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A Fare Share: A Proposed Solution to Address the Racial Disparity in Access to Public Transportation Funding in America

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A FARE SHARE: A PROPOSED SOLUTION TO ADDRESS
THE RACIAL DISPARITY IN ACCESS TO PUBLIC
TRANSPORTATION FUNDING IN AMERICA

Michael Swistara[★]

ABSTRACT

Black American households are up to six times less likely to own a car than white families and are four times more likely to rely on public transportation to meet their daily needs. Despite this, communities of color have seen consistent disinvestment in their transit infrastructure. Four hundred years of continued housing segregation combined with post-recession austerity policies and ongoing pro-automobile bias has exacerbated this disparity. This Note proposes a straightforward legislative tool to begin to combat this inequity. The proposed legislation would require that urbanized areas spend their public transit dollars according to the population density of the communities a given project would serve, create reporting requirements related to the racial and economic impact of transit projects, and establish a private right of action. In proposing this legislation, this Note evaluates the state of civil rights litigation as it pertains to transportation racism and draws lessons from other areas such as environmental law in order to put forth a simple solution that would have tangible effects across the country in both the short and long term.

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INTRODUCTION

It was the cotton that passed through our chained hands that inaugurated this age. It is the flight from us that sent them sprawling into the subdivided woods. And the methods of transport through these new subdivisions, across the sprawl, is the automobile, the noose around the neck of the earth, and ultimately, the Dreamers themselves.¹

– Ta-Nehisi Coates

More than six decades after the Supreme Court declared that separating train cars on the basis of race was inherently unequal,² there remain vast racial inequities in access to public transportation in America. The deep inequality in access to funding for reliable and affordable transit has been characterized as a “transportation apartheid” by Robert Bullard, Director of the Environmental Justice Center in Atlanta, Georgia.³

Getting to and from work is a daily challenge for many people of color. People of color have longer commutes than their white counter-

1. TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* 151 (2015).

2. *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding the separation of Black and white train passengers into “separate but equal” train cars), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

3. Andrea Bernstein & Nancy Solomon, *Back of the Bus: Mass Transit, Race and Inequality*, WNYC (Feb. 10, 2012), <https://project.wnyc.org/backofthebus/> [<https://perma.cc/47VX-BPNU>].

parts and are more likely to live near busy roads, increasing their risk of health impacts from pollution and collision.⁴ Black workers are also three to six times less likely to have a car at home than white workers and are almost four times more likely to use public transportation for their commute.⁵

Due to a history of race-based zoning laws and restrictive covenants on home ownership that barred Black residents from affluent neighborhoods near job centers in cities and suburbs, Black people are likely to live farther away from their jobs, making alternatives to driving, such as cycling or walking, impracticable – and in many areas, the sidewalk infrastructure simply does not exist.⁶ As a result, lower-income people of color are disproportionately reliant on public transportation as a means of access to work, school, healthcare, childcare, and recreation.⁷ Yet, despite continued zoning forcing reliance on public transit, Black communities suffer from disinvestment in their transit networks (and have for decades)

4. ALEX KARNER, DANA ROWANGOULD, JONATHAN LONDON, NAT'L CTR. FOR SUSTAINABLE TRANSP., *WE CAN GET THERE FROM HERE: NEW PERSPECTIVES ON TRANSPORTATION EQUITY* 19 (2016); ALGERNON AUSTIN, DEMOS, *TO MOVE IS TO THRIVE: PUBLIC TRANSIT AND ECONOMIC OPPORTUNITY FOR PEOPLE OF COLOR* 2, 6 (2017), <https://www.demos.org/sites/default/files/publications/Public%20Transit.pdf> [<https://perma.cc/AP9L-TDHE>] (finding that “[w]orkers of color are overrepresented among public transit commuters with “long commutes”—one-way commutes of 60 minutes or longer”); see RICHARD EZIKE, CONG. BLACK CAUCUS FOUND., *TRANSPORTATION, SUSTAINABILITY, AND EQUITY AND THE EFFECT ON THE AFRICAN-AMERICAN COMMUNITY* 6 (2016), <https://www.cbefinc.org/wp-content/uploads/2016/10/CBCFTransportationBriefing.pdf> [<https://perma.cc/8GHQ-L6N3>]; see, e.g., Evelyn Nieves, *In the Wake of a Teen-Ager's Death, a Cloud of Racism, Then a Lawsuit*, N.Y. TIMES, Dec. 19, 1996, <https://www.nytimes.com/1996/12/19/nyregion/in-the-wake-of-a-teen-ager-s-death-a-cloud-of-racism-then-a-lawsuit.html> (detailing the death of a Black teenage girl who had to cross a seven-lane highway to get to her job, as the mall where she worked allowed drop-off spots for buses coming from the suburbs but not for Buffalo's city buses).

5. AUSTIN, *supra* note 4, at 6-9.

6. See generally RICHARD ROTHSTEIN, *THE COLOR OF LAW* (2017); See Monica Anderson, *Who Relies on Public Transit in the U.S.*, PEW RSCH. CTR. (Apr. 7, 2016), <https://www.pewresearch.org/fact-tank/2016/04/07/who-relies-on-public-transit-in-the-u-s/> [<https://perma.cc/BZ78-BBQZ>].

7. In Los Angeles, for example, 92 percent of bus riders are people of color and their annual median income is \$12,000 (compared to 71 percent non-white and \$37,764 across the entire metropolitan area). Amanda Hess, *Race, Class, and the Stigma of Riding the Bus in America*, BLOOMBERG CITYLAB (Jul. 10, 2012, 8:40 AM), <https://www.bloomberg.com/news/articles/2012-07-10/race-class-and-the-stigma-of-riding-the-bus-in-america> [<https://perma.cc/HCG9-GPWV>]; *Los Angeles-Long Beach-Anaheim, CA Metro Area*, CENSUS REPORTER, <https://censusreporter.org/profiles/31000US31080-los-angeles-long-beach-anaheim-ca-metro-area/> [<https://perma.cc/U4DN-FSP7>] (last visited Apr. 12, 2021).

while transportation resources are funneled towards wealthier, whiter, and less dense neighborhoods.⁸

As this Note will discuss in greater detail, beginning in the post-World War II suburbanization boom and continuing into the 1990s, state and local adoption of facially “race neutral” policies that favored car owners widened the divide in access to mobility.⁹ Rail lines were closed in Black neighborhoods without adequate replacement.¹⁰ During the 2007–2009 Great Recession era of municipal belt-tightening, even more transit projects were slowed or cancelled.¹¹ The few projects that proceeded focused on attracting “choice” riders—those who could otherwise drive but choose not to (i.e., wealthier, whiter suburban residents).¹² Those who rely on public transportation for their daily needs often pay

8. See, e.g., MONTGOMERY CTY. DEP’T OF TRANSP., SERVICE PLANNING AND INTEGRATION REPORT 3-19, 4-4, (2013) [hereinafter SERVICE PLANNING AND INTEGRATION REPORT], <https://www.montgomerycountymd.gov/BRT/Resources/Files/ServiceandIntegrationStudyFinalReport.pdf> [<https://perma.cc/MXT4-VUS4>] (explains how the Purple Line project in Maryland will appeal to “choice rider[s]”); Eric Romann & Sunyoung Yang, *Bus Riders Union: Transit Justice, Not Corporate Welfare – No on Measure J*, STREETS BLOG LA (Oct. 30, 2012), <https://la.streetsblog.org/2012/10/30/bus-riders-union-transit-justice-not-corporate-welfare-no-on-measure-j/> [<https://perma.cc/HAJ3-PQ29>] (arguing against a post-recession transit-funding ballot measure that “has the effect of substituting on type of transit rider – a choice rider, a tourist, an urban professional – for a transit-dependent person, generally Black or Latino.”); see generally KENNETH J. DUEKER & MARTHA J. BIANCO, CTR. FOR URBAN STUDS. PUBL’NS. & REPS., LIGHT RAIL TRANSIT IMPACTS IN PORTLAND: THE FIRST TEN YEARS 20 (1998) (warning about transit-oriented development planners “emphasis becom[ing] misplaced, chasing the elusive choice rider while underserving the captive rider.”).

9. See Andrea B. Korb, Note, *SEPTA, Philadelphia, and Transportation Equity in America*, 3 GEO. J.L. & MOD. CRITICAL RACE PERSP. 119, 136 (2011).

10. See, e.g., Sean B. Seymore, Note, *Set the Captives Free! Transit Inequity in Urban Centers, and the Laws and Policies Which Aggravate the Disparity*, 16 GEO. MASON U. C.R. L.J. 57, 92-93 (2005).

11. See AM. PUB. TRANSP. ASS’N, IMPACTS OF THE RECESSION ON PUBLIC TRANSPORTATION AGENCIES 2 (2010), https://www.apta.com/wp-content/uploads/Resources/resources/reportsandpublications/Documents/Impacts_of_Recession_March_2010.pdf [<https://perma.cc/9LDQ-7BYC>] (survey results finding widespread budget shortfalls resulting in layoffs, service cuts, and slowed capital improvements); Joseph W. Kane & Adie Tomer, *Shifting into an Era of Repair: US Infrastructure Spending Trends*, BROOKINGS (May 10, 2019), <https://www.brookings.edu/research/shifting-into-an-era-of-repair-us-infrastructure-spending-trends/> [<https://perma.cc/7LHK-HDPW>] (showing a decline of over \$35 billion in public infrastructure spending between 2009 and 2013); see, e.g., Joni Earl, *Completing Projects With Less Funding: Sound Transit’s Success Story*, ENO CTR. FOR TRANSP. (Jan. 20, 2014), <https://www.enotrans.org/article/completing-projects-less-funding-sound-transits-success-story/> [<https://perma.cc/Q456-PRK6>] (detailing Seattle metro region’s struggle to institute project cuts and delays to public transportation in the face of declining post-2007 funding levels).

12. See sources cited *supra* note 8.

more into the system than their communities receive back, as metropolitan area transit boards spend most of their budgets on these “choice” riders, who constitute a minority of each system’s ridership.¹³

The handful of statutory and judicial attempts to remedy this inequity have failed. This is in large part because of the heightened restrictions the Supreme Court has placed on civil rights plaintiffs seeking to bring claims under Title VI, the provision of the Civil Rights Act of 1964 that prohibits discrimination on the basis of race, color, or national origin in programs receiving federal funding.¹⁴ A legislative fix is possible. This Note proposes legislation that would require that public transportation spending be apportioned to projects on the basis of population density, increase transparency through mandatory reporting requirements, and create a private cause of action.

Part I of this Note provides an overview of the history of racial discrimination as it pertains to public transportation funding and accessibility, with a focus on the post-war suburbanization of America. Part II illustrates the state of the problem currently, with case studies of Boston and Baltimore as examples. Parts III and IV discuss past attempts to address this problem, including litigation strategies and attempted statutory fixes. Finally, Part V proposes a new piece of federal legislation which builds upon past attempts and provides a robust and workable framework for tackling this issue by requiring that public transportation spending be allocated according to population density.

I. HISTORY OF HOUSING AND TRANSPORTATION SEGREGATION

The long history of racial discrimination and bigotry in the United States intersects with public transportation law and policy at all levels of government. In *Plessy v. Ferguson*, the Supreme Court upheld a statute that explicitly banned Black and white passengers from riding public transit together.¹⁵ When civil rights activists boycotted this *de jure* segregation in Montgomery, Alabama in 1955, the city’s bus service retaliated by modifying or entirely cutting routes that included stops in predominantly Black neighborhoods.¹⁶ The chronic underfunding of affordable

13. See, e.g., *N.Y. Urban League, Inc. v. Metro. Transp. Auth.*, 905 F. Supp. 1266, 1273 (S.D.N.Y. 1995) (discussing MTA’s proposed fare hike for urban riders to subsidize commuter rail, which redistributed funding away from the NYCTA such that wealthier whiter suburban commuters had 50 to 60 percent of their commute subsidized relative to 40 percent for urban commuters), *rev’d*, 71 F.3d 1031 (2d Cir. 1995).

14. See 42 U.S.C.A. § 2000d (West 2021); *infra* Part III.A.

15. See *Plessy*, 163 U.S. 537.

16. See *Negroes’ Boycott Cripples Bus Line*, N.Y. TIMES, Jan. 8, 1956, at 71; see also Hess, *supra* note 7.

and accessible transportation in communities of color continued long after *Brown v. Board of Education* overturned *Plessy v. Ferguson* in 1954.¹⁷

The advent of the personal automobile and subsequent federal policies encouraging suburban sprawl supercharged these geographic racial disparities.¹⁸ In the New Deal era, the Roosevelt administration created the Federal Housing Authority (FHA) to help make homeownership more affordable for white families, in part through the creation and financial backing of longer-term, lesser down payment mortgages.¹⁹ The FHA “redlined” neighborhoods, drawing lines on a map around predominantly Black neighborhoods and systematically denying home financing assistance by refusing to back mortgages in those “redlined” areas.²⁰ This policy meant that the FHA did not back many loans made in urban neighborhoods. For example, between 1934 and 1966 the FHA “did not

17. See Robert D. Bullard, *Addressing Urban Transportation Equity in the United States*, 31 *FORDHAM URB. L.J.* 1183, 1187 (2004) (states spend most of their transit money on highways and roads to the detriment of urban transportation needs); Laura Bliss, *Public Transit Faces Its Own Police Reckoning*, *BLOOMBERG CITYLAB* (Jun. 26, 2020, 7:00 AM), <https://www.bloomberg.com/news/features/2020-06-26/how-public-transit-got-overpoliced-and-underfunded> [<https://perma.cc/S3G3-HXK5>] (detailing how investment in transit since the 1970s has largely focused on highways and attracting suburban riders with expensive rail projects, along with underinvestment in bus networks as they are perceived more as “social welfare” than “public utility”); *This Is What Defunding Transit Looks Like*, *TRANSITCENTER*. (Jan. 23, 2017), <https://transitcenter.org/this-what-defunding-transit-looks-like/> [<https://perma.cc/S4KE-ZD3H>] (describing the implications for riders in California or Governor Schwarzenegger’s elimination of the State Transit Assistance program).

18. This transportation segregation was supported by explicit government choices that, in tandem with housing policy, established a map of geographic segregation in cities and counties all across America that persists to this day. See Tracy Jan, *Redlining Was Banned 50 Years Ago. It’s Still Hurting Minorities Today*, *WASH. POST* (Mar. 28, 2018, 6:00 AM), <https://www.washingtonpost.com/news/wonk/wp/2018/03/28/redlining-was-banned-50-years-ago-its-still-hurting-minorities-today/>; see also Emily Badger, *How Redlining’s Racist Effects Lasted for Decades*, *N.Y. TIMES* (Aug. 24, 2017), <https://www.nytimes.com/2017/08/24/upshot/how-redlinings-racist-effects-lasting-for-decades.html>; Maria Godoy, *In U.S. Cities, The Health Effects of Past Housing Discrimination Are Plain to See*, *NPR* (Nov. 19, 2020, 5:00 AM), <https://www.npr.org/sections/health-shots/2020/11/19/911909187/in-u-s-cities-the-health-effects-of-past-housing-discrimination-are-plain-to-see> [<https://perma.cc/W6WA-7NDT>].

19. See ROTHSTEIN, *supra* note 6, at 50, 64–67 (“Because the FHA’s appraisal standards included a whites-only requirement, racial segregation now became an official requirement of the federal mortgage insurance program.”); Alexis C. Madrigal, *The Racist Housing Policy That Made Your Neighborhood*, *ATLANTIC* (May 22, 2014), <https://www.theatlantic.com/business/archive/2014/05/the-racist-housing-policy-that-made-your-neighborhood/371439/> [<https://perma.cc/TQ7P-8QHJ>] (“The FHA explicitly refused to back loans to black people or even other people who lived near black people.”).

20. See ROTHSTEIN, *supra* note 6, at 64–65; Madrigal, *supra* note 19.

insure even one mortgage” in Camden or Paterson, cities in New Jersey with significant Black populations.²¹

During President Lyndon B. Johnson’s “Great Society” policy push, Congress sought to undo some of the redlining of the past with the passage of the 1968 Fair Housing Act.²² The 1968 Act ended the FHA’s racist mortgage support policy and barred discrimination in the sale, rental, and financing of housing on the basis of race.²³ However, part of the compromise to pass the Fair Housing Act resulted in stripping the bill of key enforcement provisions.²⁴ The same year, Congress passed the Housing and Urban Development Act of 1968 to expand the role of the Department of Housing and Urban Development (HUD) in providing public housing and housing assistance.²⁵ The 1968 HUD Act included a provision that sought to directly remedy redlining by guaranteeing the mortgages of lower-income households.²⁶

Yet these remedial legislative actions resulted in accelerated white flight from urban cores and further undermined the ability of Black families to build wealth through homeownership.²⁷ Realtors used this new federal aid to “blockbust” by selling homes to newly eligible Black families and then scaring white families into panic selling out of fear their homes would lose value if the racial composition of their neighborhood changed, resulting in more sales for the realtors.²⁸ The resulting white

21. Michael E. Lewyn, *Suburban Sprawl: Not Just an Environmental Issue*, 84 MARQ. L. REV. 301, 306-07 (2000).

22. See Douglas S. Massey, *The Legacy of the 1968 Fair Housing Act*, 30 SOCIO. F. 571, 575-79 (2015) (describing the legislative history of the Fair Housing Act of 1968, including the context of its passage in the aftermath of Dr. Martin Luther King, Jr.’s assassination, the bill’s “lofty goals,” and the Dirksen compromise that stripped it of its key enforcement mechanisms).

23. Civil Rights Act of 1968, Pub. L. No. 90-284, § 804, 82 Stat. 73 (1968); see also *History of Fair Housing*, U.S. DEP’T OF HOUSING AND URB. DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/abouttheo/history [<https://perma.cc/YP2A-TA5R>] (last visited Mar. 6, 2021).

24. See Massey, *supra* note 22, At 575-79.

25. Housing and Urban Development Act of 1968, Pub. L. No. 90-448, 82 Stat. 476 (1968).

26. *Id.* § 235.

27. See Lewyn, *supra* note 21, at 307 (highlighting how Section 235 of the 1968 Housing Act “fueled ‘white flight’ from cities” in part by incentivizing “blockbusting” and other racist private practices); Kevin Fox Gotham, *Separate and Unequal: The Housing Act of 1968 and the Section 235 Program*, 15 SOCIO. F. 13, 13 (2000) (finding that the federal market-based subsidy approach to housing policy that allowed “white families to purchase ‘new’ housing in suburban areas . . . [while] African American families purchased ‘existing’ . . . inner city” homes hurt Black families’ ability to build wealth); see also *Why Is This Happening?: Undermining Black Homeownership with Keeanga-Yamahtta Taylor*, MSNBC (Oct. 8, 2019) (downloaded using Apple Podcasts).

28. See Lewyn, *supra* note 21, at 307.

flight often meant that Black families had to pay for lower-quality homes and were not able to afford to leave for new suburban neighborhoods. This was partly because Black families had been shut out of building the wealth needed to afford suburban homes, as well as white suburbanites' continued hostility to integration.²⁹ Even when they had the money to do so, Black families were frequently legally barred from moving to more affluent suburbs by racially restrictive covenants imposed by homeowners associations (HOAs) and were often met with violence.³⁰ HOAs were so prominent in large part because they had been a prerequisite for FHA insurance of many suburban developments when they were constructed.³¹

These government housing policies, designed to create a post-World War II suburban "American dream" largely exclusive to white families, worked in tandem with private industry to hollow out public transportation systems. Projects like Levittown on Long Island, a model for future segregated suburbs, were funded with financial backing from the FHA and Department of Veteran's Affairs. These projects encouraged white flight from redlined urban neighborhoods towards car-centered suburban living where residents could affordably own their own home and yard – their own slice of "the American dream."³² A focus on suburban America and the personal automobile led to "nearly every U.S. transit agency slash[ing] service" after the widespread arrival of cars throughout the 1950s and 1960s.³³ Cities that did expand public transit in the latter half of the twentieth century focused on commuter rail to bring suburban white workers to and from the city centers, to the detriment of local residents within the city.³⁴ Private industry, through corporations like National City Lines (owned by General Motors), bought up and then systematically dismantled city bus networks, which were seen as

29. See Gotham, *supra* note 27, at 33.

30. See *id.*; see also ROTHSTEIN, *supra* note 6, at 139-52.

31. See ROTHSTEIN, *supra* note 6, at 70-71, 78-79 (detailing how FHA policy required large-scale projects such as Levittown in New York to be racially exclusionary and how even after the FHA abandoned these policies the government still upheld private racial covenants through the courts).

32. See *id.* at 71.

33. Jonathan English, *Why Did America Give Up on Mass Transit? (Don't Blame Cars.)*, BLOOMBERG CITYLAB (Aug. 31, 2018, 11:38 AM), <https://www.citylab.com/transportation/2018/08/how-america-killed-transit/568825/> [<https://perma.cc/VN9Y-XGVT>].

34. See Bliss, *supra* note 17 (detailing how investment in transit since the 1970s has largely focused on attracting suburban "choice" riders with expensive rail projects, leading to significant underinvestment in bus networks that tend to serve local and lower income populations).

primary competitors to the relatively young personal automobile industry, at the same time that public transit agencies cut service.³⁵

Thus, racially restrictive housing policies created geographic racial segregation that forced Black families to live in denser urban areas while white families left for car-focused suburbia, and both public and private action gutted public transportation service in those same cities. Transportation racism “combines with public policies and industry practices to provide benefits for whites while shifting costs to people of color,”³⁶ all leading to a mismatch of where people live and work such that subsequent “race neutral” policies only further entrench these inequities.³⁷

II. THE PROBLEM OF TRANSPORTATION RACISM TODAY

The lengthy history of government sanctioned, racially discriminatory housing policies contributed so heavily to residential segregation that today most Black Americans still live in metropolitan areas.³⁸ On average, Black workers have the longest commutes of any racial demographic group, are less likely to own cars, and are more likely to rely on public transportation to meet their daily commuting and travel needs.³⁹ Given this, pro-public transit policies have been described as race-conscious policies while cuts to transit service “support[] the agenda of segregation.”⁴⁰ At the metropolitan level, public transportation funding is often disproportionately focused towards attracting “choice” riders—those who opt to

35. See Patrick Moulding, Note, *Fare or Unfair? The Importance of Mass Transit for America's Poor*, 12 GEO. J. ON POVERTY L. & POL'Y 155, 159 (2005).

36. JUST TRANSPORTATION: DISMANTLING RACE AND CLASS BARRIERS TO MOBILITY 1 (Robert Bullard & Glenn Johnson eds., 1997).

37. See Korb, *supra* note 9, at 136 (applying Critical Race Theory and the argument that modern definitions of racism as antithetical to “color blindness” mask the systemically racist outcomes of “facially neutral” transportation policies).

38. As per the 2010–2014 American Community Survey, 75 percent of Black Americans live in either large cities or their immediate suburbs. See Alana Semuels, *No, Most Black People Don't Live in Poverty – or Inner Cities*, ATLANTIC (Oct. 12, 2016), <https://www.theatlantic.com/business/archive/2016/10/trump-african-american-inner-city/503744/> [<https://perma.cc/DZ3P-SPJP>]; see also Kim Parker, Juliana Menasce Horowitz, Anna Brown, Richard Fry, D'Vera Cohn & Ruth Igielnik, *Demographic and Economic Trends in Urban, Suburban and Rural Communities*, PEW RSCH. CTR. (May 22, 2018), <https://www.pewsocialtrends.org/2018/05/22/demographic-and-economic-trends-in-urban-suburban-and-rural-communities/> [<https://perma.cc/RZT2-UF5Z>] (between 2000 and 2012–16, urban counties went from majority white to majority non-white).

39. AUSTIN, *supra* note 4, at 9; Anderson, *supra* note 6.

40. Korb, *supra* note 9, at 136; Fabricio Rodriguez, *Proposed Metrobus Cuts Continue a Long, Intertwined History of Transit and Race*, GREATER GREATER WASH. (Jan. 27, 2017), <https://ggwash.org/view/62135/transit-and-race-in-the-washington-region-have-a-long-intertwined-history> [<https://perma.cc/5RJT-EQF6>].

use public transit but have the choice to drive instead—who are more likely to be wealthier white suburbanites.⁴¹ Bringing in choice riders expands the fare base in a way catering to existing riders does not, and so cities will often fund expensive new projects to incentivize such new riders.⁴² This flow of resources towards choice riders only further reinforces the racial disparity in access to public transportation.

Following the 2007-08 housing crisis and the subsequent “Great Recession,” many municipalities instituted austerity programs that hurt public transit by cutting service and raising prices.⁴³ While not entirely new,⁴⁴ the scale of these recent budget cuts have accelerated the focus on attracting more “choice” riders who, by convincing riders who may otherwise choose driving, can grow the fare-base rather than making service improvements for transit-reliant communities.⁴⁵ The austerity measures have disproportionately hurt Black communities and communities of color that rely on public transportation for access to work, healthcare, education, grocery stores, and other vital aspects of daily life.⁴⁶

Traditional social science research argued that it was the physical distance, or “spatial mismatch,” between job centers and residential areas that most hurt Black Americans displaced by racist housing policies.⁴⁷ New research asserts that proximity to jobs is less important than access to transportation.⁴⁸ This research notes that transit access relates to more than just job opportunities, but also to grocery store accessibility and to other key metrics for health and wellbeing.⁴⁹ Economists at Harvard Uni-

41. See sources cited *supra* note 8; Hess, *supra*, note 7 (explaining that U.S. cities are “eager to attract” choice riders, often going to the lengths of raising fare prices for the ‘captive’ majority of riders to attract these choice riders with “bells and whistles” for new lines or stations); see also Jinhua Zhao, Valerie Webb, and Punit Shah, *Customer Loyalty Differences Between Captive and Choice Transit Riders*, 2415 J. TRANSP. RSCH. BD. 80 (2014) (detailing the benefits of a “customer retention” model over the “choice” rider focused model preferred by many municipalities).

42. See Hess, *supra*, note 7.

43. See sources cited *supra* note 11.

44. Laura Bliss, *Out of Darkness, Light Rail!*, BLOOMBERG CITYLAB (Jan. 17, 2020, 3:26 PM), <https://www.bloomberg.com/news/articles/2020-01-17/when-america-fell-in-love-with-light-rail> [<https://perma.cc/H3P6-GD26>] (Noting that in his first year in office “Ronald Reagan cut federal support for transit by 32 percent.”).

45. See, e.g., SERVICE PLANNING AND INTEGRATION REPORT, *supra* note 8, at 56 (explaining how the greenlit Purple Line project in Maryland will appeal to “choice rider[s]” when Red Line project to urban Baltimore was cancelled).

46. See Rodriguez, *supra* note 40.

47. See, e.g., John F. Kain, *The Spatial Mismatch Hypothesis: Three Decades Later*, 3 HOUSING POL’Y DEBATE 371 (1992).

48. See Brian S. McKenzie, *Neighborhood Access to Transit by Race, Ethnicity, and Poverty in Portland, OR*, 12 CITY & CMTY. 134 (2013).

49. See *id.* at 137-38.

versity have recently found that shorter commute times (as a proxy for urban sprawl) are strongly correlated with upward mobility.⁵⁰

As commute times across the country continue to rise⁵¹ and the climate effects of our fossil-fuel-focused transportation systems are felt with greater effect,⁵² public transportation is increasingly important as a means for people in metro regions to get around quickly and with less of a carbon impact. Hopefully, cities will begin to respond to the climate crisis by investing more in resilient, green public transit networks. If they do, it is of the utmost importance that this expansion is equitable. However, a combination of austerity economics, race politics, and a deeply entrenched pro-car bias is actively continuing a practice of spending a disproportionate share of public transit funding on less dense, more prosperous areas that need it less.⁵³ In metropolitan areas, this can amount to a redistribution of money from communities of color, which contribute disproportionately more fare dollars into transit organizations than they receive back.⁵⁴ Reallocating a larger share of funding to denser neighbor-

50. See Raj Chetty & Nathaniel Hendren, *The Impacts of Neighborhoods on Intergenerational Mobility II: County-Level Estimates*, 133 Q. J. ECON. 1163, 1210-12 (2018) (finding commute times to be the most correlated variable with intergenerational mobility).

51. See Christopher Ingraham, *Nine Days on the Road. Average Commute Time Reached a New Record Last Year.*, WASH. POST (Oct. 7, 2019, 6:00 AM), <https://www.washingtonpost.com/business/2019/10/07/nine-days-road-average-commute-time-reached-new-record-last-year/> (detailing the rise in commute times across the country); Gabriela Saldivia, *Stuck In Traffic? You're Not Alone. New Data Show American Commute Times Are Longer*, NPR (Sep. 20, 2018, 6:08 PM), <https://www.npr.org/2018/09/20/650061560/stuck-in-traffic-youre-not-alone-new-data-show-american-commute-times-are-longer> [<https://perma.cc/2F43-FEB7>](citing experts who speculate that longer commute times are likely due to a combination of population growth, the rise of ridesharing apps that require a constantly moving fleet of vehicles, and an increase in delivery trucks like those from Amazon).

52. See Bruce Liebermann, *A Brief Introduction to Climate Change and Transportation*, YALE CLIMATE CONNECTIONS (Sept. 22, 2019), <https://www.yaleclimateconnections.org/2019/09/a-brief-introduction-to-climate-change-and-transportation/> [<https://perma.cc/D8Y9-DHKD>].

53. See sources cited *supra* note 17; see also *infra* Part II.A; Luis Antonio Lindau, Dario Hidalgo, and Adriana de Almeida Lobo, *Barriers to planning and implementing Bus Rapid Transit systems*, 48 RES. TRANSP. ECON. 9 (2014) (citing a bias towards expanding private car travel and expanding roads to accommodate more lanes as one of several reasons that Bus Rapid Transit systems face political opposition); Paul Mees & Jago Dodson, *The American Heresy: Half a Century of Transport Planning in Auckland* (Jan. 2, 2001) (presented to joint conference of New Zealand Geographical Society and Australian Institute of Geographers) (describing the “policy bias towards the private car” in Auckland, New Zealand and comparing it to a majority of major American cities in terms of low rates of public transportation use and urban planning focus on highways and accommodating private automobiles).

54. See, e.g., *N.Y. Urb. League, Inc. v. Metro. Transp. Auth.*, 905 F. Supp. 1266, 1273 (S.D.N.Y. 1995) (discusses proposal “to raise fares 20% for the NYCTA on which

hoods would serve as a good proxy to address racial disparities in transit access as denser neighborhoods tend to be lower income and more racially diverse.⁵⁵

Boston and Baltimore, as two older cities with long and complex histories of public transportation and residential segregation, serve as good case studies for demonstrating how modern transit decisions continue to perpetuate, effect, and create racial disparities. In both cities, Black communities saw reliable transit networks decline or disappear entirely. In Boston, the rerouting of rail lines left diverse neighborhoods like Roxbury off the metro map, while in Baltimore the streetcar network was destroyed without any rail replacement. When East and West Baltimore were finally about to secure approval for the long-promised Red Line rail link, it was cancelled in favor of light rail running through the wealthiest suburb of the state. While this problem has national scope, each of these cities is a prime example of the need for a plan that would reinvest transportation dollars in denser, lower income, and majority-minority communities.

A. Boston Case Study

The Massachusetts Bay Transportation Authority (MBTA), Boston's provider of light rail, heavy rail, and bus services, ranks amongst the most used public transportation networks in the country, with ridership per mile of both its light and heavy rail ranking first and second, respectively, in the nation.⁵⁶ However, like the city of Boston itself,⁵⁷ the MBTA has a

almost 60% of the riders are minority and to raise fares only 9% for the riders on the commuter lines which are over 80% white.”).

55. See JENNY SCHUETZ, ARTURO GONZALEZ, JEFF LARIMORE, ELLEN A. MERRY & BARBARA J. ROBLES, *BD. OF GOVERNORS OF THE FED. RSRV. SYS., ARE CENTRAL CITIES POOR AND NON-WHITE?* 12 (2017), <https://www.federalreserve.gov/econres/feds/files/2017031pap.pdf> [<https://perma.cc/2XA6-6AQH>] (finding lower income tracts have higher population density and a higher percent of Black and Hispanic residents); see also ALEXANDER TSIATAS, *POPULATION DENSITY AND DIVERSITY: AN UPDATE TO SCHELLING'S MODEL* 11 (2010), <https://cseweb.ucsd.edu/~atsiatas/density.pdf> [<https://perma.cc/45ZQ-SUKD>] (finding correlation between density and diversity in San Diego and suggesting higher-density development could encourage more heterogeneous urban neighborhoods).

56. See Laura Bliss, *A U.S. Transit Atlas That Ranks the Best (and Worst) Cities for Bus and Rail*, CITYLAB (Nov. 28, 2018, 11:01 AM), <https://www.bloomberg.com/news/articles/2018-11-28/the-u-s-cities-with-the-best-and-worst-transit-mapped> [<https://perma.cc/8SG9-KGJY>].

57. See, e.g., GUY STUART, *THE CIVIL RTS. PROJECT, HARVARD UNIV., SEGREGATION IN THE BOSTON METROPOLITAN AREA AT THE END OF THE 20TH CENTURY* 6 (2000), <https://www.civilrightsproject.ucla.edu/research/metro-and-regional-inequalities/metro-boston-equity-initiative-1/segregation-in-the-boston->

long history of racial segregation and discrimination that manifests in disparate access to transit today.

Boston's public housing projects, like those in the rest of the country,⁵⁸ were racially segregated for decades.⁵⁹ Brookline, Massachusetts, just outside of Boston and currently served by the MBTA, was one of the first jurisdictions in the country to use racially restrictive deeds in private housing.⁶⁰ White flight to racially restricted suburbs in the twentieth century created the modern majority-Black Boston neighborhoods of Roxbury and Mattapan.⁶¹ Roxbury was once serviced by an elevated rail line, the Orange Line, until the city shut down service to Roxbury in 1987 in order to reroute the southern portion of the line to a newly constructed railway to the west, where the MBTA had recently taken possession of land along the Southwest Corridor alongside the Amtrak right-of-way.⁶² Though the elevated rail infrastructure was never removed, the rerouted tracks were laid at least half a mile away from the original route, placing it just outside of the Roxbury neighborhood.⁶³ This meant that while Roxbury was once accessible by the Orange Line as a major transit artery, today, the entire neighborhood does not have a single metro station, forcing residents to transfer from buses or walk long distances to access rail transit.⁶⁴

Roxbury residents have some of the longest commutes in the region and most expensive transit fares in the country.⁶⁵ The relatively poor, densely populated neighborhood of around 126,000 people sits in a transit "void," where one resident who lives just two miles from work may have to take two buses and spend over half an hour commuting.⁶⁶ In Boston, Black bus riders average a 46 minutes plus commute, almost

metropolitan-area-at-the-end-of-the-20th-century/stuart-segregation-boston-20th-century-2000.pdf [https://perma.cc/J4DV-T59D].

58. See INST. FOR RESEARCH ON POVERTY, UNIV. OF WISCONSIN-MADISON, *A History of Residential Segregation in the United States*, 34 IRP FOCUS, Mar. 2019, at 2, 3 (asserting that when the Public Works Administration constructed public housing during the New Deal era, "all of the projects were segregated").

59. See Seymore, *supra* note 10, at 86; see also Richard Rothstein, *Race and Public Housing: Revisiting the Federal Role*, 21 POVERTY & RACE, Nov./Dec. 2012, at 1, 14-15.

60. See ROTHSTEIN, *supra* note 6, at 78.

61. See Seymore, *supra* note 10, at 85-86.

62. See *id.* at 92.

63. See *id.* at 93.

64. See Eric Moskowitz, *Wide Racial Gap Exists on Speed of Boston-area Commutes*, BOSTON.COM (Nov. 23, 2012), <https://www.boston.com/news/local-news/2012/11/23/wide-racial-gap-exists-on-speed-of-boston-area-commutes> [https://perma.cc/P3WB-RG2C].

65. See *id.*

66. See *id.*

double that of white commuters who drive.⁶⁷ On top of removing nearby rail access, Boston at one point housed more than half of the city's buses at a depot in Roxbury, which MBTA has acknowledged contributed to asthma rates in the neighborhood that are many times higher than those in the rest of Boston and in the State of Massachusetts as a whole.⁶⁸ This relates to broader environmental justice concerns as air quality is worse across the Greater Boston area in majority-minority communities. As one recent study found, this disparity in air quality is not geographic happenstance, but is the direct result of housing and transit policy.⁶⁹

In contrast, Brookline—a town just outside of Boston's city limits—has several rapid transit options despite being a less populous and less dense community than Roxbury.⁷⁰ The MBTA's B, C, and D Lines all stretch into and through Brookline, while Roxbury is notably shut out of the metropolitan region's light rail network.⁷¹ Brookline is overwhelmingly white. Black residents represent only 3.41 percent of the population compared to 61.65 percent in Roxbury.⁷²

As rail spending focused on the suburbs around Boston, the more than a third of MBTA riders who relied on the city bus system saw their

67. See *id.*

68. See Seymore, *supra* note 10, at 99 (“Asthma rates in Dorchester, Mattapan and Roxbury are as much as 178 times the state average.”); see also BOS. PUB. HEALTH COMM'N, COMMUNITY MEETINGS 2004: HEALTH STATUS REPORT FOR ROXBURY 31 (2004), <https://www.bphc.org/healthdata/archive/Documents/Roxbury%20Health%20Status%202004.pdf> [<https://perma.cc/BE95-DH23>] (demonstrating that across all age groups, the asthma rate in Roxbury is greater than that of the rest of Boston).

69. See Conor Gately & Tim Reardon, *Racial Disparities in the Proximity to Vehicle Air Pollution in the MARC Region*, METRO. AREA PLANNING COUNCIL (May 2020), <https://www.mapc.org/pollution-disparities-covid19/> [<https://www.mapc.org/pollution-disparities-covid19/>] [<https://perma.cc/YP3B-MM7A>].

70. See Seymore, *supra* note 10, at 83 (“Whereas the upper-middle class town of Brookline has several trolley lines, residents of the economically-depressed communities of Roxbury and Mattapan must rely primarily on bus service”). Roxbury has a population of 63,672 people and a density of 14,252 per square mile, compared to Brookline's similar population of 59,180 people spread out such that density is only 8,754 per square mile. See *Brookline, MA Demographics*, AREAVIBES, <https://www.areavibes.com/brookline-ma/demographics/> [<https://perma.cc/46Y6-RAFY>] (last visited Mar. 9, 2021) and *Roxbury, Boston, MA Demographics*, AREAVIBES, <https://www.areavibes.com/boston-ma/roxbury/demographics/> [<https://perma.cc/9SBK-A282>] (last visited Mar. 9, 2021).

71. It should be noted that this is in part because Brookline sits on the east-west corridor and so trains to other western suburbs are required to go through Brookline. However, these suburbs are also disproportionately wealthier and whiter and so the argument for Brookline largely extends to them as well. See Transit Map of Boston Metro Area, GOOGLE MAPS, <https://www.google.com/maps> [<https://perma.cc/EK7W-BH5W>] (search for “Brookline, MA” and select “Transit” from the menu to display transit map).

72. See *Brookline, MA Demographics*, *supra* note 70; *Roxbury, Boston, MA Demographics*, *supra* note 70.

share of funding decline to just 17 percent of the agency's capital investment.⁷³ In the early 2000s, 40 percent of Boston's public transit funding went to commuter rail lines serving just 10 percent of its ridership, while less than two-thirds of the city's under-funded buses arrived on time.⁷⁴ One analysis into the fair share of transit resources found that spending worked out to a subsidy per rider on MBTA's commuter rail of \$6.89, compared to just \$1.90 per bus passenger.⁷⁵ For bus routes serving Roxbury, that subsidy was as low as \$0.69 per passenger.⁷⁶ The lack of rail service and disproportionately low bus rider subsidy for Roxbury residents is illustrative of the disparity in transit funding and thus transit access for many transit-dependent communities of color. If the MBTA had to apportion its funding at least in part according to population density, communities like Roxbury would receive much closer to their fair share of regional transit spending.⁷⁷

B. Baltimore Case Study

By the end of World War II, Baltimore had one of the most expansive bus and trolley networks on the East Coast.⁷⁸ It had been the first city in America to have a commercial electronic streetcar, launched in 1885.⁷⁹ From that single line, the city's bus and rail network grew. The network crisscrossed the city, providing east-west and north-south rail access all over the city during its heyday.⁸⁰ Most importantly, the bus and

73. Seymore, *supra* note 10, at 88 (“[A]ccording to the American Public Transportation Association, the T’s bus system saw just 17 percent of the agency’s capital investment, or just \$660 million, even though a third of the T’s riders take buses”) (quoting Raphael Lewis, *A Fare Question Under Fire for Its Heavy Investment in Commuter Rails, The MBTA Is Taking Steps to Improve Service to Bus Riders, Earmarking More Money for that System in Coming Years*, BOS. GLOBE, May 20, 2001, at B1.).

74. *See id.* at 88 n.225 (quoting Brian Braiker, *The Terrible T*, BOS. MAG., Sept. 2002, <https://www.bostonmagazine.com/2006/05/15/the-terrible-t/> [<https://perma.cc/76ZX-J2Q9>]); Lewis, *supra* note 73.

75. Seymore, *supra* note 10, at 89.

76. *Id.*

77. Roxbury has roughly the same population as Brookline but is denser, so a spending regime that allocates more public transportation funding to denser neighborhoods would benefit Roxbury and other similar neighborhoods. *See Brookline, MA Demographics, supra* note 70; *Roxbury, MA Demographics, supra* note 70.

78. *See* Sidney Levy, *Lost City: Baltimore’s Trolleys, Trackless Trolleys and Buses*, MD. HIST. SOC’Y, <https://www.mdhistory.org/lost-city-baltimores-trolleys-trackless-trolleys-and-buses/> [<https://perma.cc/8E2G-NKYW>] (last visited Mar. 9, 2021).

79. Christina Tkacik, *When Baltimore’s Streetcars Stopped Running*, BALT. SUN (Mar. 22, 2019, 7:00 AM), <https://www.baltimoresun.com/features/retro-baltimore/bs-md-retro-streetcar-20190317-story.html>.

80. *See* Levy, *supra* note 78.

trolley lines provided extensive coverage to then-redlined neighborhoods such as Sandtown-Winchester.⁸¹ Sandtown-Winchester was once touted as “Baltimore’s Harlem” and hosted performances by Billie Holiday and Diana Ross, but more recently it has become known for the uprising that broke out following Freddie Gray’s death in police custody in 2015.⁸²

By the 1960s, Baltimore’s trolley system had gone the way of almost all major American cities’ streetcar networks and was systematically replaced to make way for cars.⁸³ A combination of pro-car policies and corporate action eventually starved the city’s transit system.⁸⁴ National City Lines, the General Motors-owned private transportation company notorious for buying up and shutting down streetcar lines, purchased Baltimore’s streetcar system in 1948, and the last streetcar ran in November of 1963.⁸⁵

More recently, there have been several pushes to revive public transportation access for Baltimore’s communities of color, including the Red Line train that would have connected West Baltimore to jobs centers downtown as well as to the MARC train that connects Baltimore with the Washington, D.C., metro area.⁸⁶ The Red Line project had been in the works for many years and was championed by the late U.S.

81. See *id.*; see also *Residential Security Map of Baltimore Md.*, JOHNS HOPKINS UNIV. (1937), <https://jscholarship.library.jhu.edu/bitstream/handle/1774.2/32621/Residential%20Security%20Map%201937.JPG?sequence=1&isAllowed=y> [<https://perma.cc/2WPU-M9BR>] (providing a map of residential redlining in 1937 Baltimore).

82. See Jeremy Ashkenas, Larry Buchanan, Alicia Desantis, Haeyooun Park & Derek Watkins, *A Portrait of the Sandtown Neighborhood in Baltimore*, N.Y. TIMES (May 3, 2015), <https://www.nytimes.com/interactive/2015/05/03/us/a-portrait-of-the-sandtown-neighborhood-in-baltimore.html>; see also Eyder Peralta, *Baltimore Riots: ‘This Is a Dead Neighborhood’*, NPR (Apr. 28, 2015, 5:01 PM), <https://www.npr.org/sections/thetwo-way/2015/04/28/402848564/baltimore-riots-this-is-a-dead-neighborhood> [<https://perma.cc/U9YS-RZXM>].

83. See John Martin, *Streetcars: The Transit System America Threw Away*, GOVERNING (June 2014), <https://www.governing.com/archive/gov-the-transit-system-we-threw-away.html> [<https://perma.cc/C7AJ-468H>]; see also Joseph Stromberg, *The Real Story Behind the Demise of America’s Once-Mighty Streetcars*, VOX (May 7, 2015, 9:20 AM), <https://www.vox.com/2015/5/7/8562007/streetcar-history-demise>.

84. See *supra* Part I. Streetcars were particularly vulnerable to the emergence of automobiles in cities that, through regulation or subsidy, fueled the shift to personal car travel. Some cities required streetcar operators to pay to maintain adjacent roadways that carried cars while other cities instead opted to grant public transit the right of way. Cities that did the latter and adopted other pro-transit policies still have streetcars, while cities that forced streetcar operators to pay for their competition and let them sit in traffic saw their networks disappear. See Bliss, *supra* note 17.

85. See Levy, *supra* note 78.

86. See Jeff La Noue, *Baltimore’s Red Line Connects More Than You May Think*, GREATER GREATER WASH. (Feb. 5, 2015), <https://ggwash.org/view/37092/baltimores-red-line-connects-more-than-you-may-think> [<https://perma.cc/5TFL-RMCP>].

Representative Elijah Cummings.⁸⁷ Governor Martin O'Malley greenlit both the Red Line project and another transit project, the Purple Line, in 2009.⁸⁸ The Red Line was to serve the low-income and largely Black communities of East and West Baltimore while the Purple Line would connect wealthier suburbs of Washington, D.C. to the city, including Montgomery County (the wealthiest county in the state and predominantly white) and the more racially diverse, middle-income Prince George's County.⁸⁹ By the 2014 state gubernatorial election, both projects were nearing the construction phase. The ultimate winner of the election, Governor Larry Hogan, cancelled the Red Line project, citing his aversion to tax increases and government spending, returned the federal money, and reallocated the state funding to bridge and highway projects, mostly in white neighborhoods.⁹⁰ He did not cancel the Purple Line.⁹¹

Following Governor Hogan's decision to cancel the Red Line, complaints were filed under Title VI of the Civil Rights Act, which prohibits racial discrimination in programs receiving federal funding, leading

87. See Kevin Rector, *Cummings Joins Transit Advocates in Urging Continued Support for Red Line*, BALT. SUN (Jan. 7, 2015, 9:20 PM), <https://www.baltimoresun.com/business/bs-md-red-line-forum-20150107-story.html>.

88. See Robert Thompson, *O'Malley Backs Light Rail for Purple Line*, WASH. POST (Aug. 4, 2009), http://voices.washingtonpost.com/getthere/2009/08/omalley_backs_light_rail_for_p.html?wprss=getthere (covering O'Malley's back-to-back press conferences announcing the Purple and Red Lines in the same day).

89. See Alon Levy, *How You Can Tell Larry Hogan's Decision to Kill the Red Line Was Racially Discriminatory*, STREETS BLOG USA (Apr. 21, 2017), <https://usa.streetsblog.org/2017/04/21/how-you-can-tell-larry-hogans-decision-to-kill-the-red-line-was-racial-discrimination/> [<https://perma.cc/JH4Q-FEYF>]; *Maryland at a Glance: Income*, MD. STATE ARCHIVES (Sept. 24, 2019), <https://msa.maryland.gov/msa/mdmanual/01glance/economy/html/income.html> [<https://perma.cc/4VN6-B2HG>]; Louis Peck, *Major Events in the History of the Purple Line*, BETHESDA MAG. (Jun. 25, 2015, 1:56 PM), <https://bethesdamagazine.com/bethesda-beat/news/major-events-in-the-history-of-the-purple-line/> [<https://perma.cc/X57H-7684>].

90. See Colin Campbell, *Five Years Later, Many Across Baltimore Bitterly Lament Gov. Hogan's Decision to Kill the Red Line Light Rail*, BALT. SUN (Sept. 11, 2020), <https://www.baltimoresun.com/politics/bs-md-pol-red-line-five-years-20200911-b2d3knvbpngdrirbc44fd55pti-story.html>; see also Daniel C. Vock, Danielle E. Gaines & Bruce DePuyt, *Hogan Catches Flak for Red Line Cancellation at U.S. Senate Hearing on Infrastructure*, MD. MATTERS (Feb. 24, 2021), <https://www.marylandmatters.org/2021/02/24/hogan-catches-flak-for-red-line-cancellation-at-u-s-senate-hearing-on-infrastructure/> [<https://perma.cc/7N2P-MZCC>].

91. See Michael Dresser & Luke Broadwater, *Hogan Says No to Red Line, Yes to Purple*, BALT. SUN (Jun. 25, 2015, 11:25 PM), <https://www.baltimoresun.com/politics/bs-md-hogan-transportation-20150624-story.html>.

to a federal Department of Transportation civil rights investigation.⁹² The complaints alleged that Governor Hogan's decision to cancel the Red Line but not the Purple Line was made not on the basis of cost, as he had claimed, but instead on the basis of racial discrimination, given that both projects had comparable costs-per-projected-rider and the Red Line was actually cheaper in terms of total project cost.⁹³ The complaints were quickly dismissed—an example of the failure of the 1964 Civil Rights Act as a means to advance equity in transit access.⁹⁴ Civil rights organizations have sued cities across the country for the disparate impact of transit policies. These cases have largely been unsuccessful due to the deference to transit agencies in justifying their decisions afforded under Title VI jurisprudence.⁹⁵

Governor Hogan's cancellation of the Red Line helped suburban residents at the direct expense of urban communities of color. Proponents of the project had estimated it would have reduced commute times and increased access to job centers.⁹⁶ Given that lower commute times have been found to be correlated with upward mobility, the Red Line could have substantially positively impacted these communities.⁹⁷ Instead, the resources were funneled into suburban highway projects, while another light-rail line serving "choice" communities like Montgomery County is nearing completion.⁹⁸ This result could have been prevented if the state government had been forced to allocate public transit funding at least in part on the basis of population density, as area the around the

92. See Letter from Yvette Rivera, Assoc. Dir., Departmental Off. of Civil Rights, U.S. Dep't of Transp., to Larry Hogan, Governor of the State of Md., and Pete K. Rahn, Sec'y of the Md. Dep't of Transp. (Jan. 19, 2017), <http://s3.documentcloud.org/documents/3404919/Red-Line-Compliance-Review-Letter.pdf> [https://perma.cc/J3DP-JT8R]; see also Katherine Shaver, *Federal Officials Close Civil Rights Complaint About Baltimore Light-Rail Project*, WASH. POST (Jul. 13, 2017), https://www.washingtonpost.com/local/trafficandcommuting/federal-officials-close-civil-rights-complaint-about-baltimore-light-rail-project/2017/07/13/dda1e216-680e-11e7-8eb5-cbccc2e7bfbf_story.html.

93. See Letter from Yvette Rivera, *supra* note 92; Levy, *supra* note 78.

94. See Seymore, *supra* note 10, at 75.

95. See *id.*

96. See, e.g., *Economic Justice, Case: Baltimore Red Line*, NAACP LEGAL DEF. & EDUC. FUND (Feb. 16, 2018), <https://www.naacpldf.org/case-issue/baltimore-red-line/> [https://perma.cc/5YRQ-7M3E].

97. See, e.g., Chetty & Hendren, *supra* note 50, at 1211.

98. See Katherine Shaver, *Purple Line Set to Open in Fall of 2022, Despite Year-Long Delay in Construction Start, Maryland Official Says*, WASH. POST (Sept. 27, 2018, 1:32 PM), <https://www.washingtonpost.com/transportation/2018/09/27/purple-line-set-open-fall-despite-year-long-delay-construction-start-maryland-official-says/>.

proposed Red Line is denser than most of the neighborhoods served by the Purple Line.⁹⁹

C. National Scope

The problem of racially disparate access to public transportation, as exemplified by Boston and Baltimore, manifests itself in cities and towns across the country. In the South, cities typically have fewer rail lines and less public transportation infrastructure overall, yet they still exhibit vast racial and economic disparities in the quality and consistency of neighborhood bus services. For example, a study of Nashville, Tennessee measuring bus routes against ten standards (such as having a bus stop close to your home, frequency of buses, and adequacy of bus shelters and benches along the route) found that the best bus routes serve the wealthier, whiter communities while all of the lowest ranked routes serve communities of color, many of which are only becoming more densely populated.¹⁰⁰

In the Midwest, larger cities spend disproportionately more on suburban commuter routes, while mid-sized cities have heavily disinvested in public transit across the board. Detroit saw radical declines in public transit infrastructure throughout the twentieth century akin to Baltimore's experience, and attempts to increase transit funding faced ani-

99. The density in Montgomery County as a whole is 2,117 people per square mile. Comparatively, Baltimore City has a population density of 7,594 people per square mile as a whole with highs along the Red Line corridor with well over 25,000 people per square mile in West Baltimore. While there are pockets of Montgomery County with equal or higher density in downtown Silver Spring and Bethesda, the fact that this Note uses neighborhood level density as a means of allocating transit dollars, it still holds that West Baltimore is transit-poor relative to its population density across neighborhoods. See *USA Population Density*, ARCGIS, <https://www.arcgis.com/home/webmap/viewer.html?webmap=3327e6cc84a84d7194437d7904fb64b3> (in the "Find address or place" box enter "Baltimore" and click on block groups in West Baltimore to view data) [<https://perma.cc/D723-AAK9>]; *Population Density, Baltimore City, MD*, OPEN DATA NETWORK, https://www.opendatanetwork.com/entity/0500000US24510/Baltimore_city_MD/geographic.population.density?year=2018&ref=compare-entity [<https://perma.cc/PX9X-7GAP>] (last visited Mar. 30, 2021); *Population Density, Montgomery County, MD*, OPEN DATA NETWORK, https://www.opendatanetwork.com/entity/0500000US24031/Montgomery_County_MD/geographic.population.density?year=2018 (last visited Mar. 30, 2021).

100. See MUSIC CITY RIDERS UNITED, BUS ROUTE REPORT CARD 6, 10 (2018), <https://www.workersdignity.org/wp-content/uploads/2019/09/Bus-Route-Report-Card.pdf> [<https://perma.cc/R245-7675>].

mosity from white suburbanites.¹⁰¹ Chicago, as the largest city in the region, has a more extensive and developed rail and bus network.¹⁰² Yet, in many ways the city is a poster child for the problem this Note seeks to address. While the downtown-operating Chicago Transit Authority serves some 80 percent of all regional riders, it receives less capital and operating funding per rider than Metra, a regional agency serving whiter suburban counties.¹⁰³

Finally, on the West Coast, cities that largely developed after the invention of the private automobile continue to exhibit deep inequities in funding, ridership, and accessibility of public transportation. In Los Angeles, 92 percent of bus riders are people of color and riders' annual median income is \$12,000 (compared to the metropolitan area as a whole, where 71 percent of residents are non-white and the median income is \$37,764).¹⁰⁴ Three-quarters of these riders are not "choice" riders and are dependent on transit.¹⁰⁵ Despite a victory for the Bus Riders Union in 1995 to stop a fare hike that would have hurt minority bus riders the most, Los Angeles "cut bus service by 7 percent and bumped transit fares by 44 percent" between 2008 and 2012.¹⁰⁶

Cities from coast to coast have faced civil rights lawsuits challenging discriminatory dispersal of transportation funds of the kind described in this section.¹⁰⁷ Yet none of these have resulted in favorable judicial rulings, so metropolitan transit agencies continue to allocate a disproportionately large share of funding to wealthier, whiter communities.¹⁰⁸

101. See Dan Austin, *How Metro Detroit Transit Went From Best to Worst*, DETROIT FREE PRESS (updated Feb. 10, 2015, 11:02: AM), <https://www.freep.com/story/news/local/2015/02/06/michigan-detroit-public-transit/22926133/> [<https://perma.cc/7YQW-CXLH>].

102. See *Let's Take a Ride: 5 Largest US Public Transit Systems*, UNC SCH. OF GOV'T (Aug. 18, 2014), <https://onlinempa.unc.edu/5-largest-us-public-transit-systems-inforgraphic/> [<https://perma.cc/79BT-ZAZZ>].

103. See *Munguia v. Illinois*, No. 10-C-0055, 2010 WL 3172740, at *8 (N.D. Ill. Aug. 11, 2010); Bob Sexter & Richard Wronski, *Is It a Fair Ride?*, CHI. TRIB. (Jan. 7, 2010), <https://www.chicagotribune.com/news/ct-xpm-2010-01-07-1001070059-story.html> [<https://perma.cc/27XK-SZAG>].

104. See sources cited *supra* note 7.

105. See Hess, *supra* note 7.

106. See *id.*

107. See, e.g., *Darensburg v. Metro. Transp. Comm'n*, 636 F.3d 511 (9th Cir. 2011) (challenging the Bay Area's metropolitan transit organization); *N.Y. Urb. League, Inc. v. New York*, 71 F.3d 1031 (2d Cir. 1995) (challenging the New York metro region's transit agency); *Munguia*, 2010 WL 3172740, at *8 (challenging the Chicago regional transit agency).

108. See sources cited *supra* note 8; *Darensburg*, 636 F.3d; *N.Y. Urb. League, Inc.*, 71 F.3d; *Munguia*, 2010 WL 3172740; see also Robert D. Bullard, *All Transit Is Not Created Equal*, RACE, POVERTY & THE ENV'T, Winter 2005/2006, at 9, 9-10.

III. LITIGATION STRATEGIES

Civil rights lawyers attempting to address racial inequities like the disparate treatment of Black and Brown communities in transport funding decisions often rely on targeted impact litigation. However, traditional Civil Rights Act claims have failed to address this specific problem, and the Supreme Court has continued to narrow avenues to bring these suits under Title VI and other civil rights laws. This Note seeks to learn from the failures of Title VI suits as a means to address transportation racism and the relative successes in other areas of the law, such as environmental law, where an effective statutory framework has provided litigators tools unavailable to civil rights plaintiffs.

A. Title VI

As a cornerstone of the Civil Rights Movement's legislative and legal victories, the most obvious litigation strategy to address the racial injustice of modern public transportation funding is through Title VI of the Civil Rights Act of 1964. Title VI states that “[n]o person in the United States shall, on the ground of race, color, or national origin . . . be subjected to discrimination under any program or activity receiving Federal financial assistance.”¹⁰⁹ Facially, it seems that this would apply to public transit projects receiving federal funding. In reality, this approach has faced serious and often dispositive barriers as courts have refused to apply the discrimination requirement of Title VI when government provides a “substantial legitimate justification.”¹¹⁰

However, the government defense of a “substantial legitimate justification” only applies when such cases receive discussion on the merits, and they are frequently dismissed before even reaching that stage in the proceedings.¹¹¹ Motions to dismiss under Federal Rule of Civil Procedure 12(b)(6) are regularly successful against transportation racism litigants because of the difficulty in showing that there was no substantial legitimate justification for any discrimination—even if a plaintiff can show that discrimination did occur.¹¹² Courts are also highly deferential to urban plan-

109. The Civil Rights Act of 1964, 42 U.S.C.A. § 2000d (Westlaw through Pub. L. No. 116-259).

110. See, e.g., *N.Y. Urb. League, Inc.*, 71 F.3d at 1036.

111. See, e.g., *Buhendwa v. Regional Transp. Dist.*, 82 F. Supp. 3d 1259, 1273 (D. Colo. 2015) (dismissing a Black bus rider's claim against a transit agency, who asserted that their access had been restricted on the basis of race, for lack of subject matter jurisdiction and failure to state a claim for which relief could be granted).

112. See Moulding, *supra* note 35, at 172-73 (“[I]t is still difficult to prove disparate impact (especially cases based strictly on funding and not on service quality) because of the

ners on matters of municipal transit policy.¹¹³ Heightened pleading standards since *Ashcroft v. Iqbal* have only made the situation more difficult for plaintiffs, who must assert even more facts in their initial complaint—despite transportation racism plaintiffs often lacking key information used by decision-makers.¹¹⁴ For similar reasons, when litigants do reach the merits of a case, they regularly lose.¹¹⁵ City or state governments can plausibly argue before a court that their decisions to reallocate funding from communities of color to “choice” riders are simply to decrease inner city congestion or air pollution, among other possible motivators.¹¹⁶

In *New York Urban League, Inc. v. State of New York*, a dispute arose over New York State’s 1995 budget, which had allocated funding away from both the State’s general fund and the New York City Transit Authority (NYCTA) towards commuter lines in the surrounding region (e.g., Metro North and Long Island Railroad).¹¹⁷ The Urban League argued that the greater financial burden this imposed on the disproportionately minority ridership of the NYCTA violated federal Department of Transportation regulations promulgated under Title VI, namely that

[a] recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program [that receives federal funding] . . . may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the *effect* of subjecting persons to discrimination because of their race, color, or national origin.¹¹⁸

inherent discretion urban planners and governments have in setting the priorities of city infrastructure, including transit systems.”); *see also* Comm. for a Better N. Phila. v. Se. Pa. Transp. Auth., No. CIV. A. 88-1275, 1990 WL 121177, at *4 (E.D. Pa. Aug. 14, 1990) (granting summary judgment to the transit agency and defendants for similar reasons) (“In reality, this action is nothing more [than] an attack on the business judgement of SEPTA.”).

113. *See id.*

114. *See Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (heightening the notice pleading standard to require that the pleading state specific facts sufficient for a plausible claim of relief).

115. *See Seymore*, *supra* note 10, at 77 (dividing Title VI suits into three categories and highlighting the failure of all but one notable suit since the Civil Rights Movement).

116. *See, e.g., N.Y. Urb. League, Inc.*, 71 F.3d at 1037 (upholding the MTA’s decision to take money from the city’s transit authority to fund suburban projects because the MTA’s stated purpose was to effect “a reduction in traffic congestion, pollution, and other adverse effects” of car commuters).

117. *Id.* at 1034.

118. 49 C.F.R. § 21.5(b)(2) (2020) (emphasis added); *N.Y. Urb. League, Inc.*, 71 F.3d at 1035.

Though this regulation used the word “effect” rather than intent, which would suggest that non-discriminatory intentions are insufficient to overcome such a challenge, the Second Circuit still dismissed the case and held that the Urban League was likely to lose on the merits.¹¹⁹ Its primary reasoning was that NYCTA funding decisions were ultimately managerial decisions the court could not remedy with an injunction.¹²⁰

The holding from *New York Urban League* has been reaffirmed by the Second Circuit and other federal courts of appeals on numerous occasions.¹²¹ One of these cases, *Darensburg v. Metropolitan Transportation Commission*, challenged the San Francisco Bay Area’s regional transit authority’s “inconsistent application of selection criteria to bus and rail projects.”¹²² Specifically, the plaintiffs alleged that funding allocations disproportionately harmed minority riders. The Ninth Circuit followed the Second Circuit’s trend, siding with the Metropolitan Transportation Commission on the basis that the plaintiffs failed to establish a prima facie case of discrimination and failed to establish discriminatory effect under California’s statute with identical language to Title VI.¹²³

As both *New York Urban League* and *Darensburg* demonstrate, cases that allege racially disparate impact due to transit funding are routinely dismissed or reversed. But dismissal is not the only risk for these cases, as the Supreme Court has continued to narrow the scope of Title VI claims.¹²⁴ In *Alexander v. Sandoval*, ruling on a disparate impact challenge to Alabama’s English-only driver’s license test, the Court held that there is no private right of action to enforce regulations promulgated under Title VI for their disparate impact.¹²⁵ This ended the thirty-five-year-long

119. *N.Y. Urb. League, Inc.*, 71 F.3d at 1040.

120. *See id.*

121. *See, e.g.*, *Darensburg v. Metro. Transp. Comm’n*, 636 F.3d 511, 519 (9th Cir. 2011); *N.Y.C. Env’t Just. All. v. Giuliani*, 214 F.3d 65, 70 (2d Cir. 2000); *Cureton v. Nat’l Collegiate Athletic Ass’n*, 198 F.3d 107, 112 n.4 (3d Cir. 1999); *cf. Munguia v. Illinois*, No. 10-C-0055, 2010 WL 3172740, at *8 (N.D. Ill. Aug. 11, 2010).

122. *Darensburg*, 636 F.3d at 514.

123. *Id.* at 520 (Lower court granted summary judgement for MTA on intentional discrimination but sided with *Darensburg* at trial on disparate impact claim. 9th Circuit reversed.).

124. *See* Meridel J. Bulle-Vu, Note, *Statistical Intent: A Post-Sandoval Litigation Strategy for Title VI ‘Impact’ Cases*, 17 GEO. J. ON POVERTY L. & POL’Y 461, 462 (2010).

125. *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (Justice Scalia’s majority opinion reasoned that the “rights-creating” language present in other parts of the law was not present in Section 602 and that the dissent erroneously relied upon a non-precedential footnote from a prior case).

practice of using Title VI to challenge “neutral policies that have a disproportionate effect on [racial minorities].”¹²⁶

The Supreme Court’s actions in *Sandoval* and *Iqbal* drive home the need for a remedy outside of traditional civil rights litigation. In this respect, environmental law shows potential. Over the last several decades, environmental lawyers have made progress overcoming standing challenges and enforcing federal statutes, suggesting that environmental law may offer promising lessons for litigating transportation racism.

B. *Lessons from Environmental Law*

As traditional civil rights jurisprudence moves further away from allowing private enforcement and litigants are repeatedly thrown out of court, recent successes in environmental law litigation can provide potential alternative strategies. During the late twentieth century, environmental lawyers assisted in the passage of landmark federal statutes promoting environmental goals, such as improving ambient air quality.¹²⁷ Importantly, these laws allowed citizens to sue governments that fail to adhere to the procedural or substantive requirements.¹²⁸ Some of these statutes, such as the Clean Air Act, have been used to push for new public transportation infrastructure, but transportation policy can borrow even more from environmental law.¹²⁹

Returning to Boston, in 2006, the citizen group Conservation Law Foundation (CLF) sued then-Governor Mitt Romney for violating the Clean Air Act by failing to complete promised public transit projects.¹³⁰

126. Bulle-Vu, *supra* note 124, at 462-63; *see also* Richard A. Marcantonio, Aaron Golub, Alex Karner & Louise Nelson, *Confronting Inequality in Metropolitan Regions: Realizing the Promise of Civil Rights and Environmental Justice in Metropolitan Transportation Planning*, 44 *FORDHAM URB. L.J.* 1017, 1042 (2017) (“Judicial enforcement of Title VI became much more difficult in 2001 when the United States Supreme Court decided *Alexander v. Sandoval*.”).

127. *See, e.g.*, Clean Water Act of 1972, 42 U.S.C.A. §§ 1251-1387 (Westlaw through Pub. L. No. 116-259); National Environmental Policy Act of 1969, 42 U.S.C.A. §§ 4321-4370h (Westlaw through Pub. L. No. 116-259); Clean Air Act of 1970, 42 U.S.C.A. §§ 7401-7671q (Westlaw through Pub. L. No. 116-259).

128. *See, e.g.*, 42 U.S.C.A. § 4332 (Westlaw through Pub. L. No. 116-259) (detailing Environmental Impact Statement requirements under the National Environmental Policy Act); 42 U.S.C.A. §§ 7407-7410 (Westlaw through Pub. L. No. 116-259) (detailing national ambient air quality standards and State Implementation Plans under the Clean Air Act).

129. *See* Conservation L. Found. v. Romney, 421 F. Supp. 2d 344, 347 (D. Mass. 2006) (involving a suit by a citizen group alleging violation of the Clean Air Act when the government failed to complete promised transit projects under the State Implementation Plan).

130. *Id.*

Under Massachusetts's State Implementation Plan, a large highway infrastructure project (the "Big Dig") in the Boston metro area was only allowed to go forward because of concessions on bus and rail line projects that would offset the Big Dig's environmental impact.¹³¹ These projects included modernizing stations, increasing frequency of service, and even extending the Green Line out towards Tufts University.¹³² While the State ultimately settled with CLF and then scrapped most of these bus and rail line projects,¹³³ the failure to complete previously promised projects set the stage for a subsequent lawsuit by another citizens' group in Jamaica Plain, alleging the State had violated a contract due to its failure to construct the Arborway Green Line extension.¹³⁴ While the lawsuit was ultimately dismissed on statute of limitations grounds, the parties agreed that the state had failed to complete the Arborway project and restoration as promised.¹³⁵

As this Clean Air Act litigation in Massachusetts demonstrates, the citizen suit provision allowing private enforcement of the State Implementation Plans and National Ambient Air Quality Standards is vital in advancing meritorious suits concerning the environmental impact of transportation policy. Creating an analogous citizen suit provision for public transit funding plans could prevent racial discrimination cases from being dismissed as frequently as they are under Title VI challenges. If *Sandoval* demonstrated the Court's refusal to read citizen suits into civil rights statutes, the Clean Air Act has shown that explicit citizen suit language makes bringing such action easier for plaintiffs.

Similarly, the National Environmental Policy Act (NEPA) creates a mandatory requirement that any major federal project first complete a mandatory Environmental Impact Statement or Environmental Assessment.¹³⁶ This disclosure requirement forces the government to at least consider the environmental impact of its actions and sheds light on the expected impact for the public.¹³⁷ As with other environmental statutes, NEPA provides for a private cause of action if the government fails to comply with the requisite procedures.¹³⁸ As NEPA defines a major federal

131. *Id.*

132. See Roger L. Smerage, *Two for the T, Three for You and Me: The MBTA's Exception to the Three-Year Statute of Limitations*, 42 SUFFOLK U. L. REV. 729, 744 (2009).

133. See *id.* at 746.

134. See *Arborway Comm. v. Exec. Off. of Transp. & Constr.*, No. SUCV2007-00675-E, 2009 WL 1546638, at *1 (Mass. Super. May 26, 2009).

135. *Id.* at *1, 6.

136. 42 U.S.C.A. § 4332 (Westlaw through Pub. L. No. 116-259).

137. See Helen Leanne Serassio, *Legislative and Executive Efforts to Modernize NEPA and Create Efficiencies in Environmental Law Review*, 45 TEX. ENV'T. L.J. 317, 318-19 (2015).

138. See, e.g., *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989); *Kleppe v. Sierra Club*, 427 U.S. 390 (1976).

project, its disclosure requirement applies to transportation projects receiving federal funding.¹³⁹ Through its disclosure requirement, NEPA has provided victories for environmentalists even when traditional litigation may not have succeeded. These victories include cancelling entire projects that would have significantly harmed the environment or public health, adjusting projects like moving road construction sites, and several other real-world responses to discoveries made in the public environmental review that were never litigated.¹⁴⁰ NEPA's statutory framework has been a vital tool for environmental advocates to gain access to decision-making information to facilitate community engagement and even litigation.

However, there is no analogous federal reporting or disclosure requirement for economic, ethnic, or racial impacts of federal action.¹⁴¹ This Note recommends the creation of a new reporting requirement analogous to the NEPA requirements for environmental impact and the creation of a citizen suit provision to transit funding allocation. As the field of environmental law has demonstrated, these provisions are important tools for nonprofits and other interested citizens to acquire information about the impact of government projects and to advance litigation challenging concerning projects. Similar legislative tools should be created to monitor the impact of federally funded projects on marginalized racial, ethnic, and socioeconomic groups.

139. 42 U.S.C.A. § 4332(2)(C) (Westlaw through Pub. L. No. 116-259); *e.g.*, *Colo. River Indian Tribes v. Marsh*, 605 F. Supp. 1425, (C.D. Cal. 1985) (applying NEPA disclosure requirement to an entire 156-acre tract of land despite the fact that the federal permit only applied to a small part of the land).

140. For example, in 2001, the Army Corps of Engineers dropped a plan to dredge Bolinas Lagoon in California when a NEPA-required environmental review discovered that instead of preventing silting in the pristine lagoon (as the project aimed to do) the proposed action would have actually increased silting. In 2007, NEPA disclosures regarding the environmental, public health, and economic consequences of a highway expansion in metropolitan Atlanta led to the Georgia Department of Transportation modifying the project from adding lanes to merely converting a lane already there into a reversible HOV lane. Elly Pepper, NAT. RES. DEF. COUNCIL, *Never Eliminate Public Advice: NEPA Success Stories* (Feb. 1, 2015), <https://www.nrdc.org/resources/never-eliminate-public-advice-NEPA-success-stories> [<https://perma.cc/5ZPP-T2HM>].

141. The closest to such a requirement is Executive Order 12,898, which requires federal agencies to identify, and, to the extent practicable, address disproportionate health and environmental effects on minority communities from all major agency action. *See* Exec. Order No. 12,898, 32 C.F.R. § 651.17 (Feb. 11, 1994).

IV. CURRENT STATUTORY FRAMEWORK AND ATTEMPTED LEGISLATIVE FIXES

Public transportation in America is funded through a combination of rider fares, money from the local, state, and federal governments, and earnings by the regional transit agency itself from sources such as bonds and advertising revenue.¹⁴² In 2016, total public transportation funding reached an all-time high of \$70.67 billion.¹⁴³

Over the last several decades, the federal government has increasingly used its significant financial influence in transportation spending to encourage a variety of programs, from bicycle infrastructure to recreational trails.¹⁴⁴ While some of this federal influence has been used to indirectly benefit communities of color through funding transit workforce development in marginalized communities or championing safer school commutes,¹⁴⁵ existing legislation does not go far enough to address the deep inequities in access to public transportation nationwide.¹⁴⁶ In large part, this is because of the broad discretion state governments have in deciding how to spend their budgets. Fiscal pressure on transit budgets since the recession has incentivized states and municipalities to attract new riders that grow the fare base rather than improve transit access for existing riders, which only further encourages spending to disproportionately flow to wealthier, whiter suburbs where residents are less reliant on public transportation.¹⁴⁷ In order to more directly benefit the communities that need public transit the most, the federal government should pass new legislation directing its spending towards denser areas and creating greater transparency in public transportation decision-making.

142. See AM. PUB. TRANSP. ASS'N, 2018 PUBLIC TRANSPORTATION FACT BOOK 16 (2018), <https://www.apta.com/wp-content/uploads/Resources/resources/statistics/Documents/FactBook/2018-APTA-Fact-Book.pdf> [<https://perma.cc/GPH2-JGXT>].

143. *Id.*

144. See RICHARD C. EZIKE, CONG. BLACK CAUCUS FOUND., *THE FAST ACT: IMPLICATIONS FOR THE AFRICAN-AMERICAN COMMUNITY* 10 (2017), available at <https://www.cbcfinc.org/publication/the-fast-act-implications-for-the-african-american-community/>.

145. See *id.* at 1.

146. See Beth Osborne, *New Principles for Our Transportation Program*, CENTURY FOUND. (May 11, 2016), <https://tcf.org/content/report/new-principles-transportation-program/?agreed=1> (describing past legislative efforts like the FAST Act as “inadequate” and criticizes federal transit planning for failing to consider accessibility, including specific criticism that Congress has failed to require states or MPOs measure accessibility to multimodal transportation).

147. See sources cited *supra* note 8; and see sources cited *supra* note 11.

A. Federal Funding Framework

Federal government funding to local and statewide public transportation projects is split between operational costs and capital expenses.¹⁴⁸ The former includes the costs associated with maintaining and running current modes of public transportation, maintaining transit stations, and purchasing transportation from private operators such as privately-run bus routes or after hours taxi services.¹⁴⁹ The latter, capital expenses, fund purchases of all new large equipment like buses and train cars, as well as the construction of new rail lines or other new infrastructure projects.¹⁵⁰ Federally funded public transportation projects allow for no more than a 50 percent matching share for operating costs, which still represent the majority of federal public transportation dollars spent (some two-thirds).¹⁵¹ Unlike operating costs, federal capital expense dollars will match up to 80 percent of state and local funds.¹⁵² Despite making up a smaller share (the remaining third) of government public transit spending, the federal government is involved in more capital projects than operational ones across the country.¹⁵³ Federal dollars account for less than 10 percent of all operational costs, but close to 40 percent of capital expenses.¹⁵⁴

The federal government funds local public transportation projects through six major programs, all administered by the Federal Transit Authority.¹⁵⁵ The largest of these programs, the Urbanized Area Formula, accounts for 39 percent of all authorized funding under the Federal Public Transportation Program, the largest federal transit spending program.¹⁵⁶ The Urbanized Area Formula program disburses funds to all cities with populations over 50,000, which are divided into two categories.¹⁵⁷ Cities with populations between 50,000 and 200,000 receive funding according to population and population density, while cit-

148. See WILLIAM J. MALLET, CONG. RSCH. SERV., R42706, FEDERAL PUBLIC TRANSPORTATION PROGRAM: IN BRIEF 3 (2021).

149. See MALLET, *supra* note 148, at 3.

150. See *id.*

151. See *id.*

152. *Id.*

153. See *id.* at 3–4.

154. See *id.* (in 2018, the federal government funded 36.2 percent of capital expenses and 8.6 percent of operational costs); AM. PUB. TRANSP. ASS'N, *supra* note 142, at 16–17 (in 2016, the federal government financed 41 percent of all capital spending compared to 8 percent of operational costs).

155. See MALLET, *supra* note 148, at 4.

156. See *id.*

157. 49 U.S.C.A. § 5307 (Westlaw through Pub. L. No. 116-259); 49 U.S.C.A. § 5302(23) (West 2021).

ies over 200,000 receive funding according to six criteria: total population, population density, bus revenue vehicle miles, bus passenger miles, fixed guideway revenue miles, and fixed guideway route miles.¹⁵⁸

The remaining 61 percent of federal public transportation funds is distributed among five other programs, which include a program providing funds for repairing existing transit infrastructure, a program providing investment in new transportation projects, and a program specifically targeting the mobility needs of the elderly and people with disabilities.¹⁵⁹ With the exception of the Rural Area Formula program, which “provides funding to states and Indian tribes for public transportation outside of urbanized areas,”¹⁶⁰ almost all federal transportation dollars flow towards a handful of large cities,¹⁶¹ This is mostly due to distribution requirements based on population, along with the fact that 73 percent of all public transit trips occur in just ten metropolitan areas.¹⁶²

B. *Transit Spending Bills from 1991-2016*

In 1991, Congress passed the first in a flurry of the largest federal transportation planning legislation since the Eisenhower-era investments in the interstate highway system.¹⁶³ The first of these statutes was the Inter-modal Surface Transportation Efficiency Act (“ISTEA”), passed in 1991.¹⁶⁴ ISTEA promoted the twin goals of creating a national, economically-efficient transportation system that created jobs while complying with all environmental regulations.¹⁶⁵ ISTEA vested transportation planning with Metropolitan Planning Organizations (MPOs)—federally man-

158. A “passenger mile” is a unit denoting one mile traveled by one passenger on public transportation, “revenue miles” is a passenger mile unit denoting paying passengers on trains or planes, “fixed guideway” refers to railways, and “route miles” are the physical distance of rail or other fixed guideway tracks. *Id.*

159. 49 U.S.C.A. §§ 5309 (Capital Investment Grant), 5310 (Enhanced Mobility of Seniors and Individuals with Disabilities), 5311 (Rural Area Formula), 5337 (State of Good Repair), 5339 (Bus and Bus Facilities).

160. MALLETT, *supra* note 148, at 6.

161. *See id.* at 4.

162. These ten areas are: New York City, Chicago, Los Angeles, Washington, D.C., Boston, San Francisco, Philadelphia, Seattle, Miami, and Atlanta. MALLETT, *supra* note 148, at 2.

163. Dennis C. Gardner, *Transportation Reauthorization: A Summary of the Transportation Equity Act (TEA-21) for the Twenty-First Century*, 30 URB. LAW. 1097, 1097 (1998).

164. *Id.*

165. Joseph P. Thompson, *ISTEA Reauthorization and the National Transportation Policy*, 25 TRANSP. L.J. 87, 99 (1997).

dated regional planning boards originally established under the Federal-Aid Highway Act of 1962.¹⁶⁶

Legal scholars have criticized this delegation of planning authority to MPOs as ineffective at addressing metropolitan areas' actual transit needs, as MPOs are ultimately subservient to state governments that hold funding and decision-making authority.¹⁶⁷ This led to conflicts that frustrated the ability of MPOs to properly carry out ISTEA's goals in urban areas because states tend to prefer road-building and other suburban-focused projects. Adding to this problem is inadequate federal oversight into state and local planning.¹⁶⁸

State governments largely used the broad discretion they were granted under ISTEA to foster suburban sprawl.¹⁶⁹ Between 1992 and 1997, the annual increase in newly developed land (a proxy for suburbanization) peaked.¹⁷⁰ While the successor to ISTEA, the Transportation Equity Act for the Twenty-First Century ("TEA-21"), was larger and more ambitious, it did not change these inherent conflicts in decision-making authority.¹⁷¹

President Clinton signed TEA-21 in 1998.¹⁷² At the time, TEA-21 was "the largest public works bill enacted in the nation's history."¹⁷³

166. Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, § 1006(a), 105 Stat. 1914 (1991).

167. See Benjamin K. Olson, *The Transportation Equity Act for the 21st Century: The Failure of Metropolitan Planning Organizations to Reform Federal Transportation Policy in Metropolitan Areas*, 28 *TRANSP. L.J.* 147, 159-61 (2000).

168. See *id.* at 170-71.

169. See *id.* at 171 ("[A] substantially smaller percentage of federal transportation funds continues to be spent on urbanized areas than the percentage of the population those areas represent.") (citing SURFACE TRANSP. POL'Y PROJ., GETTING A FAIR SHARE: AN ANALYSIS OF FEDERAL TRANSPORTATION SPENDING 1-5 (1996)).

170. See U.S. DEP'T OF AGRIC., 2015 NATIONAL RESOURCES INVENTORY: SUMMARY REPORT 2-7 (2018), https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcseprd1422028.pdf [<https://perma.cc/B9EP-J9RP>]. Land development is a good proxy for suburbanization because most Americans live in suburbs, suburbia accounts for the highest growth rate areas, and the average suburban dweller takes up more land (and emits more carbon) than urban residents. See Christopher Boone, *The US Has Become a Nation of Suburbs*, THE CONVERSATION (Sept. 19, 2018, 6:41 AM), <https://theconversation.com/the-us-has-become-a-nation-of-suburbs-101501> [<https://perma.cc/T7N4-W8JL>]; William H. Frey, *Big City Growth Stalls Further, as the Suburbs Make a Comeback*, BROOKINGS (May 24, 2019), <https://www.brookings.edu/blog/the-avenue/2019/05/24/big-city-growth-stalls-further-as-the-suburbs-make-a-comeback/> [<https://perma.cc/LC7X-V9BC>]; Chris Mooney, *Scientists Just Showed What Building a New Suburb Does to the Atmosphere*, WASH. POST (Mar. 8, 2018, 8:00 AM), <https://www.washingtonpost.com/news/energy-environment/wp/2018/03/08/scientists-just-showed-what-building-new-suburbs-does-to-the-atmosphere/>.

171. Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 107 (1998).

172. *Id.*

However, after only one six-year period, the Highway Trust Fund, which finances most federal road and mass transit projects through gas taxes,¹⁷⁴ was spending more money than it raised through revenue, and funding disputes led to the bill lapsing.¹⁷⁵ In 2005, George W. Bush signed TEA-21's successor: the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users ("SAFETEA-LU").¹⁷⁶ Once again, SAFETEA-LU represented the "largest public works bill in U.S. history,"¹⁷⁷ but largely missed the opportunity to meaningfully change racially disparate outcomes. While massive in scale, these bills mostly maintained the status quo and failed to address how the distribution of transit dollars exacerbated racial inequities.¹⁷⁸

President Obama signed two more bills in the TEA line of legislation during his presidency: the Moving Ahead for Progress in the 21st Century Act ("MAP-21") in 2012 and the Fixing America's Surface Transportation ("FAST") Act in 2015.¹⁷⁹ The FAST Act made marginal advancements beyond prior legislation towards addressing racial inequity by including specific outreach to underrepresented groups, such as the Black community, in its workforce training and technical assistance grants.¹⁸⁰ However, much of the FAST Act's implementation plan was "up in the air" after Donald Trump was elected President in 2016.¹⁸¹ It is a little early to draw conclusions at the time of this Note's publication,

173. Bullard, *supra* note 17, at 1198 (quoting Dennis C. Gardner, *Transportation Reauthorization: A Summary of the Transportation Equity Act (TEA-21) for the Twenty-First Century*, 30 URB. LAW. 1097, 1097 (1998)).

174. See *What is the Highway Trust Fund, and How Is It Financed?*, TAX POL'Y CTR., <https://www.taxpolicycenter.org/briefing-book/what-highway-trust-fund-and-how-it-financed> [<https://perma.cc/FN53-BKM5>] (last visited Apr. 15, 2021).

175. See Jeff Davis, *20 Years Ago This Week: House, Senate Pass Final TEA21 Legislation – May 22, 1998*, ENO CTR. FOR TRANSP. (May 22, 2018), <https://www.enotrans.org/article/20-years-ago-today-house-senate-pass-final-tea21-legislation-may-22-1998/> [<https://perma.cc/R7GD-8YFF>].

176. Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, 119 Stat. 11444 (2005). See also EZIKE, *supra* note 144, at 3.

177. Jenna Musselman, *SAFETEA-LU's Environmental Streamlining: Missing Opportunities for Meaningful Reform*, 33 ECOLOGY L.Q. 825, 825 (2006).

178. For example, ISTEA required transportation plans to comply with Title VI, but as this Note demonstrates violations of Title VI are difficult to enforce when municipalities can assert a multitude of accepted 'substantially legitimate justifications' for planning decisions – and since ISTEA passed the Supreme Court has further restricted rights of action under Title VI. See *supra* Part III.A; Bullard, *supra* note 17, at 1198.

179. Fixing America's Surface Transportation Act, Pub. L. No. 114-94, 129 Stat. 1312 (2015); Moving Ahead for Progress in the 21st Century Act, Pub. L. No. 112-141, 126 Stat. 405 (2012). See also EZIKE, *supra* note 144, at 2.

180. See EZIKE, *supra* note 144, at 1.

181. *Id.* at 11.

but the Biden Administration has signaled that investment in infrastructure will be a priority.¹⁸²

While the FAST Act represented movement in the right direction, it did not tackle the core problem—the racial gap between access to public transportation and public transit funding, which equates to a loss of opportunity for social mobility within urban communities of color. Specifically, the FAST Act failed to acknowledge or address the disproportionate toll pro-car and “choice” rider policies have on communities of color across America. Investing in job training is necessary, but it should be paired with halting disinvestment away from transit-reliant communities of color that too often goes towards flashy new projects in less reliant, wealthier, and whiter suburban neighborhoods. Reinvesting in denser, more diverse communities will go a long way towards addressing the fundamental racial disparities in access to reliable and efficient transit. New legislation, proposed herein, requiring that public transit dollars flow primarily to where density suggests they are required could have a greater impact on breaking down the inequalities of access to public transportation by reinvesting in the communities that are most reliant on it.

V. A NEW SOLUTION

Congress should enact legislation to address the racial inequities in transportation funding and access that have gone unanswered by litigation and previous transit bills. The proposed law would require that spending be allocated according to the population density of the community served, mandate NEPA-style impact reporting, and create a private cause of action to challenge state and local government entities for violations. Because it places these conditions on only a small share of a state’s budget, the proposed bill avoids the constitutional issue of coercion, a doctrine that limits congressional action to financing conditions that are clearly defined and can be opted out of by states without disastrous consequences. If enacted, the legislation would greatly improve access to and quality of public transportation for communities that are reliant on public transit for their everyday needs.

182. The plan unveiled by the White House on March 31, 2021 would—if passed—be the largest investment in transportation infrastructure in decades. The Biden plan includes \$20 billion to “reconnect’ communities of color to economic opportunities,” a promising sign that this bill may learn from some of the drawbacks of past transit legislation. See Jim Tankersley & Zolan Kanno-Youngs, *Biden Seeks to Use Infrastructure Plan to Address Racial Inequities*, N.Y. TIMES (Apr. 1, 2021), <https://www.nytimes.com/2021/04/01/us/politics/biden-infrastructure-racial-equity.html>.

A. *The Proposed Bill*

The proposed solution for addressing the disparate public transportation funding to communities of color is a bill (“the Act”) that would place conditions upon federal spending for state and local government transit projects. Three key provisions set out these conditions. First, the Act would require that any project receiving federal funding to allocate its spending according to population density as the primary consideration. Second, it would require state and local governments to report the racial, ethnic, and economic impacts of all proposed public transportation projects. Third, the Act would include a citizen suit provision to provide standing for private citizens or citizen groups to challenge state and local governmental failure to comply with the statute. With these provisions, the Act learns from the failures of prior litigation attempts and legislative actions, and borrows from other, more successful, areas of statutory regulation such as environmental law.

1. Allocating Spending to Projects According to Population Density

The first of the Act’s major provisions would use Congress’ spending authority to require that state and municipal governments apportion their public transportation funding to projects according to the population density of the neighborhoods served if the project is to receive federal funding.¹⁸³ The federal government, predominantly via the Urbanized Area Formula program, which apportions funds to cities with populations larger than 50,000, currently apportions its funding using population density as one of many factors.¹⁸⁴ However, once that money is allocated to the states and municipalities, the Urbanized Area Formula has no condition that the money be spent according to the needs or density of any given area.¹⁸⁵

The proposed density requirement would, in practice, mean that the respective state or local governing entity responsible must give top priority to projects serving densely populated communities when decid-

183. In order to avoid being coercive to states more reliant on federal transportation dollars, the Act shall only condition federal dollars up to 2 percent of a state’s spending in a given fiscal year. *See infra* Part V.B.

184. *See* MALLETT, *supra* note 148, at 4-5.

185. State and local governments can apply for Urbanized Area Formula funding for “eligible activities” such as the planning of transit projects, and funding is granted to the Governor or metropolitan area entity on the basis of the existing statutory formula. *See Urbanized Area Formula Grants – 5307*, FED. TRANSIT ADMIN., <https://www.transit.dot.gov/funding/grants/urbanized-area-formula-grants-5307> [<https://perma.cc/NK2G-CEAG>] (last visited Apr. 15, 2021).

ing where to allocate funding for federally supported public transit projects. This will not change the high-level formulas used to allocate federal dollars nationally, and thus should have no bearing on the ratio of money flowing to urban versus rural regions of the country or even within a given state. Instead, this provision will impose a condition on how that money, once apportioned, is spent towards transit projects in a given metropolitan area.

Like the existing Urbanized Area Formula, the Act should apply only to “urbanized areas” (UAs), which are defined by the Department of Transportation and the Census Bureau as urban regions with “50,000 or more people.”¹⁸⁶ As of May 2018, there were 486 UAs holding 71.2 percent of the United States population.¹⁸⁷ Implementing the new density requirement should be straightforward because it cleanly fits alongside the existing Urbanized Area Formula; the Act simply adds conditions onto that funding. Furthermore, by focusing on money already going to urbanized areas, this Act can avoid the backlash that has occurred when transit agencies propose service or funding cuts in rural areas.¹⁸⁸ The Rural Area Formula Program receives its own funding which would not be affected by this Act in any way.

This provision should state that public transportation funding for operational improvements as well as new capital projects must be apportioned based on the population density of the served neighborhood community. This Note recommends using the neighborhood as the level of community to apportion funding. Census tracts are too small in larger, denser urban areas such that transit lines or stops likely will not pass through every tract, while the county level is far too large and would mean that large groups of neighborhoods could be entirely ignored. Thus, to receive federal funding for public transit projects, projects that serve denser neighborhoods must be prioritized. This does not mean that less-dense areas will get no funding, or that all funding must flow to areas that already have plenty of transit. Instead, it would require that when state or local governments decide where to apportion funding for improvements or new projects, they must prioritize investment in denser

186. These UAs are defined geographically around one or more “central places” with surrounding densely populated “urban fringes.” *Urban and Rural*, U.S. CENSUS BUREAU (Dec. 7, 2020), <https://www.census.gov/programs-surveys/geography/guidance/geo-areas/urban-rural.html> [<https://perma.cc/534Q-QBGB>].

187. *Urban Area Facts*, U.S. CENSUS BUREAU (May 15, 2018), <https://www.census.gov/programs-surveys/geography/guidance/geo-areas/urban-rural/ua-facts.html> [<https://perma.cc/7TRT-SKBS>].

188. See, e.g., *Amtrak Faces Rural Backlash Over Proposal to Cut Long-Distance Routes*, WALL ST. J. (July 16, 2019, 6:59 AM), <https://www.wsj.com/video/amtrak-faces-rural-backlash-over-proposal-to-cut-long-distance-routes/F2E6CBB0-A3F4-4AF2-8D3C-D4878C21165D.html> [<https://perma.cc/F66F-SMSL>].

neighborhoods.¹⁸⁹ In setting such a strong standard for where transit spending will go, this provision meets the goals of the Act in reducing opportunities for discretionary spending that perpetuates racial divides in quality of, and access to, good public transportation.

Despite the many benefits of such a presumption towards density-based spending, there are circumstances where exceptions must be allowed to meet equity goals of transit planning. One potential concern is that this provision would overly restrict MPOs, preventing spending in less dense areas for the purpose of transit-oriented development (TOD). TOD, as the name suggests, seeks to build transit infrastructure with the purpose of attracting residents and businesses to a new area, and so by its nature looks to invest and construct in lower-density areas.¹⁹⁰ The Act can address this concern by creating the ability to apply for federal waivers to fund TOD projects that would otherwise violate the requirements of the Act. Conversely, the Act should also allow waivers for overinvestment in the densest neighborhoods if needed to address historic underinvestment.

To again analogize to environmental law, the Clean Water Act sets restrictions on emissions into waterways but allows a limited exception for “fundamentally different factors,” i.e., truly unique circumstances beyond the financial cost.¹⁹¹ Similarly, the Act can and should include an exception for municipalities with a well-developed TOD plan to apply for a waiver with the Department of Transportation. Like the fundamentally different factors exception in the Clean Water Act, these TOD waivers should require a high bar to be granted (for example, by matching the bar for Low Income Housing Tax Credit projects),¹⁹² in order to

189. This provision would only apply to initial transit funding allocations. Cost overruns or other changes later on in the project’s development should not have negative consequences for funding to that community.

190. The Rosslyn–Ballston corridor in Arlington County, Virginia is a prime example of transit-oriented development. When the Washington, D.C. Metro’s Orange Line was being built out into the county, the first four stations were placed underground at greater expense with the goal of rezoning the area around each station. Several decades later, the effects can be seen in the density around metro stops in the Rosslyn–Ballston corridor relative to the elevated stations with little rezoning further out into the suburbs. See *Transit Oriented Development Advances*, NEW URBANISM, <http://www.newurbanism.org/bookstore/todadvances.html> [https://perma.cc/7Y9M-C4VV] (last visited Mar. 8, 2021).

191. 33 U.S.C.A. § 1311(n) (Westlaw through Pub. L. No. 116-259).

192. In order to qualify for the LIHTC, developers must meet at least one requirement of a three-pronged income test; for example, that at least 40 percent of units are occupied by tenants with an income of 60 or less of the area median income. See *What is the Low-Income Housing Tax Credit and How Does It Work?*, TAX POL’Y CTR., <https://www.taxpolicycenter.org/briefing-book/what-low-income-housing-tax-credit-and-how-does-it-work> [https://perma.cc/HBV4-9EL8] (last visited Apr. 15, 2021).

prevent them from creating a loophole to the goals of this bill.¹⁹³ Additionally, there should be an exception to the density requirement for emergency circumstances, such as repairing a subway tunnel or a light rail track after an extreme weather event.

In practice, the density provision would ease decision-making by creating prioritizations for projects that strongly incentivizes local governments to construct projects where they are most needed.¹⁹⁴ Take the example of Baltimore, discussed previously.¹⁹⁵ Originally, both the Red Line and the Purple Line projects were approved and were slated to provide new rail service both to urban Baltimore and suburban Montgomery County, respectively.¹⁹⁶ However, the Maryland governor's decision to axe only the Red Line meant that state spending went to projects in less dense, suburban counties. If the proposed Act had been in effect at the time, the Red Line would have been prioritized over the Purple Line. Similarly, in Boston, transit dollars would start flowing into the denser neighborhoods like Roxbury, which also tend to be poorer communities of color that are in dire need of better transportation access.

Unlike both TEA-21 and its precursor ISTEA, the proposed Act would not delegate decision-making authority to state governments. Similarly, it would not suffer from the funding disputes that ultimately felled each of the TEA-line of statutes, as it creates a condition on spending rather than allocating temporary funding. Instead, the proposed Act learns from the mistakes of those earlier statutes and considers the schol-

193. Studies have shown that TODs often fail to attract affordable housing, and so an ideal candidate for a waiver under this provision will not only include a well-developed plan but also details for how to attract and build affordable housing. Examples of this include the M Station apartments in Austin, Texas and the Patton Park apartments in Portland, Oregon. Both of these are Low Income Housing Tax Credit projects built near new transit as part of a "coordinated transportation and land use" plan intended to expand housing supply while combating exclusionary pricing. Miriam Zuk, *Is Transit-Oriented Development Offering Access to Opportunity?*, 24 *POVERTY & RACE*, May/June 2015, at 1, 6-7.

194. For example, in New York City, the census tract with the highest population density is Corona, Queens (majority Hispanic). Neighborhoods like Concourse Village in the Bronx (majority Black) are similarly amongst the densest parts of the city. Thus, the proposed Act would direct more MTA dollars to these communities of color. See *POPULATION DENSITY BY CENSUS TRACT, NYC.GOV*, [www1.nyc.gov › pdf › historical-population › pop_density_1950_2010_](http://www1.nyc.gov/pdf/historical-population/pop_density_1950_2010_) [<https://perma.cc/XP89-FPQM>]; Matt Coneybeare, *New York City Population Density Mapped*, *VIEWING NYC* (Dec. 5, 2014, 10:34 AM), <https://viewing.nyc/new-york-city-population-density-mapped/> [<https://perma.cc/4TU6-8XW5>].

195. See *supra* Part II.B.

196. See Levy, *supra* note 78 ("When Hogan was elected in 2014, there were two major rail projects in the state about to begin construction: the Red Line . . . and the Purple Line.").

arly criticisms of them, while also borrowing successful regulatory techniques from the field of environmental law. In placing a condition on existing federal spending, the Act would remove a degree of discretionary decision-making authority from state governments, allowing MPOs to spend where the population needs transit access the most, and because the conditions are on existing spending there should not be comparable funding disputes to those that led to the expiration of TEA-21.

2. Impact Statement Reporting Requirement

The second major provision of the proposed Act would require the agency leading any major public transportation capital project to release an impact statement to the public. This provision of the proposed Act is modeled after the environmental impact reporting required by the National Environmental Policy Act (NEPA). NEPA requires that all proposals for federal agency action “significantly affecting the quality of the human environment” must be accompanied with a detailed statement of the action’s impact on the environment.¹⁹⁷ Producing and releasing such an impact statement will assist in democratizing the transit planning process by providing more information to community groups with a stake in the allocation of funding.

Through these so-called sunlight provisions, NEPA has brought to light all manner of otherwise overlooked or under-considered environmental concerns for proposed federal projects over the decades. Some disclosures have led to real-world changes in how projects are implemented or have even resulted in projects being moved or canceled entirely.¹⁹⁸ While NEPA lacks any substantive provisions, its procedural requirements forcing agencies to “stop, look, and listen” have been successfully enforced by federal courts when not properly followed.¹⁹⁹

Current Department of Transportation regulations promulgated under Title VI already include some affirmative reporting requirements, but these “compliance reports” only record “the extent to which members of minority groups are beneficiaries of programs receiving [f]ederal financial assistance” rather than statutorily required studies into the likely full impact on minority groups, positive and negative, from federally funded projects.²⁰⁰ In other words, the existing requirements speak to the benefits a community might get from a specific program such as rider fare subsi-

197. National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332 (Westlaw through Pub. L. No. 116-259).

198. See Pepper, *supra* note 140.

199. See, e.g., *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep’t of Interior*, 608 F.3d 592, 610 (9th Cir. 2010).

200. 49 C.F.R. § 21.9(b) (2020); Marcantonio et al., *supra* note 126, at 1042 n.141.

dies but do not address the impacts of decisions regarding where to spend repair dollars or where to construct new transit lines. Decision-makers should take into consideration the widest possible racial, ethnic, and economic implications of their decisions, and report their findings to the public.

A lack of democratic participation in transit and planning policy has been a concern for marginalized and impacted communities for decades. From “slum clearances” for highway construction in the twentieth century that bulldozed communities of color to fulfill top-down priorities to cancellations of public transportation projects like the Red Line today, the need to democratize transit planning by engaging effected communities in actual decision-making is clear.²⁰¹ The proposed requirement that all public transportation projects receiving any federal funding must prepare and publicly release a statement detailing its racial, ethnic, and economic impact is a good place to start. In practice, this would provide citizen groups with access to information that they could use for public pressure campaigns and other political avenues otherwise not available to affected communities.

In environmental regulation, NEPA disclosure allows for citizen groups to not only be aware of a government project’s potential impact, but also to challenge government action if the environmental assessment has not been properly conducted. An analogous citizen suit provision for the proposed transportation funding Act would help overcome some of the traditional litigation barriers described in Part III of this Note and would shed sunlight on planning decisions in a way that facilitates greater community involvement in urban policy.²⁰²

3. A Private Right of Action

The third provision of the Act is to codify a private right of action to challenge transit funding decisions for substantive or procedural violations of this Act. The proposed Act’s goal of using population density as a proxy for race in allocating public transportation spending cannot succeed unless private citizens are able to sue to enforce both its substantive and procedural requirements. For this reason, the Act must contain a private right of action.

201. See Alana Semuels, *The Role of Highways in American Poverty*, ATLANTIC (Mar. 18, 2016), <https://www.theatlantic.com/business/archive/2016/03/role-of-highways-in-american-poverty/474282/> [<https://perma.cc/T35E-TSPK>] (“[I]f they put the highway in just the right place, it would allow the city to use federal funds to eradicate what they called a slum area in the center city.”); NAACP LEGAL DEF. & EDUC. FUND, *supra* note 96.

202. See *supra* Part III.A.

Historically, lawsuits alleging racial discrimination in transportation funding and access have typically been dismissed with 12(b)(6) motions in the early stages of litigation. When lawsuits do reach the merits, plaintiffs virtually always lose because the government can justify its action with a non-racialized “substantial legitimate justification” for its spending choices (such as desire to attract new riders or to reduce congestion in cities).²⁰³

As the field of civil rights law has demonstrated, private rights of action play an important role in the achievement of progress and when that ability is limited or taken away, as the Supreme Court did in *Sandoval*, it has a negative effect on the ability of individuals facing disparate treatment to seek remedy for racially disparate impact in transportation planning decisions.²⁰⁴ Once again, environmental law can provide lessons on how to establish a statutory regime of citizen suits powerful enough to enforce laws passed and halt major construction or development projects if they violate the law.²⁰⁵ In order to avoid the potential for the Court to strip this Act of any implicit right to private action as it did to the Civil Rights Act of 1964 in *Sandoval*,²⁰⁶ the Act should include an explicit right to private action.²⁰⁷

A right to private action would allow for aggrieved individuals or community organizations to sue state and local governments. For example, had this Act been on the books when the Red Line project in Baltimore was canceled, residents of neighborhoods that would have been served by the line could have used this provision to sue Governor Hogan. This provision would also mean that plaintiffs will be able to overcome the burden put in place by *Sandoval* that stripped Title VI of its im-

203. *See id.*

204. *See, e.g.,* Bulle-Vu, *supra* note 124, at 462-63 (explaining that private rights of action are primary tools for challenging discrimination that “fill a constitutional gap by reaching beyond state action to prohibit discrimination in the private sector; however, they are increasingly losing their enforcement potency.”).

205. *See* James R. May, *Now More Than Ever: Trends in Environmental Citizen Suits at 30*, 10 WIDENER L. REV. 1, 1-5 (2003) (explaining the benefits of citizen suits, how they work in environmental law, and how they “have transformed the environmental movement, and with it, society.”); *see also* S. REP. NO. 91-1196, at 36-37 (1970) (“Authorizing citizens to bring suits for violations . . . should motivate governmental . . . enforcement and abatement proceedings.”).

206. *See* *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (holding that there is no implicit right to private action in the Civil Rights Act of 1964).

207. It should be noted that courts have, at times, precluded standing even when Congress explicitly created a private right of action. Litigants may need to demonstrate both factual as well as legal injury. However, this proposed bill will at least create the necessary legal injury. *See* *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (holding that a procedural deprivation alone was insufficient to bring a suit under the Endangered Species Act, which includes a private right of action, without a particularized and concrete injury in fact).

plied right of action. Instead, citizens could point to a codified right of action if other provisions of this Act are violated. In partnership with the disclosure requirement of the Act, plaintiffs should also have access to more information for their pleadings necessary to overcome initial 12(b)(6) motions. Including a citizen suit provision would ensure that aggrieved populations could challenge such action without needing to meet higher pleading standards such as demonstrating intent,²⁰⁸ and therefore will prove a vital tool for anti-racist transit advocates.

B. *The Congressional Authority to Act*

The proposed Act falls under the power granted to Congress by the Spending Clause of the U.S. Constitution because it accomplishes its goals of reallocating transportation funding and impact analysis by placing conditions on federal spending.²⁰⁹ The Supreme Court has long recognized Congress' authority to place terms upon the money it disperses to the states.²¹⁰ In *South Dakota v. Dole*, the Court identified five limits on this authority,²¹¹ all of which are met by the Act.

First, the exercise of Congress' spending authority must be to further the "general welfare" of the United States, a deferential limit derived from the text of the Constitution itself.²¹² In *Dole*, the Court endorsed an attempt to curb dangerous activity, specifically drunk driving, as "in pursuit of the general welfare."²¹³ The Court has stated that in determining pursuit of the general welfare it must "defer substantially to the judgment of Congress."²¹⁴ With respect to the proposed Act, its stated purpose is to pursue greater racial and economic equity, as well as to bolster access to public transportation for more Americans. The scale of harm racial discrimination has caused to Americans and the landmark action Congress has taken to address such discrimination over the years suggests that com-

208. See Bulle-Vu, *supra* note 124, at 463 (noting that, post-*Sandoval*, courts have allowed suits if plaintiffs can prove intent and that this is a much higher standard than what was taken away when the Court "denied the existence of a private cause of action critical to the civil rights movement.").

209. U.S. CONST. art. I, § 8, cl. 1.

210. See, e.g., *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 15 (1981) (acknowledging Congress' "power under the Spending Clause to place conditions on the grant of federal funds"); *Oklahoma v. U.S. Civil Serv. Comm'n*, 330 U.S. 127, 142-43 (1947) (upholding a condition on federal funding that directed suspension of an officer, citing the authority of Congress "to fix the terms upon which its money allotments to states shall be disbursed.").

211. *South Dakota v. Dole*, 483 U.S. 203, 207-08, 211 (1987).

212. *Id.* at 207.

213. *Id.* at 203.

214. *Id.* at 207 (citing *Helvering v. Davis*, 301 U.S. 619, 640-41 (1937)).

batting such discrimination, including in the public transportation sphere, is well within the pursuit and furtherance of the nation's general welfare.

Second, the conditions on federal spending must be unambiguous, such that states can reasonably discern their options and choose whether to accept the conditions or not.²¹⁵ In the proposed Act, the contractual condition would be unambiguous: states could allocate their public transportation funding based on population density and mandate racial, ethnic, and economic impact statements, or they could refuse federal funding for such projects.

Third, the conditions placed on the funding must relate to a "federal interest" in the particular program.²¹⁶ In *Dole*, the Court held that raising the drinking age was germane to the federal government's interest in highway funding because it pertained to "safe interstate travel."²¹⁷ Here, the condition of focusing public transportation spending in denser communities is analogously germane to the federal objectives of subsidizing public transportation; namely, increasing access to affordable and reliable means of transportation for the public so as to increase access to jobs, healthcare, childcare, education, and more.

Fourth, the federal government cannot use the Spending Clause as a means of encouraging unconstitutional behavior and thus "other constitutional provisions" can bar any effort to do so.²¹⁸ There is no independent constitutional bar here. As past lawsuits have demonstrated, there is no statutory or constitutional barrier to apportioning transportation funds according to any non-explicitly discriminatory principle.²¹⁹

Fifth, conditions on federal spending cannot be coercive, meaning that that states must have a realistic option to decline it.²²⁰ The *Dole* court held that withholding five percent of federal highway funds was not coercive because it represented less than half of one percent of the state's budget.²²¹ Federal appellate courts have subsequently clarified that even conditioning 100 percent of a small fund or grant is not itself overly coercive, but if that program is large enough, such that the funding would

215. *Id.*

216. *Id.* at 207-08.

217. *Id.* at 208.

218. *Id.*

219. So long as the government has a legitimate non-discriminatory reason for its action, courts have upheld transit decisions even when challenged under Title VI. *See, e.g.,* *Darensburg v. Metro. Transp. Comm'n*, 636 F.3d 511, 519 (9th Cir. 2011); *N.Y. Urb. League, Inc. v. New York*, 71 F.3d 1031, 1039-40 (2d Cir. 1995).

220. *Dole*, 483 U.S. at 211.

221. *Id.* at 211; *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 581 (2012).

constitute too large a share of the state's overall budget, then it becomes coercive.²²²

The Act proposed by this Note would not be coercive as it would only condition a small share of state budgets. When it comes to transportation funding, the federal government covers 8.6 percent of all operating costs and 36.2 percent of capital costs for all transit projects nationwide.²²³ Typically, this equates to approximately 2 percent of a state's entire annual budget.²²⁴ Two percent is closer to the half percent in *Dole* than to the 10 to 16 percent of states' budgets that federal Medicare funds represented in the *NFIB v. Sebelius* decision which struck down an overly coercive policy.²²⁵ Therefore, *Dole* suggests that the spending condition in the proposed Act would be constitutionally appropriate.²²⁶ However, given that some states rely more on federal transit dollars, the Act should only condition federal transportation spending up to 2 percent of each state's respective total annual spending. This way the share of federal transporta-

222. See *Sebelius*, 567 U.S. at 579-83 (holding that conditioning 100 percent of a federal program that made up between 10 and 16 percent of most states' total budgets was too high and thus constituted coercion) [hereinafter "NFIB"]; see also *Madison v. Virginia*, 474 F.3d 118, 128 (4th Cir. 2006) (holding that conditioning 100 percent of federal funding for the state prison system was not coercive as federal funding accounted for only 1.3 percent of the state's Department of Corrections budget).

223. See MALLETT, *supra* note 148, at 4.

224. In 2017, 17.5 percent of New York State's Department of Transportation funding came from the federal government, amounting to 1.21 percent of the State's budget for that year. 2017 *Financial Condition Report: Total Spending*, OFF. OF THE N.Y. STATE COMPTROLLER, https://www.osc.state.ny.us/finance/finreports/fcr/2017/total_spending.htm [<https://perma.cc/3YS8-UVCG>]. In fiscal year 2010-2011, 26.5 percent of Virginia's Department of Transportation funding came from the federal government, amounting to approximately 2.4 percent of the state's operating budget that year. Kali Schumitz, *Budget to Drive General Assembly; Transportation, Education Are Priorities*, FAIRFAX CNTY. TIMES (Jan. 6, 2011), <https://www.washingtonpost.com/wp-dyn/content/article/2011/01/04/AR2011010404725.html> [<https://perma.cc/D6BX-VUXD>]; VA. DEP'T OF TRANSP., FISCAL YEAR 2010-2011: VDOT ANNUAL BUDGET 4 (2010), https://www.virginiaidot.org/about/resources/VDOT_Budget.pdf [<https://perma.cc/58KJ-AA3M>]. In some smaller or more rural states, federal dollars may account for a larger share of transportation spending; such as Montana for which federal transit dollars were approximately 6 percent of the state's total spending in FY 2020. See *State and Local Finance Initiative – Montana*, URB. INST. (Apr. 2021), <https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/projects/state-fiscal-briefs/montana> [<https://perma.cc/7DUS-DETY>]; MONT. DEP'T OF TRANSP. BUDGET, <https://leg.mt.gov/content/Publications/fiscal/2021-Interim/Sept-2019/20-year/54010.pdf> [<https://perma.cc/PZA7-9ET3>].

225. See *NFIB*, 567 U.S. at 580-81 (holding that the financial inducement of all Medicare funding was akin to a "gun to the head" for states given the large share of states' budget that money represented, and thus violated the bar on overly coercive federal spending).

226. See *id.* at 579-83.

tion dollars withheld would not be coercive even for states for whom federal spending represents a larger share of their budget.

The Act this Note proposes is clear, unambiguous, in pursuit of the general welfare of the United States, and conditions no more than 2 percent of a state's budget in pursuit of its goals. For these reasons, it is well within the authority of Congress to use its Spending Clause authority to incentivize states to prioritize public transit projects in denser neighborhoods. Doing so will direct more funding to transit-dependent communities of color and help to address past inequities in access to public transportation funding.

C. *The Impact of the Act*

The proposed Act would direct more public transportation funding towards poorer communities of color that are currently not getting their fair share based on both transit needs and what they pay into most transit systems. By focusing on population density to apportion transit funding, the Act will substantially alleviate the “choice rider” problem by diverting resources into denser neighborhoods with greater need. This Act would increase access to public transit overall, which would reduce commute times and should further upward economic mobility through access to more job centers, grocery stores, and others important resources.²²⁷

In Boston, the Act would send more money to Roxbury, since the density requirement would redirect some of the funds currently flowing to wealthier suburbs with similar populations but lower density.²²⁸ In Baltimore, the city could finally get its much-needed Red Line rail, as the Act would redirect more of the state's public transportation funding into Baltimore instead of wealthy suburban areas like Montgomery County.²²⁹ Similar effects would ripple across the country, as cities planning public transit infrastructure improvements and new capital projects would be required to invest a larger share of their funds in denser, often poorer, communities.²³⁰

227. See Chetty & Hendren, *supra* note 50, at 1211; McKenzie, *supra* note 48, at 137-38.

228. See sources cited *supra* note 70.

229. See sources cited *supra* note 99.

230. For example, the next time Nashville invests money in improvements to its bus network, this Act would mean that a larger share than before would need to be spent in some of the denser majority-minority neighborhoods in southeast Nashville that currently rank the worst in the city when it comes to factors like the number of bus shelters and frequency of bus service. See MUSIC CITY RIDERS UNITED, *supra* note 100, at 6, 10; see also *Population Density, Nashville, TN, NEWBORHOOD*, <https://www.newborhood.com>

In addition to the benefits of greater racial equality in public transportation, spending money according to population density will result in broader economic justice. Denser neighborhoods tend to be lower income neighborhoods, and so increasing transportation funding for these areas will have economic benefits that combat socioeconomic inequality.²³¹ Through shorter commutes and greater access to jobs, healthcare, education, food, and childcare, spending based on density can help address the challenges of inequality in America's cities.

Of course, the proposed Act would certainly not be able to alleviate all of the disparities in public transit access across racial groups. Importantly, by conditioning money already being spent, this Act does little to address the problems of urban areas that do not invest enough in public transit to begin with. However, conditioning future spending would require cities to consider the racial and economic implications of their public transit investments in a way that has never before been done.

In the short term, this Act could deliver tangible improvements for cities with well-established transit networks. These cities account for the vast majority of riders nationally, so the effects would be broad and felt across the country.²³² In the longer term, this Act would establish a framework for thinking about transportation spending towards equity and areas of actual need through both its substantive conditions as well as its disclosure provision. Hopefully, this would mean that as cities continue to invest in public transportation options for their citizens, they would focus their efforts on communities that are most reliant on public transit in their daily lives. In doing so, this Act could spark further improvements in housing and transit accessibility that recenters urban policy on the improvement of residents lives in a way that could change how cities plan for a more just and equitable future.²³³

CONCLUSION

Truly addressing the deep-seated structural racism and inequality that plagues American cities must be an ongoing endeavor at all levels of government and society. This Note attempts to take a modest step in this

/moving-guide/population_density/TN/nashville [https://perma.cc/769C-5F7K] (last visited Mar. 6, 2021).

231. See SCHUETZ ET AL., *supra* note 55, at 12 (finding that lower income tracts have higher population density).

232. See MALLETT, *supra* note 148, at 2.

233. See generally RICHARD SCHRAGGER, CITY POWER (2016) (advancing the argument that cities can do more to improve the lives of their citizens through welfare spending rather than focus on attracting mobile capital, and that ultimately the role of urban governance is to help get their citizens through inevitable difficult times).

direction by proposing federal legislation that would aim to improve access to public transportation for communities that have historically received under-investment in and have been disproportionately left out of newly funded projects. The proposed Act would establish a requirement for urbanized areas to prioritize funding for public transit projects according to the population density of the communities served, create disclosure requirements evaluating the effects of projects on marginalized groups, and would codify the ability for citizens to enforce the law. Applying this legislation to case studies like Boston and Baltimore demonstrates that this kind of density-focused apportionment will direct more transit dollars to communities of color and lower income neighborhoods. Denser communities of color and lower income neighborhoods are the most transit-reliant in the country but have seen disinvestment in transit accessibility as budgets have been reduced and remaining funding disproportionately flows to attracting wealthier, whiter suburban riders over improving accessibility for current transit users. A policy that refocuses transit dollars on the most transit-dependent communities is an anti-racist policy. As research has demonstrated, investment that reduces commute times will, in the long term, raise the chances of upward mobility for communities across America.

