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# Livability, Regional Equity, and Capability: Closing in on Sustainable Land Use

Nancy D. Perkins
*Duquesne University School of Law*

# LIVABILITY, REGIONAL EQUITY, AND CAPABILITY: CLOSING IN ON SUSTAINABLE LAND USE

**Nancy D. Perkins†**

In recent years, sustainable land use planning has captured the fancy of scholars from a wide array of disciplines. The attention is justified by observations that an overhaul of the United States' land use system is underway.[1] This change, spurred in part by the sustainable development movement,[2] has been marked by a proliferation of local environmental legislation affecting land use.[3] Deeper reforms are now being encouraged, due in part to the persistence of environmental justice advocates, whose calls for fairness in the distribution of environmental burdens and benefits have begun to infiltrate land use decision-making.[4]

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† Formerly Nancy Perkins Spyke, Professor of Law, Duquesne University School of Law. I wish to thank Dean Donald Guter for his support of this article, and Luke Sizemore, 2009 Duquesne University School of Law J.D. candidate, for his excellent research assistance.

1. *See, e.g.*, John R. Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, 26 HARV. ENVTL. L. REV. 365, 376–77 (2002), *reprinted in* 23 PACE ENVTL. L. REV. 705, 717–18 (2006) (noting that local governments are integrating environmental regulation into their land use laws); Patricia E. Salkin, *Land Use*, *in* STUMBLING TOWARD SUSTAINABILITY 369, 381 (John C. Dernbach ed., 2002).
2. Sustainable development demands the "simultaneous consideration of economic, social and environmental factors in decision making." Joel B. Eisen, *Brownfields Policies for Sustainable Cities*, 9 DUKE ENVTL. L. & POL'Y F. 187, 196 (1999). The concept was formally adopted at the United Nations Conference on Environment and Development (UNCED), also known as the Earth Summit, in 1992. *See* John Turner, *Introduction*, *in* STUMBLING TOWARD SUSTAINABILITY, *supra* note 1, at xxxi.
3. *See* Nolon, *supra* note 1, at 705.
4. Eileen Gauna, Professor of Law, University of New Mexico School of Law, Remarks at the University of Colorado Law School Symposium Conference: The Climate of Environmental Justice: Taking Stock (March 17, 2007) [hereinafter Taking Stock] (source on file with the author) (claiming that the land use area is a challenging new frontier for environmental justice). Environmental justice is a movement that has brought attention to, and seeks to mitigate, environmental disparities based on poverty and race. *See* CLIFFORD RECHTSCHAFFEN & EILEEN GAUNA, ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION xix (2002). Environmental justice's imprint on land use planning can be seen in controls that are geared toward justice, such as buffer zones and other controls tied to human health. Clifford

Because sustainability demands the simultaneous consideration of economic, environmental, and equity issues,[5] land use laws that focus more broadly on environmental and social concerns will further the move toward sustainable land use policy. Yet many attempts to make land use planning more sustainable have proved to be ad hoc and only partially integrated.[6] Despite the promise of many of these initiatives, they often vary in focus and scope, leaving little hope for consistency. Determining how best to inject intractable environmental and equity issues into land use agendas, which largely remain contentedly focused on the pursuit of economic development, has been the subject of much valuable research and scholarship.[7]

Because the environmental aspect of sustainable land use planning has already received a good deal of attention,[8] this article will focus primarily on social equity, the final prong of sustainability. It will expose the merits of two areas of sustainable land use research that seek to address social issues—livability and regional equity—and will argue in favor of many of their concepts.[9] Rather than endorsing one of the two as the better approach or suggesting that they somehow be merged, their similarities and differences will be highlighted.[10] Indeed, the sharply contrasting rationales of these schools of thought would make any attempt to combine them difficult.[11] Instead, Martha Nussbaum's capabilities approach will be offered as a normative grounding to guide the socialization of land use planning.[12] As will be shown, the capabilities approach is expansive enough to embrace the important social concerns of livability and regional equity,[13] and is adaptable enough to reach other issues, including those that are uniquely local. Its pluralistic

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Rechtschaffen, Comments at Taking Stock, *supra* (nevertheless arguing that environmental justice remains an "optional exercise" for many agencies).

5. *See* Eisen, *supra* note 2, at 196–98.
6. *See* A. Dan Tarlock, *Three Challenges for Professor Nolon,* 23 PACE ENVTL. L. REV. 697, 702–03 (2006).
7. *See, e.g.*, Kathleen E. Stein, *Preface* to NATIONAL RESEARCH COUNCIL, COMMUNITY AND QUALITY OF LIFE: DATA NEEDS FOR INFORMED DECISION MAKING, at xiii (2002) [hereinafter NATIONAL RESEARCH COUNCIL].
8. Pace Law School, for example, devoted an entire law review issue to the topic. *See* Special Edition, *The Intersection of Environmental and Land Use Law*, 23 PACE ENVTL. L. REV. 677 (2006).
9. *See infra* Part III.A–B.
10. *See infra* Part IV.
11. *See infra* Part IV.
12. *See infra* Part III.C.
13. The capabilities approach can also support the environmental piece of sustainable land use planning. *See infra* Part IV.B.

framework can help land use experts address the social and other components of sustainability in a flexible and consistent manner.

Zoning, which is the major tool of land use planning, has channeled growth and development since its inception. The fundamental goal originally was to "protect homes" and "stimulate and better guide home building,"[14] but zoning has far exceeded those expectations and is now widely used as a tool of social engineering.[15] Nevertheless, economic development has been zoning's primary driver over the past century.[16] Left unchecked by federal legislation and bolstered by numerous government subsidies,[17] this one-dimensional approach to land use planning has resulted in sprawling ex-urban growth and a host of serious social and environmental problems.[18] The smart growth movement is addressing many of these problems, as are the numerous local jurisdictions that have enacted environmental land use laws.[19] Part I of this article will address the growth of, and issues surrounding, this promising development in land use regulation.[20]

Part II will discuss more recent efforts to incorporate social equity goals into land use regulation.[21] Strong evidence of sprawl's impacts on the nation's poor and minority populations will be presented.[22] A tradition of dysfunctional land use strategies has given rise to these ills, and there is growing support for land use reforms that address the

14. Peter W. Salsich, Jr., *Toward a Policy of Heterogeneity: Overcoming a Long History of Socioeconomic Segregation in Housing*, 42 WAKE FOREST L. REV. 459, 468 (2007) (quoting HERBERT C. HOOVER, THE MEMOIRS OF HERBERT HOOVER: THE CABINET AND THE PRESIDENCY 1920–1933, at 92–93 (1952) (explaining that Hoover worked to promote zoning while serving with the Commerce Department Building and Housing Division)).

15. *See, e.g.*, Eric R. Claeys, Essay, Euclid *Lives? The Uneasy Legacy of Progressivism in Zoning*, 73 FORDHAM L. REV. 731, 731–32 (2004) (citing JESSE DUKEMINER & JAMES KRIER, PROPERTY 747, 1010 (5th ed. 2002).

16. *See* John R. Nolon, *Historical Overview of the American Land Use System: A Diagnostic Approach to Evaluating Governmental Land Use Control*, 23 PACE ENVTL. L. REV. 821, 829–30 (2006).

17. *See* William A. Johnson, Jr., *Sprawl and Civil Rights: A Mayor's Reflections, in* GROWING SMARTER: ACHIEVING LIVABLE COMMUNITIES, ENVIRONMENTAL JUSTICE, AND REGIONAL EQUITY 103, 109 (Robert D. Bullard ed., 2007) [hereinafter GROWING SMARTER] (noting the negative impact of exclusionary zoning, FHA mortgage lending, urban renewal programs, and transportation policies).

18. *See id.* at 107–08 (describing the degraded quality of life in Rochester, New York, due to sprawl).

19. *See infra* Part I.

20. *See infra* Part I.

21. *See infra* Part II.

22. *See infra* Part II.

social side of these problems.[23] A number of positive developments have occurred, including attitudinal shifts and the emergence of the environmental justice movement as a major force in the area.[24] These early-stage developments in the socialization of land use regulation reveal emerging themes and challenges, which will be evaluated.[25]

Two recent sustainable land use methodologies are the subject of Part III. Livability, a comprehensive approach to sustainable land use planning offered by the National Research Council (NRC), will be reviewed, as will regional equity, a race-centered theory for socially just land use planning.[26] Martha Nussbaum's capabilities approach, which offers a list of rights-like central capabilities,[27] will also be addressed.[28] These three frameworks will form the basis of Part IV, which will synthesize the contributions of these three bodies of work.[29] It will be argued that livability and regional equity are in need of a theoretical foundation that is large enough to anchor their valuable insights and other concerns, and that the capabilities approach can provide just such a normative underpinning.[30] While a federal or state mandated capabilities approach to land use could make sustainable planning a reality, the prospect of a legislative response in the near term is arguably weak.[31] In the meantime, it is hoped that this discussion will at the very least spur further debate about one of the nation's most pressing issues.

## I. GREENING: SPRAWL AND SMART GROWTH

The earliest environmental provisions in land use planning appeared in the 1970s, coinciding with the nation's growing environmental awareness.[32] Those efforts also responded to the social problems caused by the fragmented and uncoordinated local land use policies of the earlier twentieth century.[33] This first generation of environmental land use regulation was for the most part

23. *Id.*
24. *Id.*
25. *See infra* Part II.A–B.
26. *See infra* Part III.A–B.
27. MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 14, 77–80 (2000).
28. *See infra* Part III.C.
29. *See infra* Part IV.
30. *See infra* Part IV.A.
31. *See infra* Part IV.B.
32. LINDA A. MALONE, ENVIRONMENTAL REGULATION OF LAND USE § 1:2 at 1-5 to -7 (5th ed., Thompson West 2006).
33. *Id.* at 1-6.

economic regulation in environmental clothing, enacted only when environmental problems posed a threat to land values, drove out industry or residents, or harmed local economies.[34]

Much has changed. There has been significant growth in local environmental laws, largely due to concerns about sprawl.[35] Over the years, local authorities have become more imaginative in their approach to overlapping environmental and land use problems,[36] and with more tools at their disposal than ever before, they are gaining expertise in the area of environmental land use.[37] Despite the growing awareness that isolating environmental issues is counterproductive,[38] the learning curve for many localities has been steep, and there remains a need for professionals who understand the linkages between environmental and economic concerns as they relate to land use.[39]

John Nolon, who has written prolifically in this area, agrees that local governments are becoming more attuned to environmental issues.[40] Their actions have resulted in several developments in land use regulation,[41] including the innovative use of many traditional land use tools.[42] Less familiar land use techniques are being used to address environmental concerns as well, such as local environmental reviews and the packaging of environmental standards in local land use plans.[43]

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34. *See id.* § 1:3 at 1-9.
35. Sprawl has been defined as "a form of urbanization distinguished by leapfrog patterns of development, commercial strips, low density, separated land uses, automobile dominance, and a minimum of public open space." Robert D. Bullard, *Introduction*, *in* GROWING SMARTER, *supra* note 17, at 1 (quoting OLIVER GILLHAM, THE LIMITLESS CITY 8 (Island Press 2002).
36. Lee Paddock, Commentary, *Navigating the Confluence Among Real Estate, Land Use, and Environmental Law*, 23 PACE ENVTL. L. REV. 677, 677–78 (2006).
37. *See id.* at 678.
38. Linda A. Malone, *Looking Beyond Environmental Law's Mid-Life Crisis*, 23 PACE ENVTL. L. REV. 679, 683 (2006).
39. *See* Paddock, *supra* note 36, at 678.
40. Nolon, *supra* note 1, at 717, 754–55.
41. *Id.* at 722 (arguing persuasively that these regulations are legitimate exercises of authority under existing land use laws).
42. *See id.* at 729–47. For example, zoning districts can be drawn to be coterminous with natural resource and ecosystem boundaries. *Id.* at 731–32.
43. John R. Nolon, Golden *and Its Emanations: The Surprising Origins of Smart Growth*, 35 URB. LAW. 17, *reprinted in* 23 PACE ENVTL. L. REV. 757, 774, 776 (2006).

A related development is the notable growth in green building programs.[44] Like environmental land use regulations, green building initiatives confront the intersection of the environment with land use matters.[45] Instead of regulation, however, many governments provide incentives to encourage contractors to build sustainable structures.[46] The LEED certification program, for example, rates green construction by measuring the economic and environmental performance of buildings.[47] LEED and other green building efforts aim to decrease energy use and environmental impacts and enhance the quality of life of those who live and work in new buildings.[48] Because they strive to integrate environmental and social concerns with economic development, these efforts will play a key role in the nation's move toward sustainable land use.

By far the most comprehensive and systematic injection of environmental prudence into land use planning has come by way of the smart growth movement. Smart growth has been described as a "big tent entity,"[49] an apt characterization given the sweep of its principles. Along with promoting mixed use developments, "existing community assets," and the creation of a variety of housing options, smart growth favors "'walkable,' close-knit neighborhoods" and "distinctive, attractive communities with a strong sense of place."[50] It also seeks to "[p]reserve open space, farmland, natural beauty, and critical [ecosystems]" and to "[p]rovide a variety of transportation choices."[51] Smart growth's political framework encourages stakeholder participation; lower cost; and thriving cities, suburbs, and towns that enjoy shared benefits.[52]

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44. *See* Nancy J. King & Brian J. King, *Creating Incentives for Sustainable Buildings: A Comparative Law Approach Featuring the United States and the European Union*, 23 VA. ENVTL. L.J. 397, 397 (2005).
45. *See id.*
46. *Id.*
47. *Id.* at 406–07. LEED is an acronym for Leadership in Energy and Environmental Design. *Id.* at 406.
48. *Id.* at 399.
49. Don Chen, *Linking Transportation Equity and Environmental Justice with Smart Growth*, *in* GROWING SMARTER, *supra* note 17, at 299, 306.
50. *Id.* at 307. While there are fears that such programs may result in affordable housing shortages due to their tendency to set aside less land for residential development, some commentators argue to the contrary, noting that more housing units actually will be created due to greater housing density. *See, e.g.*, Daniel J. Hutch, *Smart Growth Tools for Revitalizing Environmentally Challenged Urban Communities*, *in* GROWING SMARTER, *supra* note 17, at 345, 351.
51. Chen, *supra* note 49, at 307.
52. *Id.* at 307–08. One New York smart growth plan is projected to save its community over $160 million in the next two decades. *See* Myron Orfield, *Building Regional*

Cost savings can be realized in various ways. For example, smart growth communities are more energy efficient than those that are typical of sprawling development, since it is less expensive to maintain and service utilities in smart growth's compact communities.[53] Smart growth can also improve a locality's "jobs-to-housing" ratio,[54] which measures the distance between jobs and housing.[55] Enabling and encouraging people to live closer to their jobs can yield tremendous time and cost savings for employees and significant savings for employers in terms of lower employee absentee and turnover rates.[56]

As will be shown below, smart growth's compatibility with the goals of the civil rights movement make it well-suited for dealing with the social problems born of sprawl.[57] The eclectic goals of smart growth also attract many diverse groups, including those devoted to environmental justice, social justice, transportation equity, housing and development, and planning in general.[58] Further, by incorporating environmental concerns into land use decision-making, smart growth is making headway in the drive toward sustainable land use and development. However, those working within these programs point to a host of challenges.

John Nolon sees a need for the greening of land use to become more regional and inclusive,[59] needs that are central to efforts aimed at socializing land use planning.[60] Enhancing citizen engagement in the planning process and prioritizing environmental assets to address

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*Coalitions Between Cities and Suburbs*, *in* GROWING SMARTER, *supra* note 17, at 323, 335.

53. *See* Hutch, *supra* note 50, at 349–50.

54. *Id.* at 349.

55. *See id.*

56. *See id.*

57. *See* Johnson, *supra* note 17, at 121. *See also* Tim Iglesias, *Our Pluralist Housing Ethics and the Struggle for Affordability*, 42 WAKE FOREST L. REV. 511, 592–93 (2007) (noting that housing problems may be addressed by smart growth).

58. *See* Chen, *supra* note 49, at 305–06. A significant smart growth effort by a professional organization is the "Growing Smarter Legislative Guidebook," published in 2002 by the American Planning Association. It sets forth model zoning and other laws that are attentive to smart growth. *See* 1 AMERICAN PLANNING ASSOCIATION, GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE (Stuart Meck ed., 2002). *See also*, Michael Lewyn, *Twenty-First Century Planning and the Constitution*, 74 U. COLO. L. REV. 651, 654 (2003) (disputing property rights activists' charges that the model legislation is unconstitutional).

59. *See* Nolon, *supra* note 1, at 749–50.

60. *See id.* at 750.

the most stressed ecosystems are two other challenges.[61] There is also a need for model legislation to assist local governments as they attempt to integrate environmental matters into land use decisions.[62] Assistance of this kind is sorely needed, as many local land use policymakers are not accustomed to the broad thinking required to adequately address environmental concerns in the context of land use planning.[63]

Even if these needs were addressed, problems would remain. Dan Tarlock acknowledges an "increasingly environmentally conscious land use ethic,"[64] but sees three significant hurdles to further development.[65] Confronting the moral hazards created by a system that incentivizes the assumption of predictable risks will not be easy,[66] neither will reconciling the ill fit between land use laws and the regulation of "non-urban landscapes on a comprehensive scale."[67] These problems are intensified by the increasing popularity of modularity in land use regulation,[68] which can lead to accountability problems and ineffective local efforts that ignore the sustainability of larger, more relevant land areas.[69]

The greening of land use regulation has taken hold in a number of jurisdictions,[70] but it remains inconsistent and for the most part is in the hands of local governments.[71] As these efforts mature, the nation's land use practices will become more sustainable, but impediments created by inconsistency, strained resources, and the absence of regional initiatives will demand attention.[72] These same

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61. *Id.*
62. *See id.* at 752. Similarly, some argue that the real hope for advancement in sustainable building is at the local government level, as there is little hope for federal legislation in this area. *See, e.g.*, King & King, *supra* note 44, at 451.
63. *See* Nolon, *supra* note 43, at 802 (2006) (suggesting that some local authorities ignore broader public interests).
64. Tarlock, *supra* note 6, at 698.
65. *Id.* at 698–99. The three hurdles are the moral hazard problem, the function of zoning, and the problem of "third best." *Id.*
66. *Id.* at 699.
67. *Id.* at 701.
68. *See id.* at 702. Modularity is an informal ad hoc approach to decision-making: "[It] requires that institutional form follow function wherever possible, meaning that the goal of the modular enterprise is first to diagnose problems and second to devise solutions and match institutions capable of implementing them." *Id.*
69. *See id.* at 702–03.
70. *See* Nolon, *supra* note 1, at 713–18. Several jurisdictions have promulgated land use laws addressing issues such as cluster development, floodplain control, and tree protection to name a few. *Id.* at 717–18.
71. *See id.* at 717–19.
72. *See id.* at 751–54.

hurdles exist—to an even greater degree—in the nascent field of socialized land use planning.[73]

## II. SOCIALIZATION—THE SPRAWL-EQUITY CONNECTION, EARLY RESPONSES, AND CHALLENGES

There is a pressing need to expand the scope of land use planning to address matters of social equity. The fact that this final pillar of sustainability is the last to be addressed by policymakers is somewhat puzzling. From its inception, the zoning power has been held to be coextensive with police powers, which promote health, safety, and the public welfare.[74] Social concerns clearly fall within these interests, and zoning frequently has been used to advance social objectives of various kinds.[75] The socialization of land use planning is also supported by international norms embedded in Agenda 21,[76] which include the promotion of human settlements, policy making for sustainable development, and establishing an integrated approach to land use.[77] Despite the breadth of the zoning power and the clarity of international ideals, land use initiatives—including smart growth programs—have done a poor job of addressing social equity.[78]

Any serious attempt to make sustainability a reality cannot ignore the social impacts of land use decisions. Yet the United States lags behind much of the world when it comes to sustainable land use planning, primarily because the vast majority of land use decisions are made by local government officials.[79] A similar reluctance to deal squarely with social concerns exists in the related area of sustainable building. A recent comparative survey of initiatives in Europe and the United States concluded that the United States focuses primarily on green building, which "does not incorporate concepts of socially responsible development or environmental

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73. *See infra* Part II.B.

74. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 386–87 (1926).

75. *See supra* text accompanying notes 14–15.

76. *See generally* U.N. Conference on Env't and Dev., Rio de Janeiro, June 3–14, 1992, 1 *Report of the United Nations Conference on Environment and Development: Resolutions Adopted by the Conference*, U.N. Doc. A/CONF.151.26/Rev.1 (vol.1) (June 14, 1992). Agenda 21 is the "plan of action" adopted at the 1992 Earth Summit. Turner, *supra* note 2, at xxxi.

77. Salkin, *supra* note 1, at 369.

78. Bullard, *supra* note 35, at 3 (noting that social equity has virtually no place in the "smart growth dialogue").

79. Salkin, *supra* note 1, at 369.

justice to the extent found in EU laws or in the laws of EU Member States."[80]

Statements focused solely on the greening of land use planning, without even a nod toward social issues, are also common,[81] as are acknowledgments in the smart growth and sustainability literature that not enough is being done to promote social equity.[82] Even those who optimistically point out that, thirteen years after President Clinton's Executive Order on Federal Actions to Address Environmental Justice,[83] environmental justice has become "firmly embedded" in sustainable land use initiatives, admit that more progress is needed.[84] Such calls for progress are made more urgent by the growing acknowledgement that traditional land use planning has caused serious social inequities.

Sprawl's impacts have been chronicled by many authors, including sociologist Robert Bullard, who describes them as "'slow-moving' disasters that [have] emptied central cities of people, jobs, housing, taxes, and wealth."[85] Others point to pervasive "income segregation" as another by-product of sprawling land use patterns,[86] as well as other egregious impacts that have been shown to be disproportionately visited upon the nation's poor, minority urban communities.[87] As whites flee inner cities, urban poverty increases, causing great disadvantages to those left behind.[88] Job opportunities

80. King & King, *supra* note 44, at 447–48.

81. *See, e.g.*, Paddock, *supra* note 36, at 678 (limiting the land use discussion to the integration of environmental and economic concerns).

82. *See* Carl Anthony, *Foreword*, *in* GROWING SMARTER, *supra* note 17, at vii, vii–viii, x; Bullard, *supra* note 35, at 3.

83. Exec. Order No. 12,898, 3 C.F.R. 859 (1995), *reprinted as amended in* 42 U.S.C. § 4321 (2000).

84. Salkin, *supra* note 1, at 375. Linda Malone has made the same argument, although a bit more esoterically, with a call to broaden Rachel Carson's belief in interconnectedness to include the relationship between social, economic, political, and environmental progress. *See* Malone, *supra* note 38, at 682. She also hopes to reinvigorate Aldo Leopold's land ethic to generate a human rights ethic to address the social isolation that results from highly technological decision-making. *Id.*

85. Robert D. Bullard, *Afterword: Growing Smarter and Fairer*, *in* GROWING SMARTER, *supra* note 17, at 371, 377.

86. Salsich, *supra* note 14, at 473.

87. *See* Robert D. Bullard, *Smart Growth Meets Environmental Justice*, *in* GROWING SMARTER, *supra* note 17, at 23, 31.

88. John A. Powell, *Race, Poverty, and Urban Sprawl: Access to Opportunities Through Regional Strategies*, *in* GROWING SMARTER, *supra* note 17, at 51, 52–53.

vanish, housing options become more limited, and depleted tax revenues lead to cuts in crucial public services.[89]

The drain on urban economies caused by this pattern of decay is significant. "Inequality and poverty breed distrust and social tension and lower the skill base, or human capital, necessary for a competitive economy."[90] Educational options shrink, too. Reduced school tax revenues in inner cities have created a "resegregation" of urban schools, which now routinely under-perform their affluent suburban counterparts.[91]

Research also documents the health inequities associated with sprawl.[92] Urban air pollution intensifies as increasing numbers of suburbanites drive to the city for work.[93] Degraded urban air sheds have left African Americans three times more likely to die of asthma than whites.[94] Sprawl contributes to nutrition disparities as well, the result of grocery store flight from inner-city areas.[95] Poor minority residents have witnessed the departure of large retail grocers and their replacement by small convenience stores and mom-and-pop operations.[96] Local retailers that offer food are more expensive than full-service grocery stores and have a poor selection of fresh foods, "rais[ing] the concern that the policies that instigated urban sprawl

89. *Id.* at 52–53, 58. Not only are the urban poor left with fewer government services, but they also lose institutional support. Johnson, *supra* note 17, at 107. Sprawling development in and around Rochester, New York caused the city to lose veterinarians, funeral homes, gas stations, and Catholic schools. *Id.* at 107–08. Not surprisingly, there are fewer residents and more vacant housing units as well. *Id.* at 108.

90. Chen, *supra* note 49, at 315 (quoting Manuel Pastor, Jr. et al., *Growing Together: Linking Regional and Community Development in a Changing Economy*, SHELTERFORCE, Jan.–Feb. 1998, *available at* http://www.nhi.org/online/issues/97/pastor.html).

91. David A. Padgett, *Nashville: An Experience in Metropolitan Governance*, *in* GROWING SMARTER, *supra* note 17, at 127, 131; *see also* Robert D. Bullard, Glenn S. Johnson & Angel O. Torres, *Confronting Transportation Sprawl in Metro Atlanta*, *in* GROWING SMARTER, *supra* note 17, at 215, 218 (noting that as people have moved to the suburbs both housing and schools have become polarized).

92. Padgett, *supra* note 91, at 127. A study by Tennessee State University Geographic Information Sciences Laboratory, for example, has shown a clear link between sprawl and inner-city environmental and health disparities. *Id.*

93. *See* Bullard, *supra* note 87, at 41.

94. *Id.* at 42.

95. Kimberly Morland & Steve Wing, *Food Justice and Health in Communities of Color*, *in* GROWING SMARTER, *supra* note 17, at 171, 173.

96. *Id.*

may have also shaped the dietary choices of inner-city residents."[97] Not surprisingly, psychological health is impaired as well. The social exclusion caused by spatial inequity runs deep, generating "concerns about physical (personal) exclusion, geographic exclusion, exclusion from facilities, economic exclusion, temporal exclusion, fear-based exclusion, and space exclusion."[98]

Sprawl's spatial inequities also are manifest in housing and transportation conditions.[99] Housing stock in distressed urban locales is often dilapidated and can become a magnet for crime.[100] Even well-intentioned programs aimed at replacing aging public housing, such as the federal Hope VI program, can add to the problem.[101] The "less-dense, mixed-use developments" they bring to neighborhoods are widely applauded, but they can displace long-time residents or lock out former residents who have poor credit or criminal records.[102]

Studies further show that sprawl renders inner-city minorities more isolated from jobs than any other demographic group.[103] More blacks than whites are without automobiles, and the poorest Americans pay up to forty per cent of their net income on transportation.[104] The slashing of public transportation budgets by urban transit authorities[105] further isolates inner-city blacks from entry level jobs in the suburbs.[106] Decreases in public funding

97. *Id.* The extent of the food disparities is nothing short of shocking. A recent study reveals that there is "one supermarket for every 23,582 residents of the predominantly black neighborhoods versus one supermarket for every 3,816 residents of the predominantly white neighborhoods." *Id.* at 178.

98. Thomas W. Sanchez & James F. Wolf, *Environmental Justice and Transportation Equity: A Review of MPOs*, *in* GROWING SMARTER, *supra* note 17, at 249, 262. The phrase "spatial inequity" refers to the inability of inner-city residents to easily access jobs, education, training and transportation, isolating them in small inner-city pockets that are mired in poverty. *See id.*

99. *See* Powell, *supra* note 88, at 52–53. *See also* Johnson, *supra* note 17, at 107–08.

100. *See* David T. Kraut, Note, *Hanging Out the No Vacancy Sign: Eliminating the Blight of Vacant Buildings from Urban Areas*, 74 N.Y.U. L. REV. 1139, 1139, 1147–48 (1999).

101. *See* Padgett, *supra* note 91, at 139.

102. *Id.*

103. *See* Bullard, *supra* note 87, at 23, 39.

104. *Id.* at 34–35. For example, thirty-nine percent of black households in Atlanta have no cars, and jobs are not conveniently accessed by public transit. *See* Bullard et al., *supra* note 91, at 219.

105. *See* Bullard, *supra* note 87, at 36 (revealing that eighty percent of surface transportation funds are allocated for highways and only twenty percent for public transit).

106. *Id.* at 37, 39–40. *See also* Sanchez & Wolf, *supra* note 98, at 249 (noting that transportation policies that foster sprawl have created and perpetuated racial isolation

translate into higher fares and service cuts.[107] One common technique is to suspend transit service after rush hour, making it impossible for car-less city residents to work late-shift jobs in the suburbs.[108] There can be little question that the spatial mismatch between jobs and inner-city residents further stresses the livability of those who still reside in the urban core.[109] More troubling yet, research suggests it is unlikely that these trends will soon change, as whites continue to move out of inner cities and minorities face chronic difficulty in their attempts to penetrate newly developed suburban areas.[110]

### *A. Early Response*

The pioneers who are designing and implementing socially conscious land use strategies face a remarkably stubborn set of political and cultural obstacles.[111] Despite this, there are signs of progress.[112] At the public sensibility level, it can be said with some confidence that the idea of integrating social goals into land use regulation is taking hold.[113] Many experts, some of whose work is more fully described below, have made that leap in their thinking and are committed to incorporating social and regional equity into the land use planning process.[114]

This attitudinal shift is reflected in studies that show Americans are not merely concerned about sprawl but favor new ways of thinking.[115] Some researchers are seeing "a potentially seismic philosophical and political change at the local level."[116] Smart growth—one of the most promising attempts to inject social concerns into land use planning—has cross-cutting appeal and has caught on with professionals in the environmental, economic, labor, and health

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and segregation, making it increasingly difficult for minorities to access entry-level jobs, many of which are found in the suburbs).

107. *See* Padgett, *supra* note 91, at 138.

108. *See id.*

109. *See* Johnson, *supra* note 17, at 108.

110. *See* Hutch, *supra* note 50, at 347.

111. *See* Anthony, *supra* note 82, at viii, ix.

112. *See id.* at x.

113. *See id.* at x, xi.

114. *See, e.g.*, *id.* at vii, x (noting that environmental justice activists increasingly argue that social equity and the full participation of under-served communities should be part of smart growth initiatives).

115. Johnson, *supra* note 17, at 103, 114–15.

116. *Id.* at 115 (pointing out that community development is becoming more place-centered).

fields, to name a few.[117] Further, the recognition that financial dividends await those who take sustainability seriously is creating allies in the corporate sector.[118] The use of indicators and benchmarking is also becoming more accepted by public decision-makers, many of whom are taking important steps to integrate social equity into traditional indicator sets.[119]

The public is particularly concerned about transportation and housing issues.[120] Surveys reveal that Americans prefer multimodal transportation alternatives and increased funding for existing roads instead of new highways.[121] Further, many communities are taking steps to integrate housing priorities into their land use plans,[122] a development that supports one writer's finding that virtually "[e]very major sector of society . . . has acknowledged at least in principle that affordability in housing is an important value."[123]

As stimulating as these new attitudes may be, they are only part of the story. The infiltration of social equity into land use policy at the federal, state, and local government levels is also evident.[124] During the 1990s, the federal government focused on livable communities and smart growth.[125] Many federal agencies launched sustainable development initiatives,[126] some of which expressly include "socially smart" goals, such as "community economic vitality, livability, resource efficiency, equity, and sense of place."[127]

Congress showed an interest in sustainable land use by establishing a Senate Smart Growth Task Force in 1999.[128] It also considered the Community Character Act in 2001 and 2002, a law designed to assist

117. Chen, *supra* note 49, at 308.
118. King & King, *supra* note 44, at 403 (citing corporate recognition that sustainable building practices can improve the bottom line).
119. NATIONAL RESEARCH COUNCIL, *supra* note 7, at 13.
120. Chen, *supra* note 49, at 303.
121. *Id.* Multimodal transportation plans include a variety of travel options, including pedestrian walkways, bicycle paths, public transit, and traditional automobile routes. *See id.* at 303–05.
122. Iglesias, *supra* note 57, at 569–70.
123. *Id.* at 590–91.
124. Salkin, *supra* note 1, at 373.
125. *Id.*
126. *See id.* at 373–74.
127. *Id.* (describing the Smart Growth Network, a joint venture of the EPA, the Urban Land Institute, and the International City-County Managers Association).
128. Patricia E. Salkin, *Zoning and Land Use Planning: Congress Misses Twice with the Community Character Act: Will Three Times Be a Charm?*, 31 REAL EST. L.J. 167, 168 (2002).

states with sustainable land use legislative efforts.[129] The legislation, which unfortunately was never enacted, required consistent citizen participation in the land use planning process, inter-jurisdictional cooperation, and comprehensive planning.[130] It also promoted sustainable economic development and coordination of housing, education, and social equity issues.[131] A pivotal piece of the statute was a financial incentive program, aimed at encouraging states to develop smart growth planning.[132]

Interestingly, local land use officials have indicated that they are not opposed to federal assistance for land use planning if it involves funding for smart growth initiatives and incentives for regional planning,[133] a sentiment that would seemingly pave the way for federal legislation of some kind. The fact that a national legislative push has been slow in coming may reflect the fact that sustainable land use is as yet too contentious to justify political action.[134]

By far, the majority of political action taken on behalf of social equity and land use has come from state and local governments.[135] Actions include revamping land use statutes to assist local governments with smart growth,[136] creating task forces to explore land use/sustainability issues, curbing subsidies that cause sprawl, and promoting the protection of green space by encouraging infill and brownfields development.[137]

As already noted, the use of indicators for sustainable land use is also on the rise.[138] Indicator sets run from the general to the specific and are beginning to reflect a growing concern about sprawl's social inequities. A sampling of suggested social indicators reveals a focus

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129. Salkin, *supra* note 1, at 376. *See* Community Charter Act of 2001, H.R. 1433, 107th Cong. (2001); Community Charter Act of 2001, S. 975, 107th Cong. (2001), *available at* http://thomas.loc.gov.

130. Salkin, *supra* note 1, at 376.

131. *Id.* *See* H.R. 1433, *available at* http://thomas.loc.gov; S. 975, *available at* http://thomas.loc.gov.

132. *See* Salkin, *supra* note 128, at 167.

133. *See* Salkin, *supra* note 1, at 377.

134. *See id.* For example, it is quite likely that property rights activists feel threatened by such proposals and aggressively lobby against them.

135. *See* Nolon, *supra* note 1, at 714–15. *See also* Orfield, *supra* note 52, at 335; Salkin, *supra* note 1, at 378.

136. *See* Salkin, *supra* note 1, at 378–79 (citing changes in New York as an example of such "revamping," and noting that similar changes have occurred to various degrees in at least fifteen other states).

137. *Id.* at 379–80.

138. NATIONAL RESEARCH COUNCIL, *supra* note 7, at 36–37 (describing indicator sets that target natural capital, ecosystem services, and cultural resources).

on race, including indicators that measure citizens' relationship with law enforcement, the number of minority owned businesses, minority home ownership, quality of schools, degree of political influence,[139] and the state of race relations.[140] Other race-sensitive measures of social equity include community cohesiveness and the spatial and demographic distribution of economic benefits.[141] Still, many sustainable land use indicators, even those with a social focus, are more race-neutral.[142] Examples include indicators that measure community involvement and volunteerism, the number of community gardens, the distance between residences of extended family members, and access to health care.[143]

### *B. Challenges*

The persuasive accounts of the relationship between race and sprawl[144] should encourage decision-makers to make the confrontation of that linkage a priority. There is little question that addressing the race-sprawl connection will be one of the great challenges facing land use in the coming years. Yet there are many more challenges to confront.

Some obstacles are generic to political decision-making in general. One problem involves the selection of appropriate decision-making models.[145] Democratic procedures seem well-suited for matters of

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139. *See* Padgett, *supra* note 91, at 144–45.

140. *See* Bullard, *supra* note 85, at 373 (arguing that both environmental justice and smart growth should pay attention to race relations).

141. NATIONAL RESEARCH COUNCIL, *supra* note 7, at 11–12.

142. *See id.* at 6–8 (noting that reliance on census tract and zoning district data, which is commonly used to measure indicators, may produce a more race-neutral appearance that does not accurately reflect the social conditions of smaller pockets of minorities). *See also id.* at 19 (noting that most indicators look for "the average profile of residents at one point in time . . .").

143. *Id.* at 3.

144. *See, e.g.*, Bullard, *supra* note 35, at 1 (describing sprawl as a civil rights problem); Manuel Pastor, Jr., *¿Quién es Más Urbanista? Latinos and Smart Growth*, *in* GROWING SMARTER, *supra* note 17, at 73, 76, 82, 83 (noting that race is a "driver" of sprawl); Powell, *supra* note 88, at 51 (noting the connections between concentrated poverty in center cities and sprawl).

145. *See* Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN. ENVTL. L.J. 3, 17 (1998) (stating that institutional preference for one model over another directly affects the level of public input). In particular, Professor Gauna has focused on the shortcomings of agency decision-making in environmental justice disputes. *See id.* at 31–32, 36–37 (questioning the value of expertise and pluralist models of decision-making, which ignore distributional problems).

equity, but they can be technically deficient.[146] This poses a problem for sustainable land use, which will be highly dependent on accurate technical data.[147] Collaborative governance models are also attractive because of their inclusiveness, but these models may as yet be undervalued by agency decision-makers,[148] and unless community capacity building becomes part of the mission of decision-making bodies, collaboration may never live up to its promise.[149]

Resource problems of all kinds will confront communities as they strive to develop sustainable land use plans. Without adequate resources, decision-makers may be unable to develop a clear vision of sustainability.[150] Not only may local governments be financially unable to fulfill the mandates of sustainable land use legislation,[151] but they may also lack the data and expertise needed to carry out the goals of these laws.[152] For these reasons, it is not uncommon for communities to rush to endorse sustainable land use planning but falter at the implementation stage.[153] Even those who champion decentralization for its reliance on community inclusiveness and expertise warn of such resource inadequacies.[154]

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146. *See id.* at 17, 28–29, 31, 47–50 (referring to essentially democratic decision-making models as "civic republican" approaches).

147. *See* NATIONAL RESEARCH COUNCIL, *supra* note 7, at 6 ("Data on both people and places are fundamental for assessing livability.").

148. Jody Freeman, *Collaborative Governance in the Administrative State,* 45 UCLA L. REV. 1, 22–23, 73–74 (1997).

149. *Id.* at 76, 80–82 (noting that resource-starved communities may be unable to meaningfully participate).

150. *See* NATIONAL RESEARCH COUNCIL, *supra* note 7, at 148–50 (describing data gaps that make sustainable decisions difficult).

151. In his historical account of the failure to fully fund the barrage of environmental laws passed in the 1970s and '80s, Richard Lazarus pointed out that "Congress was willing to ask American business and the public to curtail pollution, regardless of the cost, in order to ensure public health, [but it] refused to fund the level of agency activity necessary for even a good faith effort to implement such an ambitious program." Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law,* 54 LAW & CONTEMP. PROBS. 311, 330 (1991). There is every reason to fear that efforts to make land use more socially equitable will suffer the same fate.

152. Even if helpful data exists, it is often outdated or inconsistent. NATIONAL RESEARCH COUNCIL, *supra* note 7, at 12–13 (also noting that some promising tools, such as GISs, are accessible to decision-makers but are not being used). Concerns have also been raised about the ability of local governments to address the social dimension of sustainability. *See* Salkin, *supra* note 1, at 370.

153. *See* Salkin, *supra* note 1, at 381.

154. *See* Sheila R. Foster, *Meeting the Environmental Justice Challenge: Evolving Norms in Environmental Decision Making,* 30 ENVTL. L. REP. 10992, 11005 (2000).

Other obstacles are of a political nature. Many land use decisions that are felt at the local level are the product of processes that are not vertically integrated.[155] Sustainability initiatives in one jurisdiction also may lack consistency with those of sister jurisdictions, leading to horizontal inconsistencies.[156] This dual lack of coordination is a concern, as it ignores the reality that places are shaped by both horizontal and vertical forces generated by political, economic, and social institutions.[157] In some quarters, there also may be a lack of political interest in sustainability,[158] and even if sustainability is on the agenda, local officials may have a very narrow view of the subject.[159]

The socialization of land use planning will also present problems that are unique to the social objectives at hand. At the top of the list is the absence of a federal land use law or even a socially-focused national urban policy,[160] and similar legal vacuums may exist at state and local levels. Even well-meaning, local smart growth legislation can be frustrated by conflicts with existing land use ordinances.[161] Further, much of the smart growth movement focuses on physical rather than social improvements, and many of the celebrated smart growth housing developments are predominantly white.[162] Although a number of smart growth programs have made housing part of their

155. NATIONAL RESEARCH COUNCIL, *supra* note 7, at 13–14.

156. King & King, *supra* note 44, at 441–42 (discussing this point in reference to local green building codes).

157. *See* NATIONAL RESEARCH COUNCIL, *supra* note 7, at 16.

158. *See* King & King, *supra* note 44, at 434 (referring to sustainable building).

159. Nolon, *supra* note 1, at 711–12. Another possibility is that sustainability may become a political hot potato. For example, in the area of environmental justice there has been an "EJ shuffle" within the federal bureaucracy, as agencies hand off environmental equity problems to their counterparts within the executive branch. Nicholas Targ, Esq., former Associate Director for Environmental Justice Integration to the EPA's Office of Environmental Justice, Remarks at Taking Stock, *supra* note 4. Without further direction and guidance by way of federal or state legislation, sustainable land use could fall through bureaucratic cracks in much the same way.

160. *See* Bullard, *supra* note 35, at 8; Salkin, *supra* note 1, at 369.

161. *See* Salsich, *supra* note 14, at 461–63.

162. Johnson, *supra* note 17, at 117. An example of this type of social equity disconnect is a smart growth land use plan adopted in Richland County, South Carolina, which called for preserving green space and reducing infrastructure costs. *See* Maya Wiley, *Smart Growth and the Legacy of Segregation in Richland County, South Carolina*, *in* GROWING SMARTER, *supra* note 17, at 149, 153–54. Nowhere does the plan address the social inequities caused by the county's sprawling development, lack of housing, impediments to job access, and the difficulties local residents face converting assets into capital. *Id.* at 154.

agendas, others ignore this crucial piece of social well-being altogether.[163]

The lack of diversity on planning commissions is another concern. Prime examples are Metropolitan Planning Organizations (MPOs), the regional transportation planning entities established under the Intermodal Surface Transportation Efficiency Act (ISTEA).[164] One recent survey of fifty large MPOs reveals that eighty-eight percent of their voting members are white, seven percent black, three percent Hispanic, and one percent Asian.[165] The boards are regional in nature and are composed of representatives from many jurisdictions, requirements which seem to assure wide-ranging participation.[166] However, members are appointed, not elected, and each member has the power to cast one vote, regardless of the population of his or her constituency.[167] This one-jurisdiction, one-vote rule can have serious consequences for heavily-populated urban centers.[168]

Some of the interest groups that are most likely to make sustainable land use a reality have their own limitations. Social justice advocates, in particular, are not accustomed to working in the land use and smart growth areas. Their primary focus is urban issues, while the battle against sprawl is waged on the suburban fringe.[169]

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163. *See* Iglesias, *supra* note 57, at 582. Such omissions may arise from squabbles between various interests, including conflicts between housing and environmental advocates. *See id.*

164. *See* Sanchez & Wolf, *supra* note 98, at 252, 264–65. Enacted in 1991, ISTEA promoted various modes of travel as well as environmental and economic goals. *See* F. Kaid Benfield & Michael Replogle, *Transportation*, *in* STUMBLING TOWARD SUSTAINABILITY, *supra* note 1, at 647, 654. *See also* 49 U.S.C. § 5501 (2000). MPOs impact land use more generally, since they are directed to "foster economic and community development, and be sensitive to equity issues." *See* Sanchez & Wolf, *supra* note 98, at 252. They are thus charged with addressing civil rights issues, which they do in various ways. *See id.* at 252, 260.

165. Sanchez & Wolf, *supra* note 98, at 263–65 (also noting that only twenty-five percent of voting members are female).

166. *Id.* at 250–51, 255, 263.

167. *Id.* at 255.

168. *See id.* "[F]or each additional suburban voter on an MPO board, between 1 and 7 percent fewer funds were allocated to transit in MPO budgets." *Id.* at 266. *See also* Hutch, *supra* note 50, at 357 ("One study . . . found that while center cities comprised 34 percent of the regional population, only 5 percent of MPO board members were from these communities." (citation omitted)); Orfield, *supra* note 52, at 338–39 (pointing out that MPO boards are not elected and thus are not accountable to voters).

169. *See* Powell, *supra* note 88, at 59. Many urban activists will question the efficacy of broadening their vision simply because they are not convinced that sprawl is degrading the urban conditions they seek to improve. *Id.* They also may be concerned that participating in regional smart growth coalitions will threaten their

The tendency of social justice activists to concentrate on inner-city neighborhoods contrasts sharply with that of mainstream anti-sprawl activists, who generally ignore urban concerns.[170] If not addressed, this "dysfunctional dynamic" will only serve to intensify the fragmentation and segregation that sprawl engenders in the first place.[171]

## III. LIVABILITY, REGIONAL EQUITY, AND CAPABILITIES

Despite the gloomy forecast, the last few years have witnessed the emergence of two approaches that seriously take on many of the impediments to socially responsible land use planning. The first of these—the National Research Council's livability project—represents a clear departure from early sustainability approaches. The more recent work of the regional equity movement brings diversity and equity issues to the forefront of the discussion. These approaches were selected for discussion here for two reasons: they represent some of the most current thinking on the topic of socially just land use planning, and they approach the problem of sprawl from very different starting points.[172] Certainly there are other land use methodologies that attack the social side of sustainability, but the point of this article is not to present a digest of all relevant approaches. Rather, the presentation of two radically different frameworks is offered as a microcosm of sorts of this developing field. Martha Nussbaum's theory of human capabilities is presented at the end of this section, not as a third approach, but as a potential political foundation that may help unify the promising, but widely-diverging, approaches to sustainability.[173]

### *A. Livability*

A little over a decade ago, Winifred Gallagher's best-selling book, *The Power of Place,* made the case that the intense sensory

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culture and identity. *Id.* at 60 (noting that this position is odd, given that inner-city activists have little to lose). Urban activists also associate smart growth with gentrification, which displaces long-time city residents. *Id.* at 61.

170. *Id.* at 55.

171. *Id.* at 57. Getting past this misunderstanding is one of the most immediate challenges facing sustainable land use planning, and the problem is not limited to black urban activists. Studies show that smart growth is also not a priority in struggling Latino neighborhoods. *See* Pastor, *supra* note 144, at 88–89.

172. *See* NATIONAL RESEARCH COUNCIL, *supra* note 7, at 12 (advocating data-driven transportation planning that assesses the impact of transportation alternatives on community livability). *See also* Anthony, *supra* note 83, at ix–x.

173. *See* NUSSBAUM, *supra* note 27, at 5–6. *See also infra* Part III.C (discussion of capabilities approach).

stimulation of urban settings affect human development, and that environmental stimuli carry meaning for those who experience them.[174] There can be little doubt that the natural environment resonates in ways that can deeply affect people.[175] The power that Gallagher sees in one's place is relevant to livability, a concept that is the subject of *Community and Quality of Life,* a text published in 2002 by the NRC.[176]

The NRC calls upon land use and transportation planners to incorporate livability into their decision-making, making it highly relevant to this discussion since much of the concept of livability deals with social well-being and sustainability.[177] The text focuses primarily on livability indicators, data issues, and the type of resources and procedures needed for livability planning.[178] It also sets forth conditions of livability, which are closely tied to the equitable distribution of opportunity and access.[179]

The concept of livability has gained attention due to increasing concerns about social well-being.[180] Yet livability addresses far more than social wellness. As defined by the NRC:

> Livability is an ensemble concept whose factors include or relate to a number of other complex characteristics or states, including sustainability, quality of both life and place, and healthy communities. It is the more immediate manifestation of sustainability that, like livability, refers to the ability of a place or a community to meet the needs of its

174. WINIFRED GALLAGHER, THE POWER OF PLACE: HOW OUR SURROUNDINGS SHAPE OUR THOUGHTS, EMOTIONS, AND ACTIONS 159 (Harper Perennial 1994) (1993).

175. It has been shown, for example, that hospital patients who enjoy natural views from their hospital room windows heal faster than those who have no such views. *Id.* at 227. Gallagher further explains that the design of housing projects of the urban renewal era visited negative psychological impacts on residents and created barriers to the development of important social networks. *See id.* at 194–95. She contrasts that with urban community gardens, which increase citizens' self esteem, make residents more sociable, lower crime rates, and increase overall neighborhood satisfaction, noting that it takes only a small dose of nature to positively affect people. *See id.* at 214.

176. *See* NATIONAL RESEARCH COUNCIL, *supra* note 7, at 23. The National Research Council is "the principal operating agency of both the National Academy of Sciences and the National Academy of Engineering in providing services to the government, the public, and the scientific and engineering communities." *Id.* at iv.

177. *Id.* at 11.

178. *See id.* at 11–12.

179. *See id.* at 25.

180. *See id.* (linking social well-being to economic factors).

> current citizens without compromising the ability of future generations to meet their full range of human needs.[181]

Livability thus touches on sustainability, quality of life, and place,[182] giving special attention to people and their location.[183]

"Place," in turn, reflects the "particular environmental features and socially constructed settings in which people interact with each other and with nature."[184] One's sense of place contributes to one's identity and "rootedness,"[185] and it is shaped as much by interpersonal interactions as it is by interactions with other places.[186] This gives place a duality of meaning. As the NRC explains, the "[l]ivability of a place, *here*, is never completely independent of the livability of places, *there*."[187] Accordingly, livability can only be understood by examining linkages with other places.[188]

This understanding makes clear that the spatial reach of livability extends beyond one's neighborhood, and it is for this reason that the NRC repeatedly emphasizes the need to assess livability on a regional basis.[189] Regional planning must be pursued, despite planning's predominantly local focus and various other obstacles to regional collaboration.[190] Importantly, regional approaches will not succeed if one community is made more livable at the expense of another,[191] a cautionary principle that warns livability planners to avoid trade-offs.

Much of the NRC's work focuses on livability indicators and the data needed for decision-support.[192] Indicators identify both the circumstances that are relevant to livability and the data required to

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181. *Id.* at 3 (citation omitted).
182. *Id.*
183. *Id.* at 6–7.
184. *Id.* at 16.
185. *Id.* at 18.
186. *Id.* at 56.
187. *Id.* at 58.
188. *See id.* at 66. The concept of place is dependent on economic, social, and political forces of both large and small scales, but it is also shaped by "[t]raditions, conventions, and norms," which help create social capital. *Id.* at 64–65. The passage of time also can change the character of places, affecting their "legibility," or "the ease with which [their] parts can be recognized and can be organized into a coherent pattern." *Id.* at 69 (quoting KEVIN LYNCH, THE IMAGE OF THE CITY 2–3 (M.I.T. Press 1960). The NRC distinguishes livability and place from quality of life, the latter of which refers to "less tangible qualities such as freedom of expression and social justice." *See id.* at 24. As such, quality of life is subsumed within both livability and sustainability.
189. *See id.* at 6, 15, 103.
190. *See id.* at 13–15.
191. *Id.* at 24.
192. *Id.* at 15.

measure those circumstances.[193] To be successful, indicators must integrate the three elements of sustainability, and also must account for the fact that various "[d]imensions of livability operate at multiple, interconnected spatial and temporal scales."[194] Because of the uniqueness of place, no single set of indicators will achieve livability everywhere.[195]

The NRC's text expands upon indicator sets that tentatively address interactions between people and place,[196] and offers a number of indicators that are relevant to livability.[197] Social factors such as "community involvement (e.g., volunteerism), number of community gardens, distance between residences of extended family members, access to health care, and equity (diversity, employment types, etc.)" are suggested.[198] The NRC also favorably mentions the integrated indicators of sustainability offered by Maureen Hart, which overlap with, and supplement the NRC's own list.[199] Those indicators address all three aspects of sustainability, as well as equity issues. They include:

> [T]ransportation (infrastructure, commuting, public transit, and vehicles, in addition to the number of pedestrian-friendly streets, ratio of bike paths to streets, percentage of street miles designated bike route miles); ecosystem integrity (biodiversity, fish, land use, soil, surface water, and wetlands); community involvement (volunteerism and connectedness, [e.g., number of community gardens, and distances between residences of extended family members]); and equity (diversity, employment types, income, children, finance).[200]

193. *See id.* at 6–7.

194. *Id.* at 4–5.

195. *See id.* at 131. The NRC repeatedly emphasizes that a full understanding of livability is impossible without an understanding of place. *See, e.g., id.* at 4.

196. *See id.* at 35–36.

197. *See id.* at 35–42.

198. *Id.* at 3.

199. *See id.* at 32, 34–35.

200. *Id.* at 32. The NRC's work has a decided transportation focus. In that regard it also lists a number of transportation-specific indicators that are relevant to livability. They include:

> [M]obility and equity consequences across locations within a region and across stakeholder groups; impacts on land use and development patterns, and the consequences of those development patterns; the interaction of transportation operations with the natural and built environments and their impacts on sustainability, distribution of economic benefits and costs both

The most successful livability indicators are both cross-cutting[201] and sensitive to changes over time.[202] Importantly, they must also measure the distribution of resources within regions, because social well-being is dependent on access to resources and justice.[203] In this context, justice refers to "a social and spatial distribution of economic and environmental resources that is fair, as well as systems of governance that are inclusive of all residents."[204] Individual freedom and opportunity, not merely community-wide social well-being, are relevant.[205]

The NRC's understanding of social well-being and its concern for procedural and distributive fairness is reflected in its call for measurements of livability in both affluent and under-served areas. There is a strong argument that such localized assessments are needed in addition to standard average measures, such as means and medians.[206] The NRC similarly cautions that, in the transportation context, mobility assessments are insufficient to measure accessibility to resources unless they are accompanied by more nuanced measures, including the cost of travel and the opportunity and potential to access assets such as jobs.[207]

Vigorous public participation is another crucial input for livability planning.[208] It must begin early and continue throughout the entire decision-making process and must include "traditionally underinvolved and underserved" individuals.[209] Various media and forms of communication should be used to disseminate information to assure participant understanding of important issues such as project timing and the identity of key players and processes. All decisions should be publicized with an explanation of how public

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spatially and demographically; and consequences for community cohesiveness.

*Id.* at 12. The ability to travel to other places, measured by proximity to airports and interstate highways, and the cost of travel are additional indicators of livability. *Id.* at 72.

201. *See id.* at 47 (offering, as an example, a measurement of "additional air pollution output per new job created").

202. *See id.* at 69 (citing moving targets such as the aging and increased education of populations).

203. *See id.* at 16, 65.

204. *Id.* at 32.

205. *Id.*

206. *See id.* at 47.

207. *See id.* at 93.

208. *See id.* at 119.

209. *Id.* at 120.

input was used in the decision-making process.[210] Decision-support information should include not only an acknowledgement of public input, but also a discussion of all features of the community that are relevant to the decision, including the community's own vision of livability.[211]

Even this somewhat cursory discussion reveals that the core themes of livability are both numerous and diverse. They include regional planning, respect for place and local communities, multi-dimensional and cross-cutting indicators that have independent importance,[212] meaningful public participation, distributive justice, and individual well-being.[213] Putting these themes into action would be daunting enough if appropriate livability indicators were readily available, which the NRC acknowledges is not the case.[214] The majority of indicators presently in use focus on artificial geographic regions and average resident profiles at one point in time.[215] For indicators to truly reflect livability, they need to focus on individual conditions and people as they change over time and move to new locations.[216] Anything less will fail to "capture the many critical dimensions of urban livability."[217]

The numerous data problems plaguing livability efforts are more fundamental. First generation sustainability indicators encourage the use of value-laden data and are too closely wed to numerical

210. *Id.*

211. *Id.* at 123. Public participation plans should become part of the record, and should include the comments of all stakeholders as well as a discussion of "the distribution of impacts, both positive and negative, spatially and among different subsets of the population . . . ." *Id.* at 124. Such a document would ideally discuss any impact the plan would have on livability "as defined by [all stakeholders], and the extent to which crosscutting indicators of livability are included in the assessment of project consequences . . . ." *Id.*

212. Indicators are so important that one cannot be infringed to benefit another, since to do so would only serve to discount their individual import and the interactions between them. *Id.* at 5–6 ("[E]nvironmental and social quality of life are important components of economic well-being if the latter is measured correctly.").

213. *See id.* at 2–6 (discussing the many different livability indicators used in the decision-making process).

214. *See id.* at 5–7 (discussing the efforts being made to increase the availability of livability indicators).

215. *Id.* at 68 (stating that standard indicators provide only a snapshot of people living in a place in a given year).

216. *Id.* at 19.

217. *Id.* at 43 (citation omitted).

measures.[218] Their use can result in over commitment to symbolic benchmarks, reliance on single measures for multi-layered concepts, public participation assessments that fail to accurately assess the democratic process, and a focus on symptoms rather than causes.[219] Indicators may also be ill-timed and invite the use of incompatible data.[220] Even some of the more promising indicators, such as those that focus on accessibility to various resources, may be incomplete if they merely measure proximity, which is only one component of accessibility.[221] In addition to these problems, there is, as yet, no consensus as to the optimal method for weighing indicators.[222]

Data and other tools that supplement the decision-support process are crucial to livability, and their quality needs to improve to facilitate a more thorough consideration of socioeconomic elements.[223] Data gathering is riddled with statistical measurement problems[224] and is expensive.[225] Some data is compiled only for states and major cities,[226] leaving smaller jurisdictions in the lurch. Where more localized information is available, planners may not be aware of its existence, and even if they are, the data may be inaccessible and difficult to comprehend.[227] Federal data is known to be consistent and reliable, but it poses problems of scale and timeliness.[228] On the other hand, state data is often available only for a price,[229] and is likely to be aligned with political jurisdictions rather than areas defined by ecosystems or social factors.[230]

These indicator and data issues must be confronted if planning for livability is to become a reality. Still, there is promise in livability's comprehensive approach, since it incorporates matters of social

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218. This may result from a desire on the part of planners to create comprehensive indicator sets. *See id.* at 45–46.

219. *See id.*

220. *See id.* at 77. Reliance on artificial boundaries is particularly damaging to livability, since it ignores dependency on nearby regions. *Id.* at 82–83.

221. *Id.* at 92–93.

222. *Id.* at 50. A response to this problem has been to rely on benchmarks and other outcome assessment methodologies to measure various social factors tied to health, security, and distribution of resources. *Id.* at 50–51.

223. *See id.* at 103 (discussing the needs of the decision-support process within the context of transportation).

224. *See id.* at 91–92 (addressing inferential statistics).

225. *Id.* at 133.

226. *Id.* at 137.

227. *Id.* at 133.

228. *Id.* at 141. Census data, for example, is compiled once every decade. *Id.*

229. *Id.* at 143.

230. *Id.* at 137.

equity and other key themes of sustainability.[231] The NRC has provided a land use planning template for improving quality of life, and its primary recommendations—to integrate indicators over many spatial scales, focus on regions and "underlying geographic processes" rather than jurisdictional boundaries, reach out to diverse stakeholders, and analyze sustainability systematically through place-based planning with a focus on the individual[232]—are all crucial to sustainability planning.

### *B. Regional Equity*

Regional equity is an offshoot of the environmental justice movement that aims to provide "healthy neighborhoods with convenient access to good schools, affordable housing, parks, and grocery stores; equitable public investment; and access to opportunity."[233] It is grounded in the belief that regional programs are needed to deal with the inequities spurred by sprawl.[234] Proponents believe that the health of all people within a region must be considered when assessing regional health,[235] and that the problems of the urban core and distressed older suburbs must be dealt with regionally. Robert Bullard additionally points out that "a regional approach to equity issues must support rather than undermine the political power, social cohesion, and sense of place of all residents of the region, but particularly those who have long been denied an effective voice as a result of regional forces."[236] As a wing of the more general regionalism movement, regional equity takes a more forceful view of race as a driver of sprawl and deals head on with racial issues.[237] It puts power in the hands of regional planning authorities for issues having a "regional dimension," but leaves other decisions to local decision-makers.[238]

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231. *See id.* at 3.
232. *Id.* at 7–8, 19.
233. Anthony, *supra* note 82, at x.
234. Bullard, *supra* note 35, at 4–5. In the area of housing, regionalism can be traced to the civil rights legislation of the 1960s. *See* Florence Wagman Roisman, *Affirmatively Furthering Fair Housing in Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation*, 42 WAKE FOREST L. REV. 333, 371 ("[C]ase law powerfully and authoritatively establishes that HUD [under section 3608(e)(5) of the 1968 Civil Rights Act] has a duty to act regionally to remedy racial segregation.").
235. Bullard, *supra* note 35, at 6.
236. *Id.* (citation omitted).
237. *See* Pastor, *supra* note 144, at 76.
238. Bullard, *supra* note 35, at 8.

Regionalism seeks to channel growth in sustainable ways, and has been endorsed by groups of all political persuasions,[239] perhaps because regional approaches are slowly being understood to address more than inner-city struggles. Today, many minorities live in inner-ring suburbs that face many of the same problems that plague the urban core.[240] Some suburbs may be in even worse shape than the cities they surround, particularly if they lack the economic activity and cultural amenities that many cities still enjoy.[241] Studies also show that well-functioning cities have better functioning suburbs, and the obverse is likewise true—degraded urban centers are a drag on entire regions.[242]

These realities make regional approaches all the more appealing, but any regional response will require the collaboration of factions that normally focus on their own localities.[243] Stakeholders throughout a region need to learn the insidious lessons of sprawl to make it relevant to their own lives, and to help them understand that regional decisions are relevant to people no matter where they live.[244] In addition to getting diverse populations on board, regional equity can bring together disparate organizations such as environmental and historic preservation groups and other private organizations and businesses, all of which are often involved in regional issues but in a fragmented manner.[245] Advocates emphasize that regionalism will not strip local governments of their land use control; they can still address local problems, leaving regional planning for matters such as transportation and environmental planning, regional land use issues, and economic development.[246]

Regional equity strategies focus primarily on housing, transportation, finance, and procedural adjustments, all of which seek to mitigate, if not rectify, the sprawl-related distress suffered by inner city residents described earlier.[247] Regional housing efforts aim to provide people with more housing options and avoid choices that further isolate minorities in poor urban areas.[248] What is called for are "stable mixed-income, racially integrated communities with

239. Orfield, *supra* note 52, at 337–38.
240. *See id.* at 323–25. *See also* Powell, *supra* note 88, at 54.
241. *See* Orfield, *supra* note 52, at 324–25.
242. *See* Powell, *supra* note 88, at 54.
243. *Id.* at 55.
244. Johnson, *supra* note 17, at 119.
245. Orfield, *supra* note 52, at 337.
246. *Id.* Orfield's list of appropriate topics for regional efforts is so broad that one might reasonably ask whether anything remains for local governments to address.
247. *See supra* text accompanying notes 85–110.
248. Powell, *supra* note 88, at 68.

access to opportunities."[249] One writer suggests that builders should be required to provide quotas of affordable units or make financial contributions to regional affordable housing funds.[250] Further, to avoid gentrification, "[i]nner-city revitalization projects should not be undertaken without addressing the housing needs of low-income households."[251] The goal is to provide housing in ways that give low- and middle-income households a real choice.[252] To assure this, federal legislation may be needed to provide support for regional affordable housing programs and, more importantly, to impose "a federal override of local zoning laws when necessary to enable affordable housing developments receiving federal and state financial assistance to be scattered throughout residential neighborhoods."[253]

Transportation policy will have to change radically to respond to the demands of regional equity. Money must be made available to create transit towns and neighborhoods where people can work, play, and conduct much of their everyday business without using a car. Studies have repeatedly shown that such developments yield significant social and environmental benefits, making them precisely the type of communities that sustainable land use planners should embrace.[254] The challenge here is enormous, as no fewer than thirty states are constitutionally prohibited from spending transportation dollars on anything other than roads and bridges.[255] The entire mindset of the transportation profession will have to change to become more transit-oriented and less fixated on highways and automobiles.[256]

Regional equity activists have promoted numerous financial strategies, the most unique of which seek to achieve fiscal equity. Particularly sweeping tools include fiscal equalization programs, which attack regional fiscal disparities head on.[257] Myron Orfield points out:

> Without equalization remedies in place, the disparities from one city or suburb to the next can reach as high as ten to

249. *Id.*
250. *See* Orfield, *supra* note 52, at 331 (discussing the affordable housing strategy in Montgomery County, Maryland).
251. *Id.*
252. *Id.* at 332.
253. *See* Salsich, *supra* note 14, at 465.
254. *See* Chen, *supra* note 49, at 311.
255. *Id.* at 312.
256. *See id.* at 313.
257. *See* Orfield, *supra* note 52, at 325–26.

> one, meaning a low-tax capacity community would have to tax itself at ten times the rate of a high tax-capacity [community] in order to deliver the same level of services.[258]

Tax based sharing programs such as the Twin Cities' Fiscal Disparities Program are one type of equalization program.[259] That initiative, now over thirty years old, has reduced local tax disparities by twenty percent.[260]

The equitable distribution of revenues among all communities in a region can help communities compete fairly for new development and increase efficiency.[261] Under such a program there would no longer be an incentive for all communities within a region to spend time and resources wooing commercial enterprises to their borders, since each community would receive a share of the region's wealth no matter where a company chooses to locate. Such plans can even appeal to more affluent communities, which may be happy to forego competitions for new business in favor of retaining their rural, less dense character.[262] Still, many suburban communities are convinced that they stand to lose under such programs,[263] a view that is contradicted by studies that suggest that the opposite is likely true: "[T]he median household incomes of suburbs and cities of a metropolitan area rise and fall together, and . . . metropolitan areas with the smallest gap between city and suburban incomes have greater regional job growth."[264]

Also included in the list of fiscal equity tools are location-efficient mortgages. These securities "calculate the qualifying mortgage amount as a function of the savings accrued by living in a transit-oriented location such as an inner city."[265] The overlap of this type of product with transportation and housing policies is obvious, making it a well-targeted, multi-pronged tool for sustainable land use

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258. *Id.* at 326.

259. *Id.* A less aggressive form of equalization can be achieved by revising state aid programs to equalize funding within regions. *See id.* at 330 (noting such a technique can be used to improve school funding).

260. *Id.* at 327.

261. *Id.*

262. *Id.* at 328.

263. *Id.* at 329.

264. *Id.* (citations omitted). *See also* Hutch, *supra* note 50, at 359 (arguing that tax revenue sharing may become more palatable to wealthy suburbs once they realize that their "image is influenced by the relative health and safety of the urban core and inner suburbs").

265. Hutch, *supra* note 50, at 356.

planning. Still other equity-friendly financial mechanisms include equitable bank practices under the Community Reinvestment Act, new market tax credits, and tax increment financing.[266]

The procedural protections of a viable regional equity program are somewhat predictable. As is true of the livability approach, ongoing and inclusive participation is called for. Regional equity advocates point out, however, that any attempt to fulfill this mandate will be unsuccessful unless smart growth groups educate themselves and broaden their agendas to include a commitment to regional equity.[267] Steps also must be taken to encourage minority communities to adopt broader social justice agendas. The two groups must "become allies in community-defined struggles," so that the concerns of isolated city residents become the concern of regional smart growth proponents.[268] Participation plans should encourage all participants to engage in visioning exercises to help them design sustainable communities,[269] and when appropriate, land use plans should include provisions that make community residents accountable for the sustainability of their surroundings.[270]

A much-needed procedural reform is the overhaul of planning boards to assure diversity and equal representation. As noted earlier, MPOs make important regional decisions about transportation and land use matters, but their members are disproportionately white and male and are not accountable to voters.[271] This diversity issue must be addressed, and more must be done to assure that MPOs integrate equity concerns into their decision-making process.[272] Regional decision-making, without assuring fair representation of those who have been traditionally under-served and isolated, will only perpetuate the problems regional equity seeks to eradicate.

As would be true of any redistributive program, moving toward regional equity planning will not be easy. Turf battles in the face of questions about "who pays and who benefits, and how public investments and political power are distributed"[273] will accompany virtually every issue, whether it relates to housing, transportation, or

266. *Id.* at 360–61.
267. *See* Pastor, *supra* note 144, at 89.
268. *See id.* at 93.
269. *See* Johnson, *supra* note 17, at 116.
270. *See id.* Ideas include the formation of community land trusts and community gardens. *See id.* at 116–17. *See also* GALLAGHER, *supra* note 174, at 213–14 (advocating community gardens).
271. *See supra* notes 164–68 and accompanying text.
272. Hutch, *supra* note 50, at 346–47.
273. Bullard, *supra* note 85, at 371–72.

finance. Nevertheless, there is every reason to move forward, given the evidence of sprawl-induced inner-city distress.

### C. *Capabilities*

As helpful as the livability and regional equity approaches may be, each arguably falls short of providing a workable framework for sustainable land use planning. This will be more fully addressed in Part IV. While one may agree with some or all of their concepts, neither approach fully explores the moral underpinning of sustainability's directive to provide opportunity, accessibility, and other social assets to all people. Instead, livability accepts at face value the concept of sustainability and builds upon it, while regional equity's moral sensibility is focused on racial disparities. A foundational theory of justice that will justify the underlying broader moral basis of sustainability is called for.

There are no federal constitutional guarantees to decent housing, adequate education, or a clean environment to fill this void;[274] further, federal and state statutes that address these and other land use issues are generally derivative of commerce clause and police powers and do not contemplate the scope of land use planning that sustainability demands.[275] In the absence of a stronger political foundation, sustainable land use policy might be described as meta law,[276] derived from a rough consensus of scholars and researchers such as those whose work is described in these pages, or from international norms embedded in soft law.[277] As persuasive as this

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274. *See* Mary Becker, *Towards a Progressive Politics and a Progressive Constitution*, 69 FORDHAM L. REV. 2007, 2055–56 (2001) (noting that Jesse Jackson favors amending the Constitution to include rights to education, affordable housing, and a clean environment, among others).

275. *See* Avi Brisman, *Toward a More Elaborate Typology of Environmental Values: Liberalizing Criminal Disenfranchisement Laws and Policies*, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 283, 419–20 (2007) ("[M]any federal environmental statutes find their constitutional linchpin in the Commerce Clause . . . ."); Big Creek Lumber Co. v. County of Santa Cruz, 136 P.3d 821, 828 (Cal. 2006) (noting that local government power over land use is derived from its police powers).

276. Meta law is a concept most commonly seen in international law. *See* Brannon P. Denning & Glenn H. Reynolds, *Constitutional "Incidents": Interpretation in Real Time*, 70 TENN. L. REV. 281, 293, 305 (2003). It refers to a higher order of law that "modifies or supercedes [sic] practically all other branches of national legal systems." Manfred Balz, *The European Union Convention on Insolvency Proceedings*, 70 AM. BANKR. L.J. 485, 486 (1996). Meta law has also been described as "a super-hero with a roving commission to do justice wherever justice cries out to be done." Joel M. Ngugi, *Promissory Estoppel: The Life History of an Ideal Legal Transplant*, 41 U. RICH. L. REV. 425, 489 (2007).

277. *See supra* text accompanying notes 76–77.

support may be, it represents something less than a foundational political theory of justice. Without such grounding, it is not surprising that sustainable development programs are as inconsistent as they are diverse.

Martha Nussbaum's capabilities approach can fill this void by helping to clarify and unify the budding themes of socially just land use planning so as to forge a sort of coalescence.[278] She presents "certain universal norms of human capability" as the foundation for constitutional guarantees worldwide.[279] The capabilities are "basic aspirations to human flourishing [that] are recognizable across differences of class and context,"[280] which provide a means of measuring quality of life for comparative purposes.[281]

Nussbaum begins by asking a thought-provoking but nevertheless straightforward question: What are people capable of becoming?[282] The answer evolves into a list of "central capabilities" that are rights-like, and as such "may not be infringed upon to pursue other types of social advantage."[283] She ultimately lists ten capabilities that set forth what individuals should be able to accomplish within a variety of life functions.[284] They include life; bodily health; bodily integrity; senses, imagination and thought; emotions; practical reason; affiliation; other species; play; and control over one's environment.[285] Even without delving into the specifics of these topics, it is clear that they reflect the ideals of sustainability.[286] The capabilities of life, health, and other species are relevant to environmental matters.[287] Senses, imagination and thought; practical reason; affiliation; and control over one's environment are suggestive

278. The emphasis of this paper is the application of capabilities as a foundation for sustainable land use. However, there is no reason why the approach could not ground other sustainability initiatives.

279. NUSSBAUM, *supra* note 27, at 34–35.

280. *Id.* at 31. As such, the capabilities apply cross-culturally. *Id.* at 63.

281. *Id.* at 298.

282. *See id.* at 12 (asking what people "are actually able to do or to be").

283. *Id.* at 14.

284. *Id.* at 78–80.

285. *Id. See also* MARTHA C. NUSSBAUM, FRONTIERS OF JUSTICE 76–77 (restating the capabilities and arguing that they should be extended to apply to persons with disabilities, persons from other nations, and animals). A fuller explanation of the scope of many of these capabilities appears in Part IV of this article. *See infra* Part IV.A.

286. *See infra* Part IV.A.

287. *See infra* Part IV.A.

of social well-being, and also seem directed at assuring that people are able to actively participate in the economic sphere.[288]

There is no room for trade-offs between capabilities unless all capabilities are weighed as having central importance.[289] Neither does the list apply to average individuals or to populations at large; rather, what matters is "the functioning of each and every person."[290] Accordingly, assessments of social well-being must be determined on an individual basis.[291] The list and, more particularly, the life areas included within each capability are not only ends-oriented and substantive,[292] but open-ended to adapt to changed conditions.[293] The list is pluralistic as well, as it is intended to respect "local beliefs and circumstances."[294]

Nussbaum presents her capabilities as a means of measuring "a decent social minimum in a variety of areas," with an expectation that government will work to create conditions that assure a "threshold level of capability."[295] She specifically calls for proactive political response, stating that "[o]nce we have judged . . . that a central human power is one of the good ones, one of the ones whose flourishing is essential for the creature to have a life with dignity, we have a very strong moral reason for promoting it and removing obstacles to its development."[296] It is also clear that capabilities trump economic objectives.[297] Policy makers are instructed to ask

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288. *See infra* Part IV.A.

289. NUSSBAUM, *supra* note 27, at 81 (also eschewing cost-benefit analysis).

290. *Id.* at 56 (reflecting a strong view of "each person as end").

291. *See id.* Nussbaum's ban on capability trade-offs and her principle of "each person as end" are reflected in the NRC's reluctance to trade off livability indicators against one another and its refusal to rely merely on average conditions. *See supra* text accompanying notes 188, 222.

292. *See* NUSSBAUM, *supra* note 27, at 165–66.

293. *Id.* at 77.

294. *Id.* Nussbaum justifies the substance of her list and her reliance on a philosophical account of justice. She claims the list would be selected under conditions of "informed desire," meaning it would be chosen by an informed group of people desiring to set a foundation for political action. *Id.* at 151–52. She further points to the stability of her capabilities, which is reflected by the value people attach to capabilities in places where they flourish. *Id.* As for the abstract nature of her theory, she notes that similarly abstract economic theories have become norms recognized by governments throughout the world. *See id.* at 299. Philosophy may be "fussy," but it offers comprehensive and sustained thought about core values and concepts and can help address the shortcomings of other policies. *Id.* at 299–300.

295. *Id.* at 75. *See also id.* at 71 (noting that governments need to deliver a "basic level of capability" to their citizens).

296. Martha C. Nussbaum, *The Moral Status of Animals*, CHRON. OF HIGHER EDUC., Feb. 3, 2006, at B7.

297. NUSSBAUM, *supra* note 27, at 33.

"what politics should be pursuing for each and every citizen, before [they] can think well about economic change."[298] Economic choices, then, are to be constrained by overriding goals that seek to provide dignity, opportunity, and liberty to all people.[299]

It is the political act of creating capability for citizens, not requiring a certain level of functioning, that is the proper goal for political institutions.[300] Once people are provided with a threshold level of the capabilities they are free to choose their individual life paths, which means that some may choose not to take advantage of one or more capabilities.[301] Respecting people as "choosers" in this context is important;[302] similarly, governments are to be respected as choosers as well, freeing them to select the means by which they will promote the various capabilities.[303]

Existing preferences that tolerate abuse, poor health care, and employment discrimination are inconsistent with the capabilities and indicative of injustice.[304] Further, in cases where certain segments of the population suffer more injustice than others, those who are worse off may require more assistance to achieve "a level of capability that the more powerful can more easily attain."[305] It is clear that capabilities theory transcends pure procedural approaches to address such inequities, instead endorsing specially-focused redistribution of resources to address social disparities within any given capability.[306]

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298. *Id.*

299. *See id.* Universal norms should not focus on overall satisfaction or "presence of resources, but on what individuals are actually able to do and to be." *Id.* at 69. Not surprisingly, Nussbaum argues that the utilitarian emphasis on the greatest good is "too homogenizing." *See* Nussbaum, *supra* note 296, at B8.

300. NUSSBAUM, *supra* note 27, at 87.

301. *Id.* at 95–96.

302. *Id.* at 59–60. But there are exceptions. To secure the capabilities, a basic level of functioning is required for all people; therefore, primary and secondary education should be mandated and health care should be required. *Id.* at 90.

303. *See id.* at 105. Nussbaum acknowledges capabilities can be achieved in various ways. *Id.* They may also conflict with one another. While there can be no trade-offs in such a situation, a capability that causes harm should be limited, yielding to a conflicting capability that promotes the good. *See id.* at 221 (using an example of social reforms that burden harmful religious practices).

304. *See id.* at 112–14 (citing the plight of women in India).

305. *See id.* at 69 (discussing the effect of capabilities in regard to quality of life issues for women).

306. *See id.* Nussbaum approvingly discusses John Rawls' welfare distribution theory, but she believes it fails to take into account the differences in needs and abilities among people. *Id.* at 65–68. She also warns that purely procedural approaches to justice, such as that offered by Rawls, are unsuccessful in addressing what it is central to people's lives. *Id.* at 138–39.

The capabilities approach "continually directs its user to imagine how resources go to work differently in different lives . . . , seeing how general goals and aims are differently realized in different concrete conditions."[307] Nussbaum's firm belief that each individual is the "maker of a life plan,"[308] when combined with her list of capabilities, becomes more than a political theory. It is a call for public action.[309] To further guide that action, she offers three principles: the importance of options and opportunity, the importance of "perceived contribution," and the importance of a sense of one's own worth.[310] As will be shown, her list and these guidelines all have a place in the socialization of land use decision-making.

## IV. TOWARD A SYNTHESIS

Because the capabilities approach is as much practice as it is theory, it is not unreasonable to suggest that it be considered a foundation for sustainable land use planning. The tentative, scattered beginnings of socially responsible land use theory—promising though they are—are in need of grounding. Searching for such a foundation is a useful way to elicit the core social values that relate to sustainable land use and, more practically, to point the way toward a firmer structure for socially just land use practices. It initially will be helpful to determine what is shared by, and different about, livability and regional equity. This exercise will ultimately reveal difficulties with both approaches. To put it simply, livability may be too big and amorphous, and regional equity too small and restrictive, to succeed as models for sustainable land use. However, nearly all of the capabilities are relevant to land use, and when considered together, they capture quite well the scope of concerns addressed by livability, regional equity, and sustainability in general. Further, they do so in an ordered framework tied to concepts that are at the very core of living a good life.

The livability and regional equity approaches to land use have much in common. Both stress freedom, opportunity, and access to resources.[311] A special focus on broad-based participation and

307. *Id.* at 250.

308. *Id.* at 284–85.

309. *Id.* at 285.

310. *Id.* at 285–86, 88. "Perceived contribution" is a concept that seeks to adequately value individual contributions to society that are presently undervalued. *Id.* at 286–87 (giving as one example the need for parity in salary between men and women who do the same jobs).

311. *See* NATIONAL RESEARCH COUNCIL, *supra* note 7, at 23–25, 32; Bullard, *supra* note 35, at 11–14; *see also supra* text accompanying note 179.

transportation planning is also shared by both,[312] as is a commitment to a fair distribution of resources and the social cohesion of all population sectors.[313] Both also adopt regional approaches while securing an important planning role for localities.[314] Livability emphasizes the importance of local communities by way of its calls for location-specific indicators and its emphasis on uniqueness of place.[315] Regional equity does so by leaving residual authority in the hands of local government for truly local matters.[316]

There are, however, crucial differences between the two frameworks. Livability is much more of an ensemble concept than is regional equity; it is also far more sensitive to place.[317] By its own definition, livability encompasses not just sustainability, but quality of life, sense of place, and community health.[318] As a stand-alone concept, equity does not expressly appear in the NRC's definition of livability; instead, it is listed among the livability indicators with little elaboration.[319] It is simply identified with "diversity, employment types, income, children, [and] finance."[320] Equity is valued, but it is embedded in a deeply nuanced, expansive place-based framework that is equally concerned with ecosystem integrity, transportation,[321] and multi-dimensional indicators that track changes over time and space.[322]

Regional equity, on the other hand, is more purely people-centered.[323] What matters is the regional redistribution of resources to address the sprawl-related degradation of the inner cities.[324] Understanding sprawl as a civil rights threat and improving the lot of those languishing in the urban core are regional equity's chief

312. *See supra* text accompanying notes 200, 204, 235–38, 241.
313. *See* NATIONAL RESEARCH COUNCIL, *supra* note 7, at 32, 66–67 (speaking of the importance of sense of community and social capital); Bullard, *supra* note 35, at 6; Orfield, *supra* note 52, at 326.
314. *See* NATIONAL RESEARCH COUNCIL, *supra* note 7, at 125–27; Bullard, *supra* note 35, at 6, 8.
315. *See* NATIONAL RESEARCH COUNCIL, *supra* note 7, at 55–56, 64–65, 131.
316. *See* Bullard, *supra* note 35, at 8.
317. *See* NATIONAL RESEARCH COUNCIL, *supra* note 7, at 3, 55.
318. *Id.* at 3.
319. *See id.*
320. *Id.* at 32 (setting forth and endorsing Hart's livability indicators).
321. *See id.*
322. *See supra* text accompanying note 194. *See also* NATIONAL RESEARCH COUNCIL, *supra* note 7, at 55–61.
323. *See* Anthony, *supra* note 82, at x.
324. *See* Laurie Reynolds, *Intergovernmental Cooperation, Metropolitan Equity, and The New Regionalism*, 78 WASH. L. REV. 93, 116 (2003).

concerns. Sense of place is relevant, but the lot of the under-served takes precedence.[325] In the same vein, the environment and economy are important, but decisions on both fronts must be made so as to improve the quality of life of struggling minority communities.

Many of the urban problems exposed by regional equity proponents—inadequate education, housing, and transportation; poor access to jobs; and environmental degradation—are addressed by livability, but the reason for taking on those challenges is different.[326] Livability's approach is to cast a wide net of interrelated goals because that is what sustainability and the broader scope of livability demands. Regional equity wages its fight from a more solid social equity stance, with a special focus on racial inequities.[327]

These differences lead to two questions: Does livability do enough to address the disparities caused by sprawl? Does regional equity adequately account for sense of place and the time, space, and other dimensions of sustainability? The answer to each question seems to be no. Livability is partially measured by social equity, but little direction is given in terms of what indicators best assess the social well-being of a region's population.[328] Admittedly, livability's goals include a fair distribution of economic and environmental benefits and inclusive governance.[329] It also calls for assessments of conditions in wealthy as well as poor areas and includes individual freedom and opportunity among its goals.[330] Yet the inclusion of equity devolves from the very large concept of livability itself, one that is bigger than sustainability to begin with.[331] As the sweep of livability unfolds, equity and justice play a role, but they seem to get lost among very specific discussions about place, dimensions of space and time, and the intricacies of data gathering and indicator tweaking. Livability aggressively (and commendably) reaches out to address all of the parameters of sustainability but, especially in the area of social equity, it leaves loose ends amidst a myriad of concepts in need of a structured framework.

Regional equity presents a situation that could not be more different. It begins with a much smaller premise—that sprawl is

325. *See* Bullard, *supra* note 85, at 372–73.

326. *See* NATIONAL RESEARCH COUNCIL, *supra* note 7, at 3–4; Bullard, *supra* note 35, at 8–10.

327. *See* Bullard, *supra* note 35, at 6.

328. *See* NATIONAL RESEARCH COUNCIL, *supra* note 7, at 32.

329. *See supra* text accompanying notes 189, 203–06.

330. *See supra* text accompanying notes 189, 203–06.

331. *See* NATIONAL RESEARCH COUNCIL, *supra* note 7, at 3. As noted earlier, livability encompasses not only sustainability, but quality of life and place as well. *See id.*

exacerbating racial disparities with serious consequences for poor urban populations. Regional equity makes much needed progress in merging smart growth and environmental justice, and in particular in presenting specific social equity goals.[332] Yet scant attention is given to ecosystem protection, historic preservation, and economic goals beyond those that mitigate disparities. This narrow focus misses important aspects of sustainability.

The very different starting points of these two approaches make it difficult to think of ways to integrate them to arrive at some consensus. On the other hand, a common starting point in the form of a foundational theory and core of objectives for sustainable land use could provide a structure to help manage livability and supplement regional equity. Nussbaum's capabilities list can serve such a purpose. While it is meant to provide a foundation for constitutional guarantees worldwide,[333] here it will be applied more narrowly to furnish a moral and political grounding for sustainable land use. Given that it was developed to be acted upon by policy makers in the first place,[334] such an application is not altogether unfounded. As will be shown, the capabilities framework can accommodate the objectives of livability and regional equity, and is broad enough to include other perspectives that may be necessary to achieve sustainability.

### *A. Capabilities-Based Planning for Sustainable Land Use*

A surprising number of capabilities are relevant to land use. The "Bodily Health" capability calls for the ability to have good health, nutrition, and adequate housing; "Bodily Integrity" calls for an ability to move freely from one place to another and to be secure from violent crime.[335] Similarly, the "Emotions" capability refers to the ability to live in an environment free from the type of fear and anxiety that can stunt development.[336] "Control [O]ver One's Environment" calls for, in part, the ability to "hold" property.[337]

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332. *See* Bullard, *supra* note 85, at 372.

333. NUSSBAUM, *supra* note 27, at 34–35.

334. *See id.* at 4–5.

335. NUSSBAUM, *supra* note 285, at 76. The "Emotions" capability similarly calls for the ability to live in an environment free from the type of fear and anxiety that can stunt development. *Id.* at 76–77.

336. *Id.* at 76–77.

337. *Id.* at 77. The use of the phrase, "[b]eing able to hold property," rather than "to own property," suggests that leaseholds as well as other estates in land are contemplated. *Id.*

Two more relevant capabilities are "Play," which includes the ability to enjoy recreational activities, and "Other Species," which includes the ability to live "with concern for and in relation to" animals and the broader natural environment.[338]

Taken together, these six capabilities suggest that land use plans should focus on creating conditions that enable all people to have access to adequate housing that they can own or lease. People should also be able to access health care, decent food, and living conditions that are free from fear of crime and violence. Further, they should be able to enjoy recreational amenities, a wealth of biodiversity, and natural environmental features.

Other capabilities are relevant to land use as well. The capability dealing with "Senses, Imagination, and Thought" involves the ability to use the senses and to engage the imagination.[339] The ability to live with others and to partake in social interaction is included in the "Affiliation" capability, which also includes the ability "to be treated as a dignified being whose worth is equal to that of others."[340] Another feature of "Control [O]ver One's Environment" envisions the ability to partake in effective participation in the political process.[341]

Land use plans comporting with these capabilities would not only be the product of vigorous public participation, but would engage citizens in visioning and other planning-related tasks that let their imaginations take flight. Plans could, for example, encourage public art programs promoting sculpture and community murals. Plans would also eschew any discriminatory outcomes and respect the dignity of individuals.

It is worth repeating some of the capabilities' corollary principles. The overriding goals of individual dignity, opportunity, and liberty should guide and, when necessary, constrain economic choices.[342] This is just one manifestation of the principle that prohibits trade-offs

338. *Id.*

339. *Id.* at 76. It in particular calls for "[b]eing able to use imagination and thought in connection with experiencing and producing works and events of one's own choice . . . ." *Id.* at 76.

340. *Id.* at 77.

341. *Id.* Because the capabilities of life and practical reason seem unlikely to be furthered by land use initiatives they are not discussed here.

342. *See* NUSSBAUM, *supra* note 27, at 51, 54–55, 81 (applying the human capabilities approach, and its goals of individual dignity, opportunity, and liberty, to a cost-benefit analysis of women's human development). According to Nussbaum, any form of cost-benefit analysis must weigh all capabilities as having central importance. *Id.* at 81.

between the capabilities.[343] Further, although they represent universal norms, the capabilities are meant to be flexible to adapt to changing conditions,[344] and to operate cross-culturally to respect the uniqueness of individual locales and their citizens.[345] Individual flourishing, not average conditions, is what matters, and it is the work of government to ensure each citizen has a threshold level of each capability.[346] As governments move forward with sustainability assessments, capabilities will be useful for making quality of life comparisons between locations,[347] and if it is found that conditions in one area make people less capable than people who live elsewhere, redistribution will be called for.[348] It is "both unjust and tragic" when people fall behind,[349] making the task of ensuring capabilities through redistribution a matter of justice.

### *B. Livability and Regional Equity in a World of Capabilities*

The fundamental components of livability and regional equity can be easily nestled within the list of capabilities, as the table on the following page shows.[350] Where certain aspects of livability and regional equity are relevant to more than one capability, they are repeated.

343. *See id.* at 81 (explaining, as applied to women and human development, how the capabilities are related in complex ways that make trade-offs among them ineffectual).
344. *Id.* at 35, 77.
345. *See id.* at 34, 74.
346. *Id.* at 54–56, 71, 74–75, 81–82.
347. *See id.* at 34–35, 63 (applying the capabilities approach to an analysis of women and human development).
348. *See supra* text accompanying notes 304–06.
349. NUSSBAUM, *supra* note 27, at 71.
350. Again, because the capabilities of life and practical reason seem unlikely to be furthered by land use initiatives they are not included in the table.

**Table 1 – Livability and Regional Equity Matches with Capabilities**

| Capability | Livability | Regional Equity |
|---|---|---|
| Bodily Health | Access to health care | Access to health care<br>Access to proper nutrition<br>Mitigation of environmental disparities |
| Bodily Integrity | Access to transportation | Access to transportation |
| Senses, Imagination, and Thought | Eliciting creative community input<br>Visioning | Eliciting creative community input<br>Imagining the lives of the less well-off |
| Affiliation | Regional approach<br>Affordable housing<br>Walkable communities<br>Mixed-use designs<br>Community gardens<br>Redistribution of resources | Regional approach<br>Affordable housing<br>Integrated housing<br>Imagining the situation of less well-off<br>Fiscal equity programs |
| Other Species | Preserve green space | Mitigation of environmental disparities |
| Play | Preserve green space | Fair share of recreational amenities |
| Control Over One's Environment | Broad public participation<br>Access to jobs | Broad public participation<br>Diverse and representative participation<br>Access to jobs<br>Affordable housing |

Without too much thought, one can think of other land use options that are aligned with the various capabilities. For example, the Bodily Integrity and Emotions capabilities emphasize freedom from violence and the ability to live without fear and anxiety. Land use plans calling for safe street design and adequate access to police and fire protection and other emergency services can further these goals. Senses, Imagination, and Thought can be further fueled by set-asides

for public art (perhaps with provisions for community artist competitions and community juries), meditation space, places of worship, and neighborhood libraries. The Other Species capability can be strengthened by land use plans that include habitat set-asides and ecosystem-sensitive design.

Readers may question certain inclusions in the Table and will likely think of other land use options that correlate with various capabilities. Such responses are both expected and encouraged. The point of the Table and discussion of options is not to permanently attach every imaginable planning device to various capabilities, but rather to demonstrate more generally that capabilities-based land use planning can address the goals of livability, regional equity, and more. Land use planners who are directed to structure their plans so as to assure citizens a threshold level of each capability will be forced to think carefully and creatively about land use tools that can further each capability. That exercise surely will lead them to the sort of social equity issues that are the focus of livability and regional equity, and may encourage them to think of additional social concerns. In addition, the capabilities approach will direct planners to focus on the economic and environmental pieces of sustainability.

Standing alone, the roominess of the capabilities list provides a solid, inclusive grounding for sustainable land use planning; however, socially just land use would become even more certain if the approach's corollary principles are followed.[351] As is true of the capabilities, it is not difficult to think of specific applications to land use planning. At a minimum, planners would have to make the fair distribution of the benefits and burdens of their decisions a central concern. This would be particularly important for regional planners, whose decisions run the risk of creating disparities. Further, planners would have to respect the uniqueness of individual localities and their residents, which could be accomplished by design decisions that preserve sense of place, are responsive to citizen input, prevent gentrification, and where appropriate, allow local governments to make their own decisions. It is also imperative that the planning process be reconfigured so that decision-makers routinely ask what their decisions will mean to individual residents.

If fully implemented, the capabilities approach would prohibit planners from infringing one capability to enhance another, as no trade-offs would be permitted. Within a regional context, this would bar economic decisions that would enrich the suburban fringe while

351. *See supra* text accompanying notes 294–310.

further isolating and degrading the inner city. Neither could planners focus on average measures; benchmarks and indicator programs would have to be designed to focus on individual opportunities and freedoms. This, too, would benefit the urban victims of sprawl. Nussbaum's final three guides for public action—providing opportunity, valuing everyone's contribution, and respecting each person's sense of his or her own worth[352]—would similarly focus planners on the social implications of their plans.

The value of the capabilities approach can be seen not only in its generous scope but in its structure. The crucial aspects of a dignified life are compressed into ten capabilities, at least eight of which are relevant to land use planning. As has been shown, the large, somewhat unmanageable concept of livability can be harnessed and channeled into the capabilities framework. In addition, because each capability is of equal importance, decision-makers would be bound to consider possibilities in each area, preventing them from adopting approaches to socially just land use that are too narrow, which is arguably the flaw of regional equity. The comprehensiveness of the capabilities approach and its compact structure would yield a third benefit that is perhaps the most significant. Its workability could begin to bring consistency to sustainable land use planning, one of sustainability's most elusive goals.[353]

It is fair to ask whether this application is a mere thought exercise or whether there is any prospect of legal implementation. Not only is the Federal Constitution silent as to capabilities but, as noted earlier, it is silent as to many of the primary objectives of sustainable land use planning.[354] There is no realistic hope for constitutional change now or in the foreseeable future. However, legislative action at the federal and state levels is possible. Already, there have been calls for model federal legislation to provide assistance to states in areas such as affordable housing,[355] and there have been similar suggestions for model legislation at the state level to address various components of sustainability.[356] A state response would have merit, but the goal

352. NUSSBAUM, *supra* note 27, at 285–90.

353. *See supra* text accompanying note 156. *See also* Salkin, *supra* note 1, at 369 (emphasizing the need for consistency in land use planning and suggesting this will be difficult to accomplish in the U.S. due to the prevalence of local land use controls).

354. *See supra* text accompanying note 274.

355. *See supra* text accompanying note 253.

356. *See, e.g.*, King & King, *supra* note 44, at 450–51 (advocating a model code for sustainable construction).

should be nothing less than federal legislation for sustainable land use that adopts a capabilities framework.

Ideally, such legislation would provide state funding and technical assistance, conditioned on the development of land use programs that are structured around those capabilities that relate to the three components of sustainability: social equity, the environment, and the economy. The law should set forth the core capabilities that each state land use plan must address and include the associated rules mandating fair distribution and prohibiting trade-offs.[357] States would be given the flexibility to model their own plans based on their geographic and demographic conditions, which is precisely what the approach envisions. The possibility of this type of legislative action is not beyond hope, since Congress has recently shown an inclination to take on land use and sustainability,[358] and state and local governments are not entirely opposed to federal legislation in this area.[359] These signs of readiness suggest that the first legislative push should be at the federal level. Only if it is clear that Congress will falter should efforts be directed at state legislatures. Those efforts could promote similar laws that would tie local funding to regional capabilities-based land use plans.

Whether enacted at the federal or state level, sustainable land use legislation based on the capabilities would re-orient sustainability thinking, not only by making economic, environmental, and social goals the business of land use planners, but also by expressly directing regional land use plans to be designed in ways that assure people threshold levels of those capabilities that are relevant to land use. Those thresholds would in turn become the basis of benchmarks and indicators, allowing the kind of comparative measurements that are contemplated by the capabilities approach.[360]

It is important for funding to be specifically allocated for data collection, training, and public outreach—needs that must be addressed before capabilities planning can become a reality.[361] A two-pronged legislative approach—requiring capabilities land use planning as a prerequisite for funding, and tying funding to the decision-support needs that will assure the success of such an

357. A similar approach can be seen in the Clean Air Act, which includes specific items that states must include in the state implementation plans in order to obtain EPA approval. *See* 42 U.S.C. § 7410(a)(2)(A)–(M).

358. *See supra* text accompanying notes 128–32.

359. *See supra* text accompanying note 127.

360. *See supra* text accompanying note 276.

361. *See supra* text accompanying notes 223–30.

approach—would give sustainable land use a solid foundation and begin to bring consistency to sustainable land use planning. It also would provide sufficient space to address all of the issues that concern livability and regional equity proponents, and would be open to new goals as well. Most importantly, it would provide a manageable framework that all planners and activists could work toward with the knowledge that none of those goals can be sacrificed to advance another.

## V. CONCLUSION

The realization that radical changes are needed to address the environmental and social problems associated with sprawl presents the nation with an opportunity to take steps to help governments at all levels chart a unified and comprehensive path toward sustainable land use. The work on livability and regional equity provides promising and concrete thinking regarding the social piece of sustainability, but there are legitimate questions about its scope and focus. A capabilities approach can address these concerns and perhaps guide the nation's land use planning in general. With sufficient political will, Congress and the states can act upon this prospect and bring some much-needed law and consistency to this issue.