

2016

We Built it and They Did Not Come: Using Governance Theory in the Fight for Food Justice in Low-Income Communities of Color

Deborah N. Archer

Tamara Belinfanti

New York Law School, tamara.belinfanti@nyls.edu

Follow this and additional works at: https://digitalcommons.nyls.edu/fac_articles_chapters



Part of the [Food and Drug Law Commons](#), and the [Law and Race Commons](#)

Recommended Citation

Seattle Journal for Social Justice, Vol. 15, Issue 2 (Fall 2016), pp. 307-332

This Article is brought to you for free and open access by the Faculty Scholarship at DigitalCommons@NYLS. It has been accepted for inclusion in Articles & Chapters by an authorized administrator of DigitalCommons@NYLS.

We Built It and They Did Not Come: Using New Governance Theory in the Fight for Food Justice in Low-Income Communities of Color

Deborah N. Archer⁺ and Tamara C. Belinfanti^{*}

I. INTRODUCTION

Meet Anthony. Anthony is eighteen years old and lives with his mother, Mary, in Anacostia, a residential neighborhood in Southeast Washington, D.C.¹ There are no supermarkets in his neighborhood—the closest grocery store is 20 minutes away by bus.² One or two corner stores in the neighborhood sell milk, cereal, and other packaged foods.³ Mary shops for groceries twice a month “when she has the money.”⁴ On rare occasions she also shops for fruits and vegetables at a farmers market, though she has to travel for over 45 minutes on two buses and a train to reach it.⁵ Anthony rarely eats breakfast at home, and when he does it usually consists of dry cereal.⁶ His typical breakfast comes from either McDonald’s or a hot dog stand he passes on his way to school.⁷ If he is home for lunch, he usually

⁺ Professor of Law and Co-Director of the Unshared Bounty Project, New York Law School. I would like to thank Togtokhbayar Ganzorig, Christopher DeLong, and Sean Farrow for their invaluable research assistance.

^{*} Professor of Law and Co-Director of the Unshared Bounty Project, New York Law School. Special thanks to Vivian DePietro for her work on this Essay.

¹ Anthony’s story is taken from *Unshared Bounty: How Structural Racism Contributes to the Creation and Persistence of Food Deserts*, NEW YORK LAW SCHOOL RACIAL JUSTICE PROJECT 9 (2012),

http://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=1002&context=racial_justice_project [hereinafter UNSHARED BOUNTY].

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

has “something like a hot pocket.”⁸ More often, his lunch comes from his neighborhood McDonald’s or a Chipotle near his school.⁹ For dinner, he usually eats at McDonald’s if he is in his neighborhood or Chipotle if he is at school.¹⁰ On the occasions when Anthony and Mary have dinner together, they eat Chinese take-out; their favorite dishes are orange chicken, chicken nuggets, and fries.¹¹ Anthony gets food from McDonald’s more than any other establishment because “it is cheap and there is one every three blocks” in his neighborhood.¹² Anthony “does not like or dislike” his food options because, as he says, “I’m used to it, it’s all I know.”¹³

Anthony lives in a food desert—a neighborhood that is more than a mile away from a supermarket or other large retailer that sells fresh fruits and vegetables.¹⁴ In essence, food deserts are communities, both urban and rural, with severely limited access to healthy and affordable food.¹⁵ In the United States, approximately 23.5 million people live in food deserts.¹⁶ Most of these people are Black or Brown.¹⁷ Blacks, Latinos, and Native

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ See UNSHARED BOUNTY, *supra* note 1; see *Access to Affordable and Nutritious Food: Measuring and Understanding Food Deserts and Their Consequences: Report to Congress*, U.S. DEP’T OF AGRIC., at iii (2009),

http://www.ers.usda.gov/media/242675/ap036_1_.pdf [hereinafter FOOD DESERTS].

There are several assumptions embedded in the current definition of food deserts, including the assumption that full service grocery stores are a direct proxy for access to nutritious affordable food. Betsy Breyer & Adriana Voss-Andreae, *Food Mirages: Geographic and Economic Barriers to Healthful Food Access in Portland, Oregon*, 24 HEALTH & PLACE 131, 132 (2013). Households are presumed to buy food from the nearest market and the method of transportation is assumed to be the same for all. *Id.*

¹⁵ UNSHARED BOUNTY, *supra* note 1, at 5.

¹⁶ FOOD DESERTS, *supra* note 14.

¹⁷ The use of the term “Black or Brown” represents a deliberate choice on the part of the authors to denote more than skin color or race, but to encompass broader identity markers such as race, class, culture. See, e.g., Julie Beaulac, Elizabeth Kristjansson & Steven Cummins, *A Systematic Review of Food Deserts, 1996-2007*, 6 PREVENTING CHRONIC

Americans tend to travel farther, have fewer choices, and pay more for food than Whites.¹⁸ Compared to Whites, Blacks are half as likely to have access to a chain supermarket, while Latinos are a third less likely to have access to a chain supermarket.¹⁹

While residents of food deserts have difficulty accessing healthy food, they often have easy access to fast food and convenience stores.²⁰ Fast food restaurants offer high-calorie, filling meals at bargain prices.²¹ But fast food affordability comes at a severe cost to residents' nutrition and health.²² The average distance between an individual's home to a grocery store as compared to a fast food restaurant is relevant to his or her food choices.²³ "When fast food restaurants are closer than supermarkets to a neighborhood, the neighborhood is more likely to make unhealthy food choices."²⁴ While food deserts are characterized by a dearth of full-service supermarkets, they often have an abundance of small corner markets.²⁵ However, "fresh and nutritious produce is rarely available at these small

DISEASE 2-3 (July 2009); Nathan McClintock, *From Industrial Garden to Food Desert: Demarcated Devaluation in the Flatlands of Oakland, California*, CULTIVATING FOOD JUST.: RACE, CLASS & SUSTAINABILITY 89, 89-93 (2011); Steve Cummins, Ellen Flint & Stephen A. Matthews, *New Neighborhood Grocery Store Increased Awareness of Food Access but Did Not Alter Dietary Habits or Obesity*, 33 HEALTH AFF. 283, 283 (2016). The access issues we are talking about are not just about class, but also about broader issues of culture—including race and ethnicity.

¹⁸ UNSHARED BOUNTY, *supra* note 1, at 6-7.

¹⁹ Lisa M. Powell et al., *Food Store Availability and Neighborhood Characteristics in the United States*, 44 PREVENTIVE MED. 189, 189 (2007).

²⁰ Helen Lee, *The Role of Local Food Availability in Explaining Obesity Risk Among School-aged Children*, 74 SOC. SCI. & MED. 1193, 1193 (2012).

²¹ Colleen Doyle, *Obesity and Cancer: Epidemiology in Racial/Ethnic Minorities*, in CANCER AND ENERGY BALANCE, EPIDEMIOLOGY AND OVERVIEW 56 (2010).

²² *Id.*; see FOOD DESERTS, *supra* note 14.

²³ See MARI GALLAGHER, EXAMINING THE IMPACT OF FOOD DESERTS ON PUBLIC HEALTH IN CHICAGO 16-17 (2006).

²⁴ UNSHARED BOUNTY, *supra* note 1, at 5.

²⁵ *Id.* at 6.

stores, and the type of food generally tends to be of poorer quality and less healthy, high in sugars and saturated fats.”²⁶

In examining food deserts, many researchers found a link between poverty, access to fresh nutritious foods, and diet-related health problems.²⁷ This link leads to a paradox of poor health: “Many Americans, particularly low-income people and people of color, are overweight yet malnourished.”²⁸ They face an overwhelming variety of processed foods, but are unable to procure a well-balanced diet from the liquor stores and mini-marts that dominate their neighborhoods.”²⁹ Life in food deserts leads to a lack of food security—these are environments in which “all persons [cannot obtain] at all times a culturally acceptable, nutritionally adequate diet through local non-emergency sources.”³⁰

Food deserts and food insecurity have received considerable attention from various stakeholders, such as state and local governments, community organizations, and private sector institutions. These stakeholders have sought to overcome food insecurity by turning food deserts into oases by

²⁶ McClintock, *supra* note 17, at 89.

²⁷ See, e.g., Breyer, *supra* note 14, at 132; Powell, et al., *supra* note 19; SARAH TREUHAFT, MICHAEL J. HAMM & CHARLOTTE LITJENS, *HEALTHY FOOD FOR ALL: BUILDING EQUITABLE AND SUSTAINABLE FOOD SYSTEMS IN DETROIT AND OAKLAND* 17 (2009); AMANDA SHAFFER, L.A.’S GROCERY GAP: THE NEED FOR A NEW FOOD POLICY AND APPROACH TO MARKET DEVELOPMENT 12 (2002) (“Zip codes with a white majority experience the greatest number of supermarkets per person: 3.17 times as many supermarkets as populations with an African-American majority; 1.09 times as many supermarkets as populations with an Asian majority; 1.69 times as many supermarkets as populations with a Latino majority.”); GALLAGHER, *supra* note 23, at 16-17 (“When we analyze food access by race at the block level [among majority white, majority African American, majority Latino and majority diverse census blocks], we find that majority African-American communities have the lowest access to 1) chain grocery stores, 2) independent and smaller grocery stores, and 3) all grocery stores...”).

²⁸ Alfonso Morales, *Growing Food and Justice*, in *CULTIVATING FOOD JUSTICE: RACE, CLASS, AND SUSTAINABILITY* 149, 149 (2011).

²⁹ *Id.*

³⁰ Ursula Oswald Spring, *Food as a New Human and Livelihood Security Challenge*, in *HEXAGON SERIES ON HUMAN AND ENVIRONMENTAL SECURITY AND PEACE* 471, 475 (2009).

providing “access” to fresh, healthy food.³¹ However, many of their solutions—building supermarkets and sponsoring farmers markets—have missed the mark. Residents of food deserts did not flock to grocery stores to purchase fruits and vegetables. As a result, many stakeholders blame the residents of food deserts for their own predicament, lamenting, to paraphrase *Field of Dreams*, “we built it but they did not come.”³²

We proffer an alternative to blaming the victims. We consider that the problem is not simply that *they* did not come. Perhaps “we” made incorrect assumptions about the barriers to accessing healthy food? Thus by neglecting the full extent of the problem, “we” failed to provide *meaningful* access. In this Essay, we argue that interventions failed because we used a top-down approach that implicitly and/or unwittingly embraced a myopic narrative of food access that centered around problems of proximity. We then introduce the use of “new governance” theory to contemplate what a more collaborative and inclusive framework would look like.

New governance can be broadly described as a “school of thought that focuses on the significance of institutional design and culture for effective and legitimate regulation.”³³ New governance scholars often emphasize the value of community engagement and the use of a bottom-up approach to legitimacy and effectiveness. This stands in contrast to standard “top-down” models of rulemaking, which often involve little to no involvement of the target community. In this essay, we demonstrate how new governance concerns of legitimacy in solution design through engagement and coordination are well-placed in the food desert space. Specifically, we argue that a new governance framing provides an intriguing alternative to creating solutions to the food insecurity crisis.

³¹ Steve Cummins, Ellen Flint & Stephen A. Matthews, *supra* note 17.

³² *FIELD OF DREAMS* (Universal Pictures 1989) (“If you build it, he will come.”).

³³ Orly Lobel, *New Governance as Regulatory Governance*, in *THE OXFORD HANDBOOK OF GOVERNANCE* 65 (2012).

We develop our argument in Part II by describing the collective response to food deserts, and we posit that the bulk of these responses have been based on the premise that the food desert problem is a problem of proximity. In Part III, we develop the argument that while accessibility/proximity is a crucial factor, food deserts is a much more complex an issue. In particular, we focus on the issue of affordability. Part IV further excavates the complexity of food deserts and considers the effects of race and culture in accessing healthy food. We also observe that *true* access should include both *physical* access (in short, proximity) and *cultural* access (in short - the availability of grocery stores that feel a part of the community). Finally, Part V connects new governance framing to the food desert space to contemplate how best to achieve true access. Through the use of current and actual initiatives, the rest of the essay demonstrates the potentiality of using new governance principles to develop more engaged and meaningful solutions to the problem of food inequality. Put differently, new governance offers insight into how *we* can help *them* come.

II. THE COLLECTIVE RESPONSE TO FOOD DESERTS

Food deserts have largely been framed as problems of proximity.³⁴ If the problem is proximity to grocery stores, then the solution should be simple: create incentives and opportunities to develop grocery stores in underserved, low-income communities of color. Community organizations worked to bring farmers markets, policy makers and government officials provided financial and tax incentives for the development of full-service supermarkets, and the private sector responded by building supermarkets in many underserved communities.³⁵ In recent years, the U.S. government distributed more than \$500 million, through the Healthy Food Financing Initiative, to encourage grocery stores to open in underserved

³⁴ See FOOD DESERTS, *supra* note 14 at ii-iii.

³⁵ See UNSHARED BOUNTY, *supra* note 1, at 29–32.

communities.³⁶ Many states have also invested substantial resources to spur the development of healthy food options in poor communities plagued by diet-related health problems.³⁷ However, these investments have not always resulted in healthier communities³⁸ —supermarkets came to food deserts, but, in many of the communities, the residents neither came to the supermarkets nor bought the newly available healthy food.³⁹

In some communities, the development of full-service supermarkets did not alter residents' buying habits. Although community members shopped at the new supermarket, they often bought the same foods they previously bought.⁴⁰ Several recent studies have documented this phenomenon around the country. For a National Bureau of Economic Research study, residents agreed to allow researchers to track all of their bar-coded food purchases.⁴¹ The study confirmed that low-income neighborhoods had less physical access to healthy food.⁴² However, the study also concluded that individual food preferences, not proximity to full-service supermarkets, dominated the choices people made.⁴³ Participants who were low-income and had lower levels of education but who lived in wealthier communities with proximity to healthy foods made food choices that were similar to the choices made by

³⁶ Margot Sanger-Katz, *Giving the Poor Easy Access to Healthy Food Doesn't Mean They'll Buy It*, N.Y. TIMES (May 8, 2015), <http://www.nytimes.com/2015/05/09/upshot/giving-the-poor-easy-access-to-healthy-food-doesnt-mean-theyll-buy-it.html>.

³⁷ *Id.*

³⁸ *Id.*

³⁹ See Stephen Cummings et al., *New Neighborhood Grocery Stores Increased Awareness of Food Access but Did Not Alter Dietary Habits or Obesity*, 33 HEALTH AFFAIRS 283, 286 (2014).

⁴⁰ See *id.*

⁴¹ See Jessie Handbury, Ilya Rahkovsky & Molly Schnell, *What Drives Nutritional Disparities? Retail Access and Food Purchases Across the Socioeconomic Spectrum*, 4-5 (Nat'l Bureau of Econ. Research, Working Paper No. 21126, 2015).

⁴² *Id.* at 25-26.

⁴³ *Id.*

low-income people living in low-income neighborhoods with less physical access to healthy food.⁴⁴

Similar results were reached in studies of food desert interventions in Philadelphia and in the United Kingdom.⁴⁵ In the Philadelphia study, researchers studied the impact of opening full-service supermarkets in food deserts.⁴⁶ After studying purchasing habits over six months, the researchers found that the presence of supermarkets did not lead to increased fruit or vegetable intake of residents or impact body mass index.⁴⁷ Ultimately, researchers concluded that “the effectiveness of interventions to improve physical access to food and reduce obesity by encouraging supermarkets to locate in underserved areas therefore remains unclear.”⁴⁸

Rather than seeing the results of these studies as a prompt to further investigate the complex reasons people experience difficulty accessing healthy food, many have been content to declare the problem of food deserts solved, or to claim that food deserts were never really the threat to public health that many believed them to be.⁴⁹ Yet poor nutrition and food insecurity remain, despite the geographical proximity of supermarkets or

⁴⁴ *Id.*

⁴⁵ See Sanger-Katz, *supra* note 17.

⁴⁶ Cummins, *supra* note 17.

⁴⁷ Matthews, *supra* note 17, at 286.

⁴⁸ *Id.* at 283. To be clear, the authors of this study do not believe that residents are to blame or that food equity is not a continuing problem. Their overall suggestion was in line with the conclusion of this essay: “[C]omplementary policy changes and interventions may be needed to help consumers bridge the gap between perception and action.” *Id.*

⁴⁹ See, e.g., Boone-Heinonen, *Fast Food Restaurants and Food Stores Longitudinal Associations with Diets in Young to Middle-aged Adults: The Cardia Study*, 171 ARCHIVES INTERNAL MED. 1162 (2011) (finding supermarket availability was generally unrelated to diet quality and fruit and vegetable intake); Ruopeng An, *School and Residential Neighborhood Food Environment and Diet Among California Youth*, 42 AM. J. PREVENTIVE MED. 129 (2012) (finding no strong relationship between food environment and consumption); Katherine Mangu-Ward, *Dessert in the Desert Food Policy Myth*, REASON, Feb. 2012, at 12 (“[P]oor eating habits are a matter of preference for Doritos and Twinkies, not a lack of access to leafy greens.”).

other sources of whole foods.⁵⁰ Indeed, in the aforementioned study by the National Bureau of Economic Research, researchers found that no more than a tenth of the variation in food bought could be explained by people's proximity to a grocery store.⁵¹ One danger in this finding is that rather than further engaging to unearth and address all of the challenges and opportunity costs people face in accessing food, private industry may stop investing in full-service grocery stores in low-income communities, government entities may move to end tax incentives or other benefits, and non-profits may turn their attention and resources to "more pressing" concerns.

Others have taken the publication of these studies as an opportunity to blame the victims, declaring that access was improved and the remaining issues are about individuals having the desire to change behavior. Some in the food justice movement call residents' behavior a "lifestyle choice" and point to a perceived cultural preference for unhealthy, processed foods.⁵² For example, in a survey of community-supported agriculture initiatives ("CSA"), managers were asked, "what do you think are some of the reasons that it is primarily European-American people who seem to participate in CSAs?"⁵³ Respondents did not question access and affordability or raise issues about structural inequalities.⁵⁴ Instead, the CSA managers made remarks such as "Hispanics aren't into fresh, local, and organic products," "I believe that food is affordable to all; it's just a matter of different values .

⁵⁰ See Cummings et al., *supra* note 39.

⁵¹ Handbury, *supra* note 41, at 25.

⁵² Julie Guthman, *If They Only Knew: The Unbearable Whiteness of Alternative Food*, in *CULTIVATING FOOD JUSTICE: RACE, CLASS, AND SUSTAINABILITY* 263, 270 (Alison Hope Alkon & Julian Agyeman eds., 2011).

⁵³ Mark Paul, *Community Supported Agriculture: A Model for the Farmer and the Community?*, *FUTURE ECONOMY* 1-3 (2015), http://futureecon.com/wp-content/uploads/MP_Final_PDF.pdf, an explication and history of community support agriculture.

⁵⁴ Guthman, *supra* note 52, at 270.

..,” and “low income people shop elsewhere unless they are given freebies like WIC.”⁵⁵

These responses stigmatize the choices of affected communities rather than respond to the systemic and structural barriers that impact access and lead those people to make the choices they do. The result is condemning individuals who may not have the wealth, information, or resources to participate in the food market on the terms set by others.⁵⁶ The problem of access to healthy, affordable food is not as simple as reducing the distance a resident must travel to healthy food sources. Advocates, government entities, and members of the private sector must take a step back and examine whether they have truly addressed the access problem by focusing on the meaning of access and the specific barriers for each community.

III. THE COMPLEX CAUSES OF FOOD INSECURITY

Building a grocery store or holding a regular farmers market—providing a basic level of access—is a critically important step in promoting food security, but it is only a first step. While supermarkets technically solve the problem of the food desert, it does not necessarily create true access, as additional factors contribute to food insecurity, and there are significant opportunity costs associated with shopping at a full-service supermarket.⁵⁷

Limited access to healthy food is largely an income and class issue.⁵⁸ When addressing food access in low-income communities, food availability is often not as critical as food affordability. Healthy food is not cheap.⁵⁹ Fresh produce, for example, is considerably more expensive than processed

⁵⁵ *Id.* at 271.

⁵⁶ *Id.*

⁵⁷ See Anne Short, Julie Guthman & Sam Raskine, *Food Deserts, Oases, or Mirages? Small Markets and Community Food Security in the San Francisco Bay Area*, 26 J. PLAN. EDUC. & RES. 352, 357–63 (2007).

⁵⁸ Breyer, *supra* note 14, at 137.

⁵⁹ See Mayuree Rao, et al., *Do Healthier Foods and Diet Patterns Cost More Than Less Healthy Options? A Systematic Review and Meta-analysis*, 3 BRITISH MED. J. 1, 4 (2013); see also Sanger-Katz, *supra* note 36.

or fast food.⁶⁰ Understandably, low-income households exhibit the highest price sensitivity to fruits, vegetables, and dairy products.⁶¹ Accordingly, food prices play as great a role as proximity in determining food access for low-income households working within a tight budget.⁶² Many residents of former food deserts do not alter their shopping or eating habits because the small markets and bodegas they shop in provide more budget-friendly—though less healthy—options. For example, in one study of community markets and full-service grocery stores, researchers found that in multiple neighborhoods in San Francisco the prices at small markets were considerably lower than at nearby chain stores.⁶³

Bringing healthy food sources to food deserts without equal attention to the costs of healthy options has created “food mirages.” Food mirages are “census tracts where food access limitations stem from a lack of affordable healthful options rather than an absence of grocery stores”⁶⁴ and occur when “full service grocery stores appear plentiful but, because food prices are high, healthful foods are economically inaccessible for low-income households.”⁶⁵ In discussing an Oregon public health coalition’s efforts to assist low-income Latinos develop healthier eating habits, one commentator observed that, “although North Portland has several large grocery stores, Hispanic parents find them expensive and lacking in culturally appropriate foods, and therefore travel long distances to shop in discount markets . . . [t]he challenges of time, distance and cost means infrequent shopping trips and less fresh produce.”⁶⁶ Despite the presence of the grocery stores,

⁶⁰ Rao, *supra* note 59, at 4.

⁶¹ Breyer, *supra* note 2, at 132.

⁶² *Id.*

⁶³ Short, *supra* note 57, at 358–59.

⁶⁴ Breyer, *supra* note 2, at 132.

⁶⁵ *Id.*

⁶⁶ Margaret Everett, *Practicing Anthropology on a Community-based Public Health Coalition: Lessons from HEAL*, 35 ANNALS ANTHROPOLOGICAL PRAC. 10, 14 (2011).

Latinos in North Portland live in a food mirage with similar impacts on eating and health outcomes as food deserts.

Affordability is a primary issue in determining food access, but it is not the only issue⁶⁷—education levels also play a role.⁶⁸ Fresh, healthy food also takes more time and resources to prepare and cannot be stored as long as processed foods—all challenges for low-income community members.⁶⁹ Some residents may not know how to prepare the foods and are reluctant to seek help or advice.⁷⁰ Many residents are deterred from shopping in the new supermarkets because of the abundance of unfamiliar products and the feeling that the residents are out of place.⁷¹ The specific context of each community provides a lot of information about food access for its members. Not all communities face the same barriers, and solutions cannot be one-size-fits-all.

IV. RACE, CLASS, AND CULTURE

Food deserts disproportionately impact people of color.⁷² Although the goal may be a color-blind food system, the strategies for achieving that goal cannot be. Race and socioeconomic status cannot be ignored when crafting solutions—they played a role in creating the problem and must be acknowledged in creating a solution.⁷³ A common sentiment in the food justice movement is that “difference is wrong, it is better to try to become color blind in how we do things.”⁷⁴ However, neither the approach to

⁶⁷ Handbury, *supra* note 41, at 29.

⁶⁸ *Id.* at 28-29.

⁶⁹ See Sanger-Katz, *supra* note 36.

⁷⁰ Guthman, *supra* note 52, at 272.

⁷¹ *Id.*

⁷² See e.g., Beaulac, *supra* note 17, at 2–3; McClintock, *supra* note 5, at 89–93.

⁷³ See Sarah Treuhaft & Allison Karpyn, *The Grocery Gap: Who Has Access to Healthy Food and Why It Matters*, POLICY LINK & THE FOOD TRUST 11-19 (2010), http://thefoodtrust.org/uploads/media_items/grocerygap.original.pdf.

⁶⁷ Guthman, *supra* note 52, at 270.

identifying the sources of food insecurity nor the solutions can be color-blind or promote a white middle-class narrative.

A color-blind approach to food justice has combined with a sense of universalism, imposing and promoting one universal sense of the world. In food justice efforts, universalism may take the form of

refusing to acknowledge the experience, aesthetics, and ideals of others, with the pernicious effect that those who do not conform to white ideals are justifiably marginalized. In other words, when particular, seemingly universal ideals do not resonate, it is assumed that those for whom they do not resonate must be educated about these ideals or be forever marked as different.⁷⁵

White middle- and upper-class narratives have dominated the food justice discourse and are thus reflected in its solutions, despite the disparate impact that food insecurity has on low-income communities and communities of color.⁷⁶

In a survey of the managers of community supported agriculture initiatives, the embrace of “universal values” was clear. When asked about efforts to increase the diversity of those who use community-supported agriculture, one manager responded: “We always hope for more people and do not focus on ethnic – what we present attracts all.”⁷⁷

This same study revealed the force of color-blindness within the food justice movement.⁷⁸ Another respondent stated that “targeting those in our communities that are ethnic or low income would show a prejudice we

⁷⁵ *Id.* at 268.

⁷⁶ Allison H. Alkon & Julian Agyeman, *The Food Movement as Polyculture*, in *CULTIVATING FOOD JUSTICE: RACE, CLASS, AND SUSTAINABILITY* 1, 3 (Alison Hope Alkon & Julian Agyeman eds., 2011) (stories about low-income communities and communities of color “are all too often absent from the dominant food movement narrative, and are disproportionately harmed by the current food system”).

⁷⁷ Guthman, *supra* note 52, at 269.

⁷⁸ *Id.*

don't work within. We do outreach programs to reach everyone interested in eating locally, healthily, and organically."⁷⁹

Food is also an integral part of personal and cultural identity.⁸⁰

Not only is it a physiological necessity, but food practices . . . are manifestations and symbols of cultural histories and proclivities. As individuals participate in culturally defined proper ways of eating, they perform their own identities and memberships in particular groups. Food informs individuals' identities, including their racial identities⁸¹

Accordingly, cultural practices and lack of cultural sensitivity in full-service markets impact food choices. In a San Francisco study of the differing impacts that small community markets and larger full-service markets have on food security, the results demonstrated that culture is a critically important component.⁸² For example, the small markets studied stocked a wide variety of standard Latino food items as well as specialty items.⁸³ In contrast, the one large full-service market devoted only half an aisle to Latino products.⁸⁴ The Latino food items were also sold at substantially lower prices in the community markets than the nearby full-service chain market.⁸⁵ The community markets also created a culturally welcoming environment, not duplicated by the full-service market, advertising the availability of Latino products or the availability of Spanish-speaking employees.⁸⁶

⁷⁹ *Id.* at 269-70.

⁸⁰ Alkon, *supra* note 76, at 10; UNSHARED BOUNTY, *supra* note 1, at 5.

⁸¹ Alkon, *supra* note 76, at 4.

⁸² Short, *supra* note 57, at 357-63.

⁸³ *Id.* at 359.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* Importantly, the authors of the study noted that although there are positive aspects of community markets, they may not be contributing to food security in low-income communities and communities of color, citing the poor quality of some of the produce as just one example. *Id.* at 362. The authors of the study also raised concerns over the use of inadequate pay to keep costs down, possibly contributing to food insecurity. *Id.*

While food is tied to culture, “the relationship between food and culture is not deterministic.”⁸⁷ Given this connection, advocates must examine the way that race, ethnicity, and racism impact food purchases and consumption. Racially- and culturally-conscious approaches to challenging food insecurity must be explored. Ultimately, we need to evaluate the effectiveness of standard interventions compared to innovative solutions that better address *both* structural access as well as the range of other opportunity costs. Current policies have been set without fully engaging the community and may not take into account all of the barriers and “costs” to accessing healthy food. More specifically, many of the solutions focus on reducing the *structural* cost of *physical* access and availability, but very few solutions focus on comprehensively reducing *intangible* costs, which are harder to quantify but nonetheless present.⁸⁸

These intangible costs can be thought of as “switching costs” (i.e., they are comprised of the costs entailed in switching from one’s current food options and lifestyle to the new offerings suddenly available in the community). The concept of switching costs is widely used in the economic and marketing literature.⁸⁹ It is helpful here because it aptly captures the essence of these intangible costs that many of the traditional solutions in the food equity community have ignored. One can imagine that these switching costs could take many forms. First are information gathering costs, which will be incurred when residents opt to inform themselves on new food offerings either informally or through more formal channels like organized educational programs. Second are what we term, “identity and cultural” switching costs, which stem from switching from one’s everyday diet to what may be perceived as a new and culturally distinct diet. Finally, a third set of costs are what we term “routine recalibration” costs, which arise

⁸⁷ Alkon, *supra* note 76, at 11.

⁸⁸ Short, *supra* note 57.

⁸⁹ See, e.g., Thomas Burnham, *Consumer Switching Costs: A Typology, Antecedents, and Consequences*, 31 J. ACAD. MARKETING SCI. 110 (2003).

when target populations must recalibrate several elements of their daily routines in order to take advantage of these new offerings. These recalibrations may be small and insignificant in isolation (i.e., changing grocery stores or adding a green vegetable for dinner). However, when aggregated one can quickly see how they may become more challenging (i.e., not only is it about changing grocery stores or adding green vegetables for dinner, but perhaps it also entails other recalibrations like redoing one's budget and changing one's travel pattern so that the new grocery store can be worked into your routine).

There are already various business models that either explicitly or implicitly go beyond the tangible costs of lack of access, and address some of the intangible switching costs outlined above. For example, at the Brown Super Store in Philadelphia, the store is designed as a one-stop, full-service center with a visually appealing layout and mix of groceries that invite residents to shop, engage, and feel at home.⁹⁰ Similarly, the co-ownership model used by Bedford Stuyvesant Restoration project to encourage grocery stores to enter their community and employ residents from that community provides another case in point.⁹¹ As we examine and continue to collect data on other initiatives similar in kind, we are also working to understand their commonalities and distill basic principles that could be replicated in other instances.

Initiatives that address these intangible yet significant switching costs seem to have three core features. First, they seem to adopt a bottom-up rather than top-down approach to design and involve direct community engagement both *ex post* and *ex ante*. Second, several involve effective cross-sector collaboration and public-private partnerships, with the state serving as incentive providers while encouraging private participation. And

⁹⁰ Uplift Solutions, *Brown Super Stores Mission Video Update*, YOUTUBE (Aug. 5, 2013), https://www.youtube.com/watch?v=mVYzx_TWPGQ.

⁹¹ UNSHARED BOUNTY, *supra* note 1, at 29.

third, they are dynamic; they involve experimentation and diversity of approach; and, at times, evolve and change based on community response.

Interestingly, these descriptive core features bare conceptual similarity to the regulatory frame of “new governance”. With that recognition in mind, the balance of this essay provides an overview of the new governance framework and how such a framework could be applied to food deserts to better address both lack of access problems as well as some of the switching costs discussed above.

V. NEW GOVERNANCE—GENERAL PRINCIPLES AND SPECIFIC APPLICATIONS

New governance is “a school of thought that focuses on the significance of institutional design and culture for effective and legitimate regulation.”⁹² A new governance approach stands in paradigmatic opposition to traditional regulatory models, which often times embody a “top-down,” “command and control” approach.⁹³ Instead, new governance theory emphasizes collaborative, collective, and cooperative action between regulators and the regulated.⁹⁴ Indeed, according to noted new governance scholar Orly Lobel,

⁹² Lobel, *supra* note 33, at 65.

⁹³ *Id.*; see generally IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (1992) (discussing the government’s need to adopt a new approach to deregulation to increase market efficiency); Cristie Ford, *New Governance in the Teeth of Human Frailty: Lessons from Financial Regulation*, 2010 WIS. L. REV. 441, 445 (arguing for the adoption of a pragmatist approach involving empirical experiences, flexibility, and humility); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 466–67 (2004) (arguing for the adoption of the Renew Deal approach requiring economic efficiency, political legitimacy, and social democracy); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1100–01 (2004) (arguing that the adoption of the experimentalist approach avoids the defects of rule-bound intervention and is responsive to judicial concerns); Joanne Scott & Susan Sturm, *Courts as Catalysts: Re-thinking the Judicial Role in New Governance*, 13 COLUM. J. EUR. L. 565, 567 (2007) (arguing for the adopting of a catalyst approach, as used by European courts, to promote legitimate and effective governance decisions).

⁹⁴ See Lobel, *supra* note 33, at 65.

“a central challenge that new governance takes on is how to promote legitimate, effective, and active participation in the work of regulation by the private regulated parties themselves without devolving into deregulation.”⁹⁵ While Lobel’s observation is focused on a regulatory space, the observation works equally well in the food desert context—“legitimate, effective, and active participation” by the target communities (in Lobel’s construct, the “private regulated parties”) should be a “central” concern if we care about avoiding unsuccessful solutions (“devolving into regulations”).⁹⁶

New governance has been employed in a wide range of fields, including corporate governance, public health, federal sentencing guidelines, and environmental safety.⁹⁷ As new governance scholars have noted, a new governance approach seems particularly well suited in areas that have a “stalemate,” i.e., a gap continues to exist between problem and solution despite best efforts in designing workable solutions.⁹⁸ No matter the field employed, the central premise is two-fold: first, effective policy solutions and regulations will come from collaboration, cooperation, and engagement of the private parties affected by the solutions; and second, that these private parties should not simply be viewed as passive regulatory *objects*, but rather as engaged “norm-generating” *subjects*.⁹⁹

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See *OSHA 2003-2008 Strategic Management Plan*, U.S. DEP’T OF LABOR, OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, <https://www.osha.gov/StratPlanPublic/strategicmanagement-plan-final.html> (environmental); U.S. SENTENCING GUIDELINES MANUAL § 8 (U.S. SENTENCING COMM’N 2014) (guidelines designed to reduce penalties when a corporation has implemented an effective system of oversight for detecting violations of law); NICOLE A. SLEZAK, *THE MAKING OF GLOBAL HEALTH GOVERNANCE, CHINA AND THE GLOBAL FUND TO FIGHT AIDS, TUBERCULOSIS, AND MALARIA* 145 (2012) (using new governance in HIV studies); Tamara Belinfanti, *Shareholder Cultivation and New Governance*, 38 DEL. J. CORP. L. 789 (2014) (corporate governance).

⁹⁸ Belinfanti, *supra* note 97, at 802.

⁹⁹ *Id.* at 67 (emphasis added).

Well, how does one incentivize this collaboration and active participation by the target private parties? In other words, how does one endeavor to cultivate “norm-generating” subjects? One model proffered by Lobel suggests that the model contain eight “organizing principles” or “clusters of approaches”: “(1) increased participation of non-state actors; (2) public–private collaboration; (3) diversity and competition within the market; (4) decentralization; (5) integration of policy domains; (6) non-coerciveness (‘soft law’); (7) adaptability and constant learning; [and] (8) coordination.”¹⁰⁰ The first principle of increasing participation of non-state actors is aimed at incentivizing buy in and is also based on the premise that the private actors whose behavior will be impacted by the solution have knowledge, preferences, and expertise that would be helpful to ascertain in designing the solution.¹⁰¹ Principles two through four (public-private collaboration, diversity and competition, and decentralization) further develop aspects of participation.¹⁰² For example, the principle of diversity and competition encourages, honors, and recognizes the existence of value heterogeneity.¹⁰³ Principles five through eight (integration of policy domains, non-coerciveness, adaptability and constant learning, and coordination) speak to the need to integrate learning across policy domains to work towards collaborative norm creation and the need to be honest about failure and open to revision where solutions miss their intended mark.¹⁰⁴

As detailed above, while various public and private solutions have been developed to address the problem of lack of access to healthy food in food desert communities; as others have noted, many of these solutions continue to miss their intended mark. Perhaps we are not quite at the level of

¹⁰⁰ Lobel, *supra* note 33, at 65.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

“stalemate,” but what is clear is the need to seriously revisit the cause of this quasi-stalemate and to avoid the clean but reductionist view of “we built it but they did not come.”¹⁰⁵ Assuming “they” did not come, the policy puzzle remains of *why* didn’t they come? And relatedly, are there other approaches that could be employed to encourage “them” to come? Reframed in new governance terms, are there other approaches that encourage a shift from community as “object” to community as active, participating agents in this programmatic project of access to healthy food? We consider the potential below.

First, in terms of valuing engaged participation and honoring the knowledge, expertise, and values of the community, the Brown Superstore model provides an interesting case in point. Brown Super Stores is a grocery chain that operates in the Delaware Valley area in Pennsylvania.¹⁰⁶ Brown’s model is to build stores in low-income neighborhoods and work with community leaders to gather information on the needs and specificities of the community.¹⁰⁷ According to Jeff Brown, the company’s president, “before we open a store in a neighborhood, we work with community leaders . . . learn about their background, religion, where their families came from.”¹⁰⁸ This explicit outreach and engagement of the community at the outset helps Brown tailor its offerings to the specific needs and tastes of the community.¹⁰⁹ For example, in an area with larger Muslim populations, the Brown Super Stores have a separate section for Halal meat.¹¹⁰ Similarly, Brown Super Stores often aim to stock food from residents’ childhoods.¹¹¹

¹⁰⁵ See *supra* text accompanying notes 31–32.

¹⁰⁶ Uplift Solutions, *supra* note 90.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Sarah Treuhart, *A Business Model that Brings Jobs, Health Services—And Joy—to the Hardest Hit Communities*, HUFFPOST OPPORTUNITY WHAT IS WORKING (Sept. 25, 2015), http://www.huffingtonpost.com/sarah-treuhart/a-business-model-that-bri_b_1914585.html?utm_hp_ref=opportunity-working.

In addition to this ex ante outreach, the Brown model activates and encourages continuous participation and engagement by the community.¹¹² For example, some Brown Super Stores are designed as “one stop” lifestyle centers, which in addition to groceries offer credit union services, access to nutritionists, and health clinics, all on site.¹¹³ In addition, other stores have community rooms, which are available to community organizations for free.¹¹⁴ Brown’s multi-prong collaborative approach is in many ways an operationalization of Lobel’s new governance frame, where active and meaningful community participation is central. In addition, through a variety of design choices, a norm generation occurs that puts health and healthy food choices accessible, normative options. As such, the Brown Superstore model arguably activates principles one through three and five through six of Lobel’s approach.

While Brown’s approach is seemingly novel in the food desert space, the approach is by no means limited to Brown, and it can be replicated. In recognition of this fact, Brown’s president created a nonprofit organization (“Uplift Solutions”) whose mission is to assist grocery stores and other nutritional institutions in entering food desert communities.¹¹⁵

The second cluster of new governance principles that can be observed in the food equity space is the integration of policy domains and continued public-private collaboration. New York City’s expansion of its Electronic Benefits Transfer (EBT) program to enable use at green markets provides a case in point.¹¹⁶ In short, the New York City Council provides funding for EBT scanners, signage, community outreach, and staff to operate the

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ UPLIFT SOLUTIONS, www.upliftsolutions.org/reports (last visited Nov. 22, 2015) (Uplift Solutions 990 Form).

¹¹⁶ *Food Stamp Use Doubles at Greenmarkets in 2010*, Press Release, NEW YORK CITY COUNCIL, (Jan. 3, 2011), http://council.nyc.gov/html/pr/greenmarket_ebt_doubles_01_03_11.shtmlhttp://council.nyc.gov/html/pr/greenmarket_ebt_doubles_01_03_11.shtml.

machines at certain green markets throughout the city.¹¹⁷ The expansion of EBT use to green markets involved an integration of distinct, but related policy spheres—that of social benefit programs and that of nutritional health.¹¹⁸ Similarly, the public-private collaboration is evident by virtue of the existing partnership between the state (in this case, the City Council) and the private actors (in this case, both the individual green market vendors and potential consumers).¹¹⁹ The state actor's decision to provide funding to incentivize the use of EBTs at green markets theoretically helped expand the market for green market vendors while creating a new option for EBT users to procure healthy food.¹²⁰ While such policy domain integration and cross-sector collaboration is exactly the type of constitutive relationship that a new governance approach would encourage, what seems less present is the centrality of the values and views of the target community in informing the structure, design, and, if need be, the re-evaluation of the program.

The third group of new governance principles that appear in solutions that arguably do a better job of addressing both the tangible access costs and the intangible switching costs is diversity in approach and the ability to experiment with different models. Whole Foods Market, a large format grocery store committed to carrying only natural and sustainable products, achieves this diversity and experimentation through its core business model and through one of its foundations.¹²¹ Thus, when Whole Foods made the business decision to open a store in Detroit, Whole Foods realized that in order to be successful they would have to (1) address any specificities of food culture and (2) offer more affordably priced options.¹²² To achieve the

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ WHOLE FOODS MARKET, <http://www.wholefoodsmarket.com/mission-values> (last visited Mar. 21, 2015)

¹²² WHOLE CITIES FOUND., <https://www.wholecitiesfoundation.org/communities-we-serve/detroit-mi> (last visited Nov. 21, 2015).

former, Whole Foods conducted ethnographic research to understand the needs of the community.¹²³ In terms of the latter, Whole Foods opted to offer lower priced items.¹²⁴ As Whole Foods Co-CEO Walter Robb stated, in order to be successful “[they] would have [to] persuade a new kind of customer that what it sold—local, organic, and sustainable products—were worth seeking out and paying higher prices for.”¹²⁵ The acknowledgment of “worth seeking out and paying higher prices for” seems to be an acknowledgement that the transaction costs involved in food equity go beyond simply access, but also include a host of other switching costs such as information gathering and, in some cases, cultural adjustments and routine recalibrations. Furthermore, Whole Foods’ experience in Detroit allowed it to experiment with other models for expanding its success.¹²⁶ Instead of simply opening other grocery stores modeled on Detroit, Whole Foods diversified its approach and opted instead to create a foundation that partners with community-based organizations to create other solutions that allow meaningful access to healthy food.¹²⁷

While none of the above examples do a perfect job in addressing problems of food access, they do a *better* job than their counterparts, which ignore the knowledge, expertise, and values of the target communities. By making the specificities of the community a centerpiece in design, these solutions arguably do a better job of ameliorating both the tangible costs of access and the package of switching costs that are often present. In addition, the examples presented above illustrate how the range of policy solutions can be expanded through cross-sector collaboration, diversity in approach,

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ See Tracie McMillan, *Can Whole Foods Change the Way Poor People Eat?*, SLATE (Nov. 19, 2014, 11:30 pm), http://www.slate.com/articles/life/food/2014/11/whole_foods_detroit_can_a_grocery_store_really_fight_elitism_racism_and.html.

¹²⁶ *Id.*

¹²⁷ *Id.*

and attention to the norm-creating power of the community. As such, we argue that new governance framing offers an intellectually robust way to conceptualize and collate the types of solutions that prove most promising in the food access space.

Employing a new governance frame, we can begin to envision examples of other solutions that might do a better job than standard models in addressing both the structural costs and intangible switching costs associated with obtaining meaningful access to healthy food. For example, one could imagine an initiative that would invite the community to *itself* serve as partner in monitoring and tracking its consumption of healthy food. The “tracking” element could replicate prior research experiments that used bar codes to determine the proportion of health food purchases. The initiative itself could be structured as a tournament, where residents could organize themselves into different teams and the teams would compete for some predetermined prize. The “prize” could take many forms including vouchers, store credits, or any other form of remuneration that would further meaningful access. The tournament “referee” could be a community organization, an outside government agency, a representative from a participating store, etc. Finally, in keeping with the new governance frame, residents could be invited to participate *ex ante* in generating the rules of the game. Such a tournament model would share some similarities with the “star” certification program employed by the Occupational Safety and Health Administration (OSHA), which co-opts private companies to identify and monitor their own safety risks in return for earning a “star.”¹²⁸

For current food access initiatives that fall short of their intended mark, one approach would be to invite the community in to share its insight of why the new grocery store or program has not been widely embraced.

¹²⁸ *Voluntary Protection Programs*, U.S. DEP’T OF LABOR: OCCUPATIONAL SAFETY & HEALTH ADMIN. (Mar. 21, 2016), https://www.osha.gov/dcsp/vpp/all_about_vpp.html; see Orly Lobel, *Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety*, 57 ADMIN L. REV. 1071 (2005).

While this may seem risky because it could be interpreted as an acknowledgement of failure, such an approach has been successfully used in the business sector.

For example, Cemex, S.A., the leading Mexican cement manufacturer, adopted such an approach when it was at a loss in determining why its products were not attractive in the low-income housing market.¹²⁹ Cemex sensed that the answer was more complicated than price.¹³⁰ To answer the question, Cemex undertook an in-depth community engagement project and issued a “Declaration of Ignorance” in which it openly declared that it lacked the necessary knowledge and that it needed the community’s help.¹³¹ Cemex’s approach met with resounding success—the community responded and, out of their engagement, Cemex developed a new home ownership and building model (*Patrimonio de Hoy*), and most importantly, Cemex’s revised product offerings became an appealing choice to its intended target market.¹³² Cemex’s approach and the approach suggested in this essay are examples of crowdsourcing problem solving. From a new governance perspective, such an approach would incentivize community participation and engagement, while also being representative of the “adaptation” and “constant learning” which are recurrent features of the new governance frame.

VI. CONCLUSION

There are many reasons why Anthony cannot readily access healthy food in his Anacostia neighborhood, but proximity to that food is just one aspect of the complicated web of barriers he faces. Rather than condemn Anthony and other low-income people of color because they lack the tools to

¹²⁹ Ajit Sharma, *CEMEX: Innovation in Housing for the Poor*, MICH. BUS. SCH., Dec. 12, 2003; see also Tamara Belinfanti, *Contemplating the Gap-Filling Role of Social Intrapreneurship*, 94 OREG. L. REV. 101, 133–35 (2015).

¹³⁰ Sharma, *supra* note 129, at 3–4.

¹³¹ *Id.*

¹³² *Id.*

participate in the food market on the terms set by others, we must determine what it would take to create true access to healthy and affordable foods. And to do that, we must attend to the complex transaction costs faced by those living in food deserts.

The key objective of this essay is to offer a framework for avoiding a stalemate in the food equity space. A successful framework honors the values and experiences of those living in food deserts and encourages their active participation in the design of meaningful solutions to lack of access to healthy food.

A new governance approach has invaluable utility in the food access area. The new governance framework rejects a one-size-fits-all model, makes the community a central and key partner in programmatic choice and implementation, encourages design experimentation and adaptability, and embraces the heterogeneous nature of the food-culture relationship.

In sum, new governance provides a useful framework for conceptualizing the problem of food access and for designing effective solutions. By promoting the active participation of impacted communities and recognizing the importance of culture and context in crafting legitimate and effective solutions, perhaps we will finally determine why they did not come.