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## Confronting Inequality in Metropolitan Regions: Realizing the Promise of Civil Rights and Environmental Justice in Metropolitan Transportation Planning

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# CONFRONTING INEQUALITY IN METROPOLITAN REGIONS: REALIZING THE PROMISE OF CIVIL RIGHTS AND ENVIRONMENTAL JUSTICE IN METROPOLITAN TRANSPORTATION PLANNING

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## INTRODUCTION

Civil unrest erupted in American cities throughout the 1960s in response to police brutality, racial profiling, discrimination, and unemployment. Riots engulfed Los Angeles in 1965;<sup>1</sup> Detroit and more than a dozen other cities followed in the summer of 1967.<sup>2</sup>

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1. DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 58 (1993).

2. *See generally* NAT'L ADVISORY COMM'N ON CIV. DISORDERS, *REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS* (1968).

While the type of overt racism and discrimination that existed in the years leading up to the 1960s is largely a thing of the past, the continuing realities of police brutality gave rise to similarly profound unrest in Ferguson, Missouri and Baltimore, Maryland, in 2014 and 2015, respectively, as demonstrators protested failed governance and a lack of opportunity.<sup>3</sup> Indeed, these troubling and persistent issues surfaced in the landmark 2015 Supreme Court decision, *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*,<sup>4</sup> concerning the location of affordable housing in areas of concentrated poverty. In the words of Justice Kennedy, writing for the majority:

*De jure* residential segregation by race was declared unconstitutional almost a century ago . . . but its vestiges remain today, intertwined with the country's economic and social life . . . . Rapid urbanization, concomitant with the rise of suburban developments accessible by car, led many white families to leave the inner cities. This often left minority families concentrated in the center of the Nation's cities. During this time, various practices were followed, sometimes with governmental support, to encourage and maintain the separation of the races: Racially restrictive covenants prevented the conveyance of property to minorities . . . steering by real-estate agents . . . and discriminatory lending practices, often referred to as redlining, precluded minority families from purchasing homes in affluent areas . . . . By the 1960's, these policies, practices, and prejudices had created many predominantly black inner cities surrounded by mostly white suburbs . . . . [T]he National Advisory Commission on Civil Disorders . . . concluded that "[o]ur Nation is moving toward two societies, one black, one white—separate and unequal."<sup>5</sup>

Continuing disparities manifest themselves in astonishingly high income and wealth inequality between whites and people of color, especially African Americans and Latinos.<sup>6</sup> Although race and class

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3. See generally Richard Rothstein, *From Ferguson to Baltimore: The Fruits of Government-Sponsored Segregation*, ECON. POL'Y INST.: WORKING ECON. BLOG (Apr. 29, 2015, 2:46 PM), <http://www.epi.org/blog/from-ferguson-to-baltimore-the-fruits-of-government-sponsored-segregation> [<https://perma.cc/8J6Q-3GQK>].

4. 135 S. Ct. 2507 (2015).

5. *Id.* at 2515-16.

6. See Edward N. Wolff, *The Asset Price Meltdown and the Wealth of the Middle Class* 31 (Nat'l Bureau of Econ. Res., Working Paper No. 18559, Nov. 2012), <http://www.nber.org/papers/w18559.pdf> [<https://perma.cc/S4N9-3Z8S>]. For example, from 1982 to 2009, the median income ratios between African Americans and Whites and Latinos and Whites remained roughly unchanged from fifty-six to fifty-nine percent, and from sixty-six to sixty-seven percent, respectively. The household median wealth ratio between African Americans and Whites declined from seven to

residential segregation diminished somewhat in the late 1980s, differential access to opportunities remains a significant problem today.<sup>7</sup> Transportation is both a key driver of these continued problems and a sector on which billions of dollars of federal, state, regional, and local funds are spent every year. Although transportation infrastructure is but a single component of a mix of factors at play, there is overwhelming evidence linking transportation with employment outcomes and other opportunities, especially in communities of color.<sup>8</sup>

Transportation is inextricably bound up with land use. By making land available for development or by changing the speed with which one can travel between locations, transportation infrastructure affects the relative attractiveness of different locations. As transportation technology has advanced from the horse-drawn carriage, to the electric streetcar, to the automobile, the spatial extent of urban development has expanded ever outward.<sup>9</sup> The result is the metropolitan region—agglomerations of cities and counties bound together by commuting patterns and shared housing and labor markets. Congress recognized the importance of planning at the regional scale when it created metropolitan planning organizations (“MPOs”).<sup>10</sup> Despite a *regional* planning emphasis, individual

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five percent, and for and Hispanics and Whites it declined from four to one percent. *See generally* ROLF PENDALL & CARL HEDMAN, URB. LAND INST., *WORLDS APART: INEQUALITY BETWEEN AMERICA’S MOST AND LEAST AFFLUENT NEIGHBORHOODS* 1-9 (Jun. 2015).

7. *See* Richard Rothstein, *Racial Segregation Continues, and Even Intensifies*, ECON. POL’Y INST. (Feb. 3, 2012), <http://www.epi.org/publication/racial-segregation-continues-intensifies> [<https://perma.cc/6KJF-BNXXB>]; Comment to Edward Glaeser & Jacob Vigdor, *The End of the Segregated Century: Racial Separation in America’s Neighborhoods, 1890-2010*, 2012 CTR. FOR ST. & LOC. LEADERSHIP AT THE MANHATTAN INST. 66.

8. The McCone Commission, which investigated the causes of the Watts riots in Los Angeles in 1965, pointed specifically to the segregation of Watts from increasingly suburban employment opportunities and the insufficiency of public transit links between them. *See* GOVERNOR’S COMM’N ON THE L.A. RIOTS, OFF. OF THE GOVERNOR, CAL., *VIOLENCE IN THE CITY—AN END OR A BEGINNING?* (1965); *see also* John F. Kain & John R. Meyer, *Transportation and Poverty*, 1970 PUB. INT. 18, 75-76; John F. Kain, *Housing Segregation, Negro Employment, and Metropolitan Decentralization*, 82 Q. J. ECON. 180-81, (1968).

9. *See, e.g.*, Peter O. Muller, *Transportation and Urban Form: Stages in the Spatial Evolution of the American Metropolis*, in *THE GEOGRAPHY OF URBAN TRANSPORTATION* 59, 60 (Susan Hanson & Genevieve Giuliano eds., 3d ed. 2004).

10. 23 U.S.C. § 134(a)(1)-(2) (2017) (“It is in the national interest (1) to encourage and promote the safe and efficient management, operation, and development of surface transportation systems . . . and; (2) to encourage the continued improvement and evolution of the metropolitan and statewide transportation planning processes by metropolitan planning organizations . . .”).

localities within a region still wield substantial power and can undermine regional planners' goals by, for example, refusing to permit affordable housing or support investments in regional public transit systems.<sup>11</sup> After decades of investments that facilitated suburban growth, some locations enjoy access to high quality schools, health care facilities, and transportation, while others are locked in a cycle of decline.<sup>12</sup> By shaping regional investments, MPOs affect three important "drivers" of regional inequality: unrepresentative governance, unequal access to opportunities, and unfair distribution of the benefits and burdens of regional growth. Consequently, MPOs hold great potential to address equity issues.

This Article will address the transportation planning institutions bound by law to advance the twin goals of civil rights and environmental justice. We contend that stronger guidance requiring robust equity analyses for regional plans<sup>13</sup> has the potential to result in better planning and outcomes for metropolitan regions. First, the Article begins with a discussion of the historical development of metropolitan regions in the United States and the devastating burdens that regional growth imposes on certain communities. Second, the Article surveys MPOs and the standards for regional planning set for them by federal law.<sup>14</sup> Third, the Article examines key pieces of federal law and executive guidance directly impacting MPO planning, including Title VI of the Civil Rights Act of 1964, Executive Order 12898 on Environmental Justice ("EJ Executive Order"), and the duty under the Fair Housing Act to "affirmatively further fair housing."<sup>15</sup> The Article then scrutinizes the "equity analysis" required of MPOs. Lastly, the Article reflects on the potential benefits and shortfalls of the existing practice, and offers

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11. See, e.g., CHRISTINA D. ROSAN, GOVERNING THE FRAGMENTED METROPOLIS: PLANNING FOR REGIONAL SUSTAINABILITY 153-68 (2016).

12. See, e.g., Anthony R. Foxx, Sec'y, U.S. Dep't of Transp., Remarks at the Center for American Progress, Bridging the Divide: Connecting People to Opportunity (Mar. 30, 2016).

13. This Article addresses the Long-Range Transportation Plan ("LRTP"), sometimes shortened to "regional transportation plan" ("RTP"), as the core tool of regional planning.

14. Nationally, around forty billion dollars is to be spent annually (2016 to 2020) under the 2016 authorization of the Fast-Act; a significant share of that passes through projects and plans overseen by MPOs. See FED. HIGHWAY ADMIN., U.S. DEP'T OF TRANSP., *Notice of Apportionment of Federal-Aid Highway Program Funds for Fiscal Year 2016* (Jan. 8, 2016), <https://www.fhwa.dot.gov/legregs/directives/notices/n4510802> [<https://perma.cc/AUU9-QH7V>].

15. See Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272 (July 16, 2016) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, and 903).

proposals to strengthen the equity analysis requirement that derive from experience working with these planning processes.

### I. THE METROPOLITAN REGION AND REGIONAL INEQUITY

Twentieth century metropolitan growth in the United States resulted in regions nominally linked by transportation infrastructure and shared housing and labor markets, but separated by vast differences in racial composition, wealth, crime, health outcomes, and access to opportunities like quality education and employment.<sup>16</sup> These disparities often map consistently onto patterns of racial segregation.<sup>17</sup> Research on “regional equity” focuses on understanding maldistributions of opportunity within regions and has identified land use, housing, and transportation as policy elements affecting equitable outcomes.<sup>18</sup>

This Part traces the development of the country’s metropolitan areas and the racial inequalities that accompanied it, emphasizing the connected nature of land use, housing, and transportation. It focuses on the last century of metropolitan expansion, suburbanization, and the solidification of unequal regions across the country, and highlights the challenge of affecting regional outcomes due to the virtual non-existence of directly elected regional governments.<sup>19</sup> The Part closes by highlighting the innate potential for MPOs—regional planning agencies empowered by federal and state law to make decisions about the allocation of billions of dollars in transportation resources—to bring about equitable outcomes.

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16. See generally Robert D. Bullard, *Introduction*, in GROWING SMARTER: ACHIEVING LIVABLE COMMUNITIES, ENVIRONMENTAL JUSTICE, AND REGIONAL EQUITY 4-16 (Robert D. Bullard ed., 2007); PETER DREIER ET AL., PLACE MATTERS: METROPOLITICS FOR THE TWENTY-FIRST CENTURY 3-4 (3d ed. 2014); MYRON ORFIELD, AMERICAN METROPOLITICS: THE NEW SUBURBAN REALITY 23-49 (2011).

17. See, e.g., MASSEY & DENTON, *supra* note 1, at 148-85; David R. Williams & Chiquita Collins, *Racial Residential Segregation: A Fundamental Cause of Racial Disparities in Health*, 116 PUB. HEALTH REP. 406-09, (2001); see also Bullard, *supra* note 16; Keith R. Ihlanfeldt & David L. Sjoquist, *The Spatial Mismatch Hypothesis: A Review of Recent Studies and Their Implications for Welfare Reform*, 9 HOUS. POL’Y DEBATE 849, 851, 877-82 (1998).

18. See, e.g., CHRIS BENNER & MANUEL PASTOR, JUST GROWTH: INCLUSION AND PROSPERITY IN AMERICA’S METROPOLITAN REGIONS 1-9, 23 (2012).

19. See *id.* at 1-9. For a more detailed discussion of the importance of regional governments, see MANUEL PASTOR ET AL., THIS COULD BE THE START OF SOMETHING BIG: HOW SOCIAL MOVEMENTS FOR REGIONAL EQUITY ARE RESHAPING METROPOLITAN AMERICA 97-98, 147, 187 (2009).

### A. Early Suburbanization

Rates of urbanization began to explode in the late nineteenth century, driven by the Great Migration, the mechanization of agriculture, and the rapid immigration of low-skilled workers from Europe.<sup>20</sup> While growing cities across the United States were rife with opportunities, they also suffered from significant burdens created by rapid industrialization and dense urbanization, including noise, pollution, and overcrowding.<sup>21</sup>

As transportation technology like streetcars, regional rail, and the automobile improved, those who could afford to sought housing outside the urban core.<sup>22</sup> Distances that would have taken hours to travel in the past now took minutes. The size of regions—contiguous geographies defined by strong economic interdependencies—expanded in kind. For example, the Los Angeles metropolitan area grew from forty-two square miles in 1900 to over four hundred by 1930.<sup>23</sup>

While the engines of metropolitan economies largely remained their central cities, suburbanization complicated governance by dispersing populations and power across the landscape. Early in this process, many suburbanizing areas were annexed into the central city, but this practice was stopped in many places beginning in the 1920s.<sup>24</sup> Suburban districts were increasingly empowered by statehouses to defend themselves through municipal incorporation, allowing them to avoid central city burdens.<sup>25</sup> As wealth increased in the suburbs, so did tax bases and school quality, providing the foundations of regional fragmentation and exclusion.<sup>26</sup> The process of local zoning—

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20. See generally Patrick J. Ashton, *The Political Economy of Suburban Development*, in MARKISM AND THE METROPOLIS 64, 64-70 (William K. Tabb & Larry Sawers eds., 1978); MARK S. FOSTER, FROM STREETCAR TO SUPERHIGHWAY 1-24 (1981); KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 288-89 (1985).

21. See FOSTER, *supra* note 20.

22. See JACKSON, *supra* note 20, at 174-77; Muller, *supra* note 9, at 61-63 (describing four “eras” of the relationship between transportation technology and the spatial extent and urban form of cities).

23. See EDWARD W. SOJA, SEEKING SPATIAL JUSTICE 224 (2010).

24. Scott Greer, *The Governmental Dilemma of the Metropolis*, in THE URBANIZATION OF AMERICA: AN HISTORICAL ANTHOLOGY 384, 386 (Allen M. Wakstein ed., 1970).

25. DREIER ET AL., *supra* note 16, at 37 (discussing the adoption of state-level laws permitting suburban incorporation).

26. See generally GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 143-45 (1999) (noting that a desire to exclude undesirable residents and exert control over local land uses drives the decisions of



regulating specific land uses and allowable construction—was integral to this process. In 1916, New York City famously adopted the first comprehensive zoning code.<sup>27</sup> Less well known is the first explicitly racial zoning ordinance, adopted by Baltimore in 1910.<sup>28</sup> The U.S. Department of Commerce began promoting model zoning codes in the 1920s.<sup>29</sup> City ordinances excluding particular land uses as well as certain communities of people were ubiquitous by the end of that decade.<sup>30</sup> Although most codes did not include explicitly racist provisions, which were struck down by the Supreme Court in 1917 in *Buchanan v. Warley*,<sup>31</sup> planners were able to use more general zoning restrictions to effect racially exclusionary outcomes.<sup>32</sup>

In particular, innovations in zoning practices allowed localities to shape the housing supply and limit the construction of housing better suited to lower income residents by, for example, prohibiting construction of new multifamily units or requiring minimum lot sizes.<sup>33</sup> In 1926, the Supreme Court upheld the constitutionality of zoning in general in *Village of Euclid v. Ambler Realty Co.*, a case involving restrictions on residential density in a new Ohio suburb.<sup>34</sup> The landmark decision opened the door for localities to exclude by using proxies for race and class. For example, “nuisances” could be defined as apartment buildings and boarding houses, disproportionately occupied by low-income people and people of color.<sup>35</sup>

### B. White Flight, Subsidized Post-War Suburbanization, and Effects on Central Cities

Although the pace of suburbanization slowed during the Great Depression,<sup>36</sup> a series of federal actions in the 1930s codified racial exclusion in time for the post-war suburbanization boom. Most

individual jurisdictions); ORFIELD, *supra* note 16, at 9 (describing school quality and tax bases as the two most important characteristics of a jurisdiction).

27. JACKSON, *supra* note 20, at 241-42.

28. See DAVID M. FREUND, COLORED PROPERTY: STATE POLICY AND WHITE RACIAL POLITICS IN SUBURBAN AMERICA 59 (2010).

29. *Id.* at 72.

30. *Id.* at 80.

31. 245 U.S. 60, 82 (1917).

32. FREUND, *supra* note 28, at 59.

33. See, e.g., Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767, 781-97 (1969).

34. 272 U.S. 365, 379-85 (1926).

35. FREUND, *supra* note 28, at 83.

36. See Dennis J. Ventry, Jr., *The Accidental Deduction: A History and Critique of the Tax Subsidy for Mortgage Interest*, 73 L. & CONTEMP. PROBS. 233, 237 (2010).

significantly, the protection of private lenders against default via the creation of the Federal Housing Administration (“FHA”) dramatically lowered interest rates and increased lending.<sup>37</sup> Importantly, the FHA required the mortgage, home, and buyer to meet minimum requirements and favored lending for new homes located in suburban areas.<sup>38</sup> The agency’s notorious “redlining” manuals required lenders to document and rate neighborhoods based on their racial characteristics.<sup>39</sup> All-white neighborhoods received the highest ratings, and even the most affluent African American neighborhoods rarely qualified for lending.<sup>40</sup> The lasting importance of federally subsidized homeownership was the creation of white suburban wealth in the post-World War II period, the benefits of which were largely denied to urban-dwelling people of color.<sup>41</sup>

Urban areas were explicitly targeted with the federal government’s move into redevelopment under the aegis of the 1949 Housing Act.<sup>42</sup> The resources provided to cities as a consequence of the Act and subsequent legislation were generally aimed at “slum” clearance in the interest of urban renewal (a term used later), clearing the way for private investment and often resulting in the destruction of low-income neighborhoods and the construction of luxury housing or large-scale facilities (e.g., hospitals, schools, or stadiums).<sup>43</sup> In principle, replacement housing for the displaced was to be provided,

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37. *See id.*

38. *See* ALEX F. SCHWARTZ, HOUSING POLICY IN THE UNITED STATES 55-70 (2d ed. 2010).

39. *See* DAN IMMERGLUCK, FORECLOSED: HIGH-RISK LENDING, DEREGULATION, AND THE UNDERMINING OF AMERICA’S MORTGAGE MARKET 49 (2011) (The FHA “institutionalized and supported redlining . . . directing appraisers and lenders to place considerable emphasis on racial composition and neighborhood change.”).

40. *See* RICH BENJAMIN, SEARCHING FOR WHITOPIA 186-87 (2009).

41. *Id.* at 187 (“Home ownership through a thirty-year mortgage has long been the primary mechanism by which most American families created wealth. So deferred home ownership opportunities have compounded economic disadvantages for racial minorities.”); *see also* JACKSON *supra* note 20, at 209-15.

42. *See generally* Alexander von Hoffman, *A Study in Contradictions: The Origins and Legacy of the Housing Act of 1949*, 11 HOUS. POL’Y DEBATE 299 (2000).

43. *See* MARTIN ANDERSON, THE FEDERAL BULLDOZER: A CRITICAL ANALYSIS OF URBAN RENEWAL, 1949-1962, at 93 (1964) (“[O]nly 62 per cent of the value of the new construction within urban renewal areas was devoted to housing, and over 90 per cent of the new housing built commanded monthly rents that could be afforded by only the tiniest fraction of those displaced.”); Herbert J. Gans, *The Failure of Urban Renewal: A Critique and Some Proposals*, COMMENT. MAG. (Apr. 1, 1965), <https://www.commentarymagazine.com/articles/the-failure-of-urban-renewal> [<https://perma.cc/9BKN-B9V5>] (“[Urban renewal] has also provided inexpensive land for the expansion of colleges, hospitals, libraries, shopping areas, and other such institutions located in slum areas.”).

but production lagged far behind demand and relocation assistance was generally inadequate.<sup>44</sup> Furthermore, the majority of those displaced were African American, and there is evidence that urban renewal worsened residential segregation.<sup>45</sup>

1. *Federal Transportation Policy Accelerates Suburbanization and Wreaks Urban Destruction*

Regional segregation and inequality were exacerbated by federal investments in interstate freeways, which dramatically accelerated mass suburbanization following the passage of the Federal-Aid Highway Act of 1956. These systems became the backbone of regional expansion and significantly lowered the time cost of commuting from suburbs to downtown cores (at least until the growth they spurred created a nationwide crisis of traffic congestion).<sup>46</sup> The Act provided states with a generous ninety percent federal match and established a Highway Trust Fund that ensured that federal gas taxes were dedicated exclusively to the construction of highways.<sup>47</sup> While primarily intended to facilitate intercity and nationwide travel, the Act also funded the construction of freeways in urban areas.<sup>48</sup> Eisenhower Administration officials largely ignored warnings from engineers, planners, and urban advocates of every political persuasion that building freeways through dense cities would require careful, comprehensive planning and regard for the integrity of the existing urban fabric.<sup>49</sup> Compounding foreseeable problems associated with a

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44. Hays notes that the availability and adequacy of replacement housing and relocation assistance improved in subsequent legislation. See R. ALLEN HAYS, *THE FEDERAL GOVERNMENT AND URBAN HOUSING 175-77* (2012).

45. Gans, *supra* note 43 (“[B]ecause almost two-thirds of the cleared slum units have been occupied by Negroes, the urban renewal program has often been characterized as Negro clearance, and in too many cities, this has been its intent.”); Chester W. Hartman, *Relocation: Illusory Promises and No Relief*, 57 VA. L. REV. 745, 797 (1971) (“[T]he general pattern is that racial minorities fare somewhat worse in the relocation process and that relocation does little to decrease, and on occasions intensifies, patterns of racial segregation.”).

46. See, e.g., Nathaniel Baum-Snow, *Did Highways Cause Suburbanization?*, 122 Q.J. ECON. 775, 785, 801 (2007).

47. See MARK H. ROSE & RAYMOND A. MOHL, *INTERSTATE: HIGHWAY POLITICS AND POLICY SINCE 1939*, at 85-94 (2012).

48. See ROGER BILES, *THE FATE OF CITIES: URBAN AMERICA AND THE FEDERAL GOVERNMENT, 1945-2000*, at 70-81 (2011); Jeffrey R. Brown et al., *Planning for Cars in Cities: Planners, Engineers, and Freeways in the 20th Century*, 75 J. AM. PLAN. ASS'N 161, 171 (2009).

49. See BILES, *supra* note 48, at 74-78; JOSEPH F.C. DIMENTO & CLIFF ELLIS, *CHANGING LANES: VISIONS AND HISTORIES OF URBAN FREEWAYS 107-27* (2012); Raymond A. Mohl, *Ike and the Interstates: Creeping Toward Comprehensive Planning*, 2 J. PLAN. HIST. 237, 237-62 (2003).

lack of comprehensive planning was the fact that local officials and developers often used freeway construction as a tool to achieve urban renewal and redevelopment goals—including “slum” clearance—at great cost to poor and minority communities.<sup>50</sup>

## 2. *Increasing Citizen Participation and the Emergence of Regional Governance*

Federal housing and transportation policymakers attempted to address the new problems of central cities in the 1960s, particularly through the “Great Society” programs developed under President Lyndon B. Johnson.<sup>51</sup> Members of the public also took action; a series of “freeway revolts” mobilized to stop federally funded bulldozers in cities across the country.<sup>52</sup> However, many of these programs compounded rather than alleviated the problems of central cities. For example, in many places public transit projects supported by the 1964 Urban Mass Transportation Act and the 1970 Urban Mass Transportation Assistance Act prioritized heavy rail systems that brought suburban commuters into downtowns but that failed to effectively serve increasingly isolated central city communities.<sup>53</sup> Service was concentrated at commute times and stops were spaced too far apart to be useful for local access, which meant that they had little to no utility for central city residents.<sup>54</sup>

As these and other federal programs failed to address urban problems, community members began to demand more active engagement and opportunities for direct participation in decision-making. These demands included transportation and land use policy.<sup>55</sup>

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50. See, e.g., Raymond A. Mohl, *Stop the Road: Freeway Revolts in American Cities*, 30 J. URB. HIST. 674, 685-87 (2004).

51. See, e.g., BILES, *supra* note 48, at 112-59 (discussing President Johnson’s renewed focus on urban initiatives and efforts to address problems in inner cities).

52. See generally Katherine M. Johnson, *Captain Blake Versus the Highwaymen: Or, How San Francisco Won the Freeway Revolt*, 8 J. PLAN. HIST. 56 (2009); Mohl, *supra* note 50; Raymond A. Mohl, *The Interstates and the Cities: The US Department of Transportation and the Freeway Revolt, 1966-1973*, 20 J. POL’Y HIST. 193 (2008).

53. See, e.g., Aaron Golub et al., *Race, Space, and Struggles for Mobility: Transportation Impacts on African Americans in Oakland and the East Bay*, 34 URB. GEOGRAPHY 699, 710-15 (2013) (discussing struggles over transportation services with BART in Oakland, California).

54. See *id.*

55. See, e.g., Sherry R. Arnstein, *A Ladder of Citizen Participation*, 35 J. AM. INST. PLANNERS 216, 218-29 (1969) (critiquing urban renewal); Paul Davidoff, *Advocacy and Pluralism in Planning*, 31 J. AM. INST. PLANNERS 331, 336 (1965) (discussing regional transportation needs assessments); see also DAVID AIMEN &

One major strategy supported by the federal government for addressing the emergent set of metropolitan problems during the 1950s and 1960s involved the creation of regional transportation governance to better coordinate and oversee development across jurisdictions.<sup>56</sup> The Federal-Aid Highway Act of 1962 prioritized federal funds to transportation infrastructure that was part of a continuing, comprehensive, and cooperative planning process.<sup>57</sup> It also required the formation of planning agencies in regions exceeding fifty thousand in population; their geographic extent was meant to capture the area expected to urbanize or the census-defined metropolitan statistical area.<sup>58</sup>

Voluntary councils of government (“COGs”) initially served in this role, and the 1965 Urban Mass Transit Act led to their increasing formation. The 1973 Federal-Aid Highway Act designated a half percent of all federal-aid funds for urban transportation planning to be conducted by MPOs, a term used for the first time in the Act.<sup>59</sup> In most cases, existing COGs simply took on the additional MPO role, though many MPOs diversified representation to include local transit agencies and other sub-jurisdictions beyond those that would be included in a typical council of government. These new planning agencies represented local interests with governing boards composed largely of local elected officials based on a constituent-unit model (i.e., one government, one vote) and a professional planning staff to inform decision-making.<sup>60</sup> While showing some promise to address regional issues, this system merely reinforced the three important

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ANNE MORRIS, NCHRP REPORT 710: PRACTICAL APPROACHES FOR INVOLVING TRADITIONALLY UNDERSERVED POPULATIONS IN TRANSPORTATION DECISIONMAKING 1-6 (2012) (“Greater citizen activism and public opposition to the urban highway construction program and its destructive social consequences began to emerge in the latter half of the 1960s, leading to new political pressures to critically evaluate and reform the relationship between agencies making transportation decisions and the affected public.”).

56. EDWARD WEINER, URBAN TRANSPORTATION PLANNING IN THE UNITED STATES: HISTORY, POLICY, AND PRACTICE 32-33 (3d ed. 2008).

57. *Id.*

58. 23 U.S.C. § 134(e)(2) (2015) (“Each metropolitan planning area (A) shall encompass at least the existing urbanized area and the contiguous area expected to become urbanized within a 20-year forecast period for the transportation plan; and (B) may encompass the entire metropolitan statistical area or consolidated metropolitan statistical area, as defined by the Bureau of the Census.”).

59. WEINER, *supra* note 56, at 79; PAUL G. LEWIS & MARY SPRAGUE, PUB. POL’Y INST. CAL., FEDERAL TRANSPORTATION POLICY AND THE ROLE OF MPOS IN CALIFORNIA 31 (1997).

60. Paul G. Lewis, *Regionalism and Representation*, 33 URB. AFF. REV. 839, 841 (1998) (“[M]any COGs and other regional entities have operated on a one-government, one-vote basis.”).

drivers of inequality: unrepresentative governance, unequal access to opportunities, and unfair distribution of benefits and burdens as suburban jurisdictions were overrepresented (per capita) while central cities, containing larger minority and low-income populations, went underrepresented.<sup>61</sup>

An MPO's internal structure can limit its willingness to embrace policies and practices that would result in regionally dispersed benefits. In principle, MPOs control project selection by including, or excluding, a project in the long-range transportation plan ("LRTP") or transportation improvement programs ("TIP").<sup>62</sup> In practice, because of constituent-unit representation on boards, such choices can be influenced by political strategy. Local elected officials may not reject or challenge the projects of other board members in one planning cycle, in hopes that their project will receive similarly favorable reception in the next cycle.<sup>63</sup> In this environment, MPOs rarely challenge projects proposed by local sponsors and effectively eschew their role as gatekeeper of federal and state funds. There is empirical evidence for this tradeoff; when regional representation (including persons other than locally elected officials) increases on the MPO board, support for regional projects also increases.<sup>64</sup>

### C. Regional Planning Strengthened, but Too Little Too Late?

The specific objectives of MPOs have shifted over time from simply aggregating projects proposed by local governments to preparing LRTPs and TIPs. After a period of decreasing relevance during the 1980s,<sup>65</sup> federal transportation reauthorization bills again tended to elevate the power and responsibilities of MPOs in the 1990s.<sup>66</sup> In 1991, the Intermodal Surface Transportation Efficiency Act

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61. Thomas W. Sanchez & James Wolf, *Environmental Justice and Transportation Equity: A Review of MPOs*, in GROWING SMARTER: ACHIEVING LIVABLE COMMUNITIES, ENVIRONMENTAL JUSTICE, AND REGIONAL EQUITY 249, 263-67 (Robert D. Bullard ed., 2007).

62. See 49 U.S.C. § 5303 (2016) (containing various sections on MPO responsibilities regarding planning and project definition requirements for federal funding).

63. See ROSAN, *supra* note 11.

64. Elizabeth R. Gerber & Clark C. Gibson, *Balancing Regionalism and Localism: How Institutions and Incentives Shape American Transportation Policy*, 53 AM. J. POL. SCI. 633, 642 (2009).

65. Bruce D. McDowell, *The Metropolitan Planning Organization Role in the 1980s*, 18 J. ADVANCED TRANSP. 125, 128-31 (1984).

66. ELISA BARBOUR, PUB. POL'Y INST. CAL., METROPOLITAN GROWTH PLANNING IN CALIFORNIA, 1900-2000, at 75-91 (2002); LEWIS & SPRAGUE, *supra* note 59, at 2-3, 49-52.

(“ISTEA”) put forth fourteen “planning factors,” establishing the broader range of areas to be considered by MPOs and the influence of the transportation system on societal goals.<sup>67</sup> It also gave MPOs direct control over some funds for the first time, tightly integrated transportation and air quality planning, and encouraged additional collaboration between MPOs, state-level agencies, non-profit organizations, and the public.<sup>68</sup>

ISTEA also established new requirements for long-range planning, as well as direct allocation of federal funding in metropolitan areas with more than two hundred thousand residents.<sup>69</sup> Approximately half of the officially designated MPOs are also COGs.<sup>70</sup> Whether or not an MPO is also a COG, constituent-unit representation is still very popular; sometimes additional representatives for larger cities are added to a board to mitigate their underrepresentation.<sup>71</sup> It is largely held by transportation scholars that the lack of representativeness of MPO boards poses a substantial issue, and prevents them from having any real power as a governing body at the regional level.<sup>72</sup> Suburban bias, which favors highways over transit, continues to be a problem.<sup>73</sup>

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67. See LEWIS & SPRAGUE, *supra* note 59, at 50. Specifically, the metropolitan planning process shall provide for consideration of projects and strategies that will, among other things, address economic vitality, safety, accessibility and mobility, environmental protection, energy conservation, and “consistency between transportation improvements and State and local planned growth and economic development patterns.” 23 U.S.C. § 134(h)(1)(E) (2012). The LRTP, in addition, must “emphasize the preservation of the existing transportation system.” *Id.* § 134(h)(1)(H).

68. See, e.g., Todd Goldman & Elizabeth Deakin, *Regionalism Through Partnerships? Metropolitan Planning Since ISTEA*, 14 BERKELEY PLAN. J. 46-48 (2000) (describing the changes in MPO responsibilities pre- and post-ISTEA).

69. See NAT’L TRANSP. LIBRARY, U.S. DEP’T OF TRANSP., INTERMODAL SURFACE TRANSPORTATION EFFICIENCY ACT OF 1991—SUMMARY 14, <http://ntl.bts.gov/DOCS/ste.html> [<https://perma.cc/8PSS-BKDK>].

70. See James F. Wolf & Tara Kolar Bryan, *Identifying the Capacities of Regional Councils of Government*, 41 ST. & LOC. GOV’T REV. 61, 63 (2009); *Regional Councils, COGs & MPOs*, NAT’L ASS’N REGIONAL COUNCILS (2013), <http://narc.org/about-narc/cogs-mpos> [<https://perma.cc/PM7Q-XNLT>].

71. Goldman & Deakin, *supra* note 68, at 50; Lewis, *supra* note 60, at 846-50 (discussing and providing quantitative evidence of the malapportionment of COGs based on a survey of California agencies).

72. Goldman & Deakin, *supra* note 68, at 50; Lewis, *supra* note 60, at 851.

73. See, e.g., Arthur Nelson et al., *Metropolitan Planning Organization Voting Structure and Transit Investment Bias: Preliminary Analysis with Social Equity Implications*, 1895 TRANSP. RES. REC. 1, 5-6 (2004) (finding suburban bias in MPO board members is associated with reduced funding for public transit).

Post-ISTEA, MPOs are tasked with adopting and periodically updating long-range regional transportation plans and short-term TIPs. The LRTP is a comprehensive document that covers a planning horizon of at least twenty years, articulates transportation systems goals, and meets a range of substantive and procedural requirements, including public involvement and environmental review.<sup>74</sup>

MPOs are expected to develop performance measures and targets, and must show how the plan will meet those targets.<sup>75</sup> Specifically, MPOs must produce data described in sufficient detail to develop cost estimates and to address potential environmental mitigation activities that may be required for project development.<sup>76</sup> The plan must also be based on reasonable estimates of financial resources available over the planning period,<sup>77</sup> and should reflect consultation with appropriate agencies responsible for land use management, environmental protection, and historic preservation.<sup>78</sup> The plan is updated every five years (or four years in areas out of attainment for clean air standards).<sup>79</sup>

The TIP is a short-term programming document that links projects to specific sources of local, regional, state, and federal funds;<sup>80</sup> all projects desiring federal funding must appear in the TIP and be consistent with a long-range transportation plan.<sup>81</sup> The TIP lists projects to be constructed over a four-year period, and is updated every four years. State departments of transportation aggregate all TIPs adopted within their state into a statewide transportation improvement program (“STIP”) that also includes rural projects that are typically planned and programmed by that department.<sup>82</sup>

As with all recipients of federal funding, MPO decision-making is subject to federal oversight and regulation.<sup>83</sup> One significant set of requirements includes public involvement in the planning process; at

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74. *See* Development and Content of the Metropolitan Transportation Plan, 23 C.F.R. § 450.324 (2017).

75. *See id.* § 450.324(g)(4).

76. *See id.* § 450.324(g)(9)-(10).

77. *See id.* § 450.324(g)(11)(i).

78. *See id.* § 450.324(h).

79. *See id.* § 450.324(d).

80. Development and Content of the Transportation Improvement Program (TIP), 23 C.F.R. § 450.326 (2017).

81. Development and Content of the Statewide Transportation Improvement Program (STIP), 23 C.F.R. § 450.218(h) (2017).

82. TIP Revisions and Relationship to the STIP, 23 C.F.R. § 450.328 (2017).

83. *See, e.g.*, 23 C.F.R. § 450.300 (2017) (setting forth the policy and purposes of MPO decision-making).



the outset of each planning cycle, the MPO must adopt a public participation plan which, at a minimum, must describe explicit strategies and desired outcomes for seeking out and considering the needs of low-income and minority households.<sup>84</sup> MPOs must produce “[a] description of the procedures by which the mobility needs of minority populations are identified and considered within the planning process” that is submitted to the Federal Transit Administration (“FTA”) as part of a Title VI (of the Civil Rights Act) Program compliance document.<sup>85</sup> Neither the Federal Highway Administration (“FHWA”) nor FTA, two agencies of the U.S. Department of Transportation (“DOT”) that promulgate MPO-related guidance, have specified the mechanisms for ensuring that plans address and identify the needs of minority populations, even though they amended their MPO planning regulation in 2016 and had previously promised more guidance.<sup>86</sup>

Further, at the conclusion of the planning process, MPOs must self-certify their compliance with all applicable federal requirements.<sup>87</sup> In particular, MPOs must certify that the metropolitan transportation planning process was carried out in accordance with Title VI of the Civil Rights Act of 1964.<sup>88</sup> Following each MPO planning cycle, FHWA and FTA conduct a joint review to ensure that certification has been properly made.<sup>89</sup>

Regardless of their increasing responsibilities under federal law, an MPO’s effect is still typically limited to planning; MPOs have no

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84. *See* Interested Parties, Participation, and Consultation, 23 C.F.R. § 450.316(a)(1) (2017). The federal obligation does not end with adopting a plan for outreach and integration of the voices of low-income and minority residents; it also extends to “[p]eriodically reviewing the effectiveness of the procedures and strategies contained in the participation plan to ensure a full and open participation process.” *Id.* § 450.316(a)(1)(x). MPOs must also, as part of a required Title VI program, not only submit a public participation plan that includes an outreach plan to engage minority and limited English proficient populations, but also “a summary of outreach efforts made since the last Title VI Program submission.” FED. TRANSIT ADMIN., U.S. DEP’T OF TRANSP., CIRCULAR 4702.1B, TITLE VI REQUIREMENTS AND GUIDELINES FOR FEDERAL TRANSIT ADMINISTRATION RECIPIENTS, at ch. III, § 4(a)(4) (2012) [hereinafter FTA CIRCULAR 4702.1B].

85. FTA CIRCULAR 4702.1B, *supra* note 84, at ch. VI, § 2(a)(3). Title VI background requirements are discussed in greater detail in Section III.A *infra*.

86. *See* 49 C.F.R. § 21.21(b) (2017) (“The Secretary shall issue . . . instructions and procedures for effectuating this part.”).

87. Each MPO must “certify . . . that the metropolitan transportation planning process is being carried out in accordance with . . . Title VI of the Civil Rights Act of 1964.” 23 C.F.R. § 450.336(a); *see also* FTA CIRCULAR 4702.1B, *supra* note 84, at ch. VI, § 3.

88. 23 C.F.R. § 450.336(a).

89. *See* FTA CIRCULAR 4702.1B, *supra* note 84, at ch. VI, § 2.

jurisdiction over land use, nor transportation facilities; instead, they serve mostly to pass funding through to their sub-jurisdictions.<sup>90</sup> Transportation expert Todd Goldman has highlighted the constraints faced by MPOs, stating that they “act primarily to accommodate the decisions already made by a complex constellation of higher- and lower-level governments,”<sup>91</sup> though those responsibilities can vary by location.<sup>92</sup>

These drawbacks notwithstanding, MPOs emerged from ISTEA as key decision-making bodies in determining how to balance investment among modes at the regional level—including between central cities and suburbs—selecting from among eligible projects and distributing federal funding to local governments based on criteria of their own determination. Therefore, the regional planning apparatus remains a key focus of advocacy for regional equity.

## II. REGIONAL TRANSPORTATION PLANNING DRIVES INEQUALITY

Despite the limits that local control places on regional planning efforts, there is much at stake in MPO planning, as these agencies are the only regional decision-making bodies in most metropolitan areas, and thus, the only venue for conversations about regional equity, investment priorities, and conflict resolution. MPOs are also expected to bring together a realistic vision of future transportation investments, land use, and housing that reflects local priorities and plans. Further, the amount of spending embodied in plans and programs is substantial.<sup>93</sup> They can determine the relative shares of funding devoted to preservation and maintenance of existing facilities compared to capital expansion, as well as the balance of funding

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90. See Goldman & Deakin, *supra* note 68, at 52.

91. Todd Goldman, *Transportation Tax Ballot Initiatives as Regional Planning Processes*, 1997 TRANSP. RES. REC. 9, 10 (2007).

92. Some MPOs have revenue collection responsibilities and have a more significant role in funding decisions (e.g., MTC of the Bay Area or MAG in the Phoenix metro area), while others do not touch any funds but merely serve as a conduit for funds through their planning decisions (e.g., Portland Metro).

93. A brief review of LRTPs shows a wide range of total plan spending—from lows of about a quarter billion dollars per million population per year to well over one billion dollars per million population per year. See HOUSTON-GALVESTON AREA COUNCIL, BRIDGING OUR COMMUNITIES: 2040 RTP (2016); MARICOPA ASS’N OF GOV’TS, DRAFT 2040 REGIONAL TRANSPORTATION PLAN (2017); S. CAL. ASS’N OF GOV’TS, THE 2016-2040 REGIONAL TRANSPORTATION PLAN/SUSTAINABLE COMMUNITIES STRATEGY (2016); see also Foxx, *supra* note 12 (discussing regional transportation spending).

dedicated to highways and public transportation. Additionally, MPOs have to conduct an “equity analysis” of their plans.<sup>94</sup>

By shaping investments and assessing equity, MPOs can confront the three important drivers of inequality: unrepresentative governance, unequal access to opportunities, and unfair distribution of benefits and burdens. This Part discusses how MPO planning relates to each of these three drivers and offers Plan Bay Area (“PBA”), as an example to illustrate the connections between planning and outcomes in practice. PBA was the 2013 regional transportation plan for the San Francisco Bay Area.<sup>95</sup> Through engagement with planning processes, advocates for regional equity and environmental justice simultaneously improved democratic governance, sought increased access to opportunities, and challenged the MPO’s preferred distribution of benefits and burdens.

### A. Governance

While MPO governance and representation issues were discussed at some length in Section I.B.2 above, this Section highlights how differences in governance can affect regional equity outcomes. Specifically, whether an MPO board represents its region in terms of demographics and the nature of an MPO’s public outreach activities can affect the degree to which an agency’s activities will tend to push a region toward or away from equitable outcomes.

Although MPOs undertake many tasks, they must produce and regularly update LRTPs and TIPs to maintain eligibility for federal funding.<sup>96</sup> There is no set way to produce a plan; sometimes they form by aggregating local priorities, or sometimes by identifying regional priorities. The governance structure of most MPOs pushes agencies towards local aggregation, but meaningful and effective public involvement tends to push in the opposite direction. In some cases, MPOs have looked beyond federal mandates to create additional opportunities for engagement on particular issues. With

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94. See OFF. OF THE SEC’Y OF TRANSP., U.S. DEP’T OF TRANSP., DOT-OST-2012-0044, UPDATED ENVIRONMENTAL JUSTICE ORDER 5610.2(A) §7(a) (2012) [hereinafter UPDATED DOT ENVIRONMENTAL JUSTICE ORDER 5610.2(A)].

95. See *generally* METRO. TRANSP. COMM’N & ASS’N OF BAY AREA GOV’TS, DRAFT PLAN BAY AREA: STRATEGY FOR A SUSTAINABLE REGION (2013) [hereinafter DRAFT PLAN BAY AREA].

96. See Scope of the Metropolitan Transportation Planning Process, 23 C.F.R. § 450.306(a) (“[M]etropolitan planning organizations . . . shall develop long-range transportation plans and TIPs.”); *Id.* § 450.306(b) (“The metropolitan transportation planning process shall be continuous, cooperative, and comprehensive . . .”).

increased public engagement, MPOs are becoming important sites for activism and advocacy.<sup>97</sup>

Scenario development is one place where tension arises between aggregation and innovation, as it explores alternative futures that could result from varying policies and practices.<sup>98</sup> A status quo aggregation scenario, for example, could maintain historical levels of funding for each transportation mode and not seek to shift the landscape of opportunity by envisioning different land use configurations. A more ambitious scenario might propose investing heavily in public transit, reducing highway expenditures, and siting affordable housing in high-opportunity areas.<sup>99</sup> The status quo plan might meet the MPO's legal requirements but not reflect the desires of the public.

In general, public agencies tend to focus on strict legal compliance in terms of public engagement, but they may be pressured by communities to expand their efforts; this can have both normative and pragmatic benefits.<sup>100</sup> Normative benefits arise when marginalized groups participate in the decision-making processes; these include increased trust, empowerment, and mutual knowledge creation and social learning. Pragmatic benefits include improved quality of decisions made, context sensitivity, and the ability to promote a truly regional perspective and regional solutions to ongoing problems of inequity.<sup>101</sup>

### B. Access to Opportunities

Because individuals generally must travel to reach their desired destinations, mobility and access are a precondition for participating

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97. See PASTOR ET AL., *supra* note 19, at 95-98; Richard A. Marcantonio & Alex Karner, *Disadvantaged Communities Teach Regional Planners a Lesson in Equitable and Sustainable Development*, 23 POVERTY & RACE 5, 5, 7, 12 (2014); see also *infra* Section II.D.

98. Lew Villotti & W. Kirk Brethauer, *Predicting the Future?*, PUB. ROADS (Sept./Oct. 2013), <https://www.fhwa.dot.gov/publications/publicroads/13sep/oct/04.cfm> [<https://perma.cc/B95P-7ZDK>].

99. See, e.g., Alex Karner et al., *Putting Data into Action for Regional Equity in California's San Joaquin Valley*, in WHAT COUNTS: HARNESSING DATA FOR AMERICA'S COMMUNITIES 272, 272-76 (Fed. Reserve Bank of S.F. & Urban Inst. eds., 2014) (describing examples from practice where such innovative community-defined scenarios have been proposed); Sherman L. Lewis III, *Land Use and Transportation: Envisioning Regional Sustainability*, 5 TRANSP. POL'Y 147, 148-51 (1998); Marcantonio & Karner, *supra* note 97, at 5-7, 12.

100. See AIMEN & MORRIS, *supra* note 55; Mark S. Reed, *Stakeholder Participation for Environmental Management: A Literature Review*, 141 BIOLOGICAL CONSERVATION 2417, 2418-21 (2008).

101. See Reed, *supra* note 100.

in critical, life-enhancing activities such as employment, education, health care, and social contact.<sup>102</sup> Indeed, the relationship between job location, mobility, and employment outcomes was a significant social problem and important driver of the urban protests of the mid-1960s.<sup>103</sup> In a major study of the issue, the Brookings Institution found that low rates of car ownership and inadequate public transit kept job seekers in the urban core from reaching jobs in regions across the United States.<sup>104</sup> The study highlighted important factors including job decentralization, continued concentration of low-income families in central city areas, and poor central city-suburban transit connectivity.<sup>105</sup> Other work has investigated land use, showing that areas with high concentrations of low-wage jobs often have a dearth of housing that would be affordable to workers employed in those jobs.<sup>106</sup>

Access to opportunity is directly affected by MPO planning because the scenarios it contemplates provide varying degrees of access to populations dispersed across a region. On the other hand, alternative land use policies tied into LRTPs that, for example, challenge exclusionary zoning practices to allow more affordable housing development in high-opportunity suburban areas, can enhance access without transportation investments.<sup>107</sup> Plans that incorporate both transportation and land use to improve access can significantly enhance the lives of regional populations.

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102. AM. ASS'N OF ST. HIGHWAY & TRANSP. OFFICIALS, COMMUTING IN AMERICA 2013 BRIEF 2: THE NATIONAL REPORT ON COMMUTING PATTERNS AND TRENDS 6-7 (2013) (noting that in the United States today, only around sixteen percent of urban travel is work related); Karen Lucas, *Transport and Social Exclusion: Where Are We Now?*, 20 TRANSP. POL'Y 105, 105-06 (2012) (reviewing the social impacts of physical exclusion).

103. See Kain, *supra* note 8, at 179-89 (Kain developed what was later referred to as the "Spatial Mismatch Hypothesis," linking unemployment to the suburbanization of jobs and urban segregation); see also Ihlanfeldt & Sjoquist, *supra* note 17, at 851-52.

104. EVELYN BLUMENBERG & MARGY WALLER, BROOKINGS INST., THE LONG JOURNEY TO WORK: A FEDERAL TRANSPORTATION POLICY FOR WORKING FAMILIES 4-5 (2003).

105. See *id.*

106. Chris Benner & Alex Karner, *Low-Wage Jobs-Housing Fit: Identifying Locations of Affordable Housing Shortages*, 37 URB. GEOGRAPHY 883, 893-99 (2016).

107. For example, the TRANSDEF "Smart Growth" scenario was tested as part of the 2005 LRTP analysis for the San Francisco Bay Area. It performed better in terms of congestion, emissions, and open space preservation than their preferred scenario. See *The TRANSDEF Smart Growth Alternative*, TRANSP. SOLUTIONS DEF. & EDUC. FUND, <http://transdef.org/RTP/RTP.html> [<https://perma.cc/ZV3A-PEUJ>].

### C. Benefits and Burdens of Investments

While mobility and access to opportunities are likely to be the most important benefits of transportation investments,<sup>108</sup> others include health benefits from improved travel by foot and bicycle and increased values for private property located near new infrastructure.<sup>109</sup> Aside from certain burdens like regional air pollution and climate change, which are felt by widely dispersed populations, most burdens are localized, such as health impacts resulting from near-roadway air pollution, or displacement pressures due to development. Physical displacement sometimes results when housing is removed to make way for infrastructure, and economic displacement can result from how changes in access induce changes in local property markets (e.g., intensifying development via gentrification, or slowing development leading to disinvestment).<sup>110</sup>

Historically, the benefits of transportation investments have accrued to those who are already mobile and the burdens have fallen disproportionately on low-income people and people of color. Since status quo automobile-based planning tends to focus on central city-suburb and suburb-suburb movements, or on solving congestion problems on key travel corridors, it is whiter and wealthier communities that reap its benefits.<sup>111</sup> This also means that such suburban-central city commuters, who are the most mobile and make the greatest demands on roads, will benefit most from future investments.<sup>112</sup>

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108. Karel Martens, *Justice in Transport as Justice in Accessibility: Applying Walzer's 'Spheres of Justice' to the Transport Sector*, 39 TRANSP. 1035, 1038-42 (2012).

109. See generally Aaron Golub et al., *Spatial and Temporal Capitalization Effects of Light Rail in Phoenix: From Conception, Planning, and Construction to Operation*, 34 J. PLAN. EDUC. & RES. 415, 415-29 (2012).

110. See Stephanie Pollack et al., *Demographic Change, Diversity and Displacement in Newly Transit-Rich Neighborhoods*, in TRANSPORTATION RESEARCH BOARD 90TH ANNUAL MEETING (No. 11-3567, 2011). For a broad overview of these dynamics, see LORETTA LEES ET AL., GENTRIFICATION (2008).

111. See generally Robert Cervero, *Job Isolation in the US: Narrowing the Gap Through Job Access and Reverse-Commute Programs*, in RUNNING ON EMPTY: TRANSPORT, SOCIAL EXCLUSION AND ENVIRONMENTAL JUSTICE (Karen Lucas ed., 2004); Robert A. Johnston, *The Urban Transportation Planning Process*, in THE GEOGRAPHY OF URBAN TRANSPORTATION 115, 115-30 (Susan Hanson & Genevieve Giuliano eds., 3d ed. 2004); THOMAS W. SANCHEZ ET AL., MOVING TO EQUITY: ADDRESSING INEQUITABLE EFFECTS OF TRANSPORTATION POLICIES ON MINORITIES (2003).

112. See, e.g., Karel Martens, *Basing Transport Planning on Principles of Social Justice*, 19 BERKELEY PLAN. J. 1, 3-7 (2006).

Investments in public transportation also present unique equity challenges. Depending on location and configuration, different systems will benefit different types of users.<sup>113</sup> Commuter-oriented rail and express bus systems typically draw a higher income clientele because of their peak period orientation and the location of key stops in suburban areas.<sup>114</sup> On the other hand, in most regions, local urban transit services (mostly bus, but sometimes light rail) typically provide the workhorse connectivity required to meet daily travel needs for those without automobiles.<sup>115</sup> Local bus service, though vitally important, is often not high quality. In most places, this system persists so that transit-dependent populations are afforded a minimal level of service by bus while regional congestion, air quality, and climate change goals can be addressed through investments in rail modes.<sup>116</sup> The bifurcation of benefits from public transport, however, can lead to tensions when funding gets shuffled between services for low-income groups and for higher-income commuters.<sup>117</sup>

#### D. Case Study: Plan Bay Area and the “Six Wins” Coalition for Social Equity

The San Francisco Bay Area’s 2013 RTP update demonstrates the degree to which MPO processes can affect regional equity outcomes. The RTP, entitled Plan Bay Area, was the first in the region to require a sustainable communities strategy (“SCS”) to reduce future greenhouse gas emissions as required under SB 375.<sup>118</sup> This requirement offered an opportunity to address longstanding issues of regional equity by focusing investments in the densest parts of the region, where public transit is most viable and substantial

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113. See, e.g., Mark Garrett & Brian Taylor, *Reconsidering Social Equity in Public Transit*, 13 BERKELEY PLAN. J. 6, 7, 11-13 (1999); Brian D. Taylor & Eric A. Morris, *Public Transportation Objectives and Rider Demographics: Are Transit’s Priorities Poor Public Policy?*, 42 TRANSP. 347, 353-60 (2015).

114. See generally Joe Grengs, *Community-Based Planning as a Source of Political Change: The Transit Equity Movement of Los Angeles’ Bus Riders Union*, 68 J. AM. PLAN. ASS’N 165, 169 (2002); Eric Mann, *Los Angeles Bus Riders Derail the MTA*, in HIGHWAY ROBBERY: TRANSPORTATION RACISM AND NEW ROUTES TO EQUITY 33, 33-48 (Robert Bullard et al. eds., 2004).

115. Buses carry about twenty percent more passengers than rail systems do nationally, and most of that total rail ridership is concentrated into just a few cities. See BUREAU OF TRANSP. STAT., U.S. DEP’T OF TRANSP., TABLE 2-1 U.S. PASSENGER-MILES TRAVELED BY MODE: 2000, 2010 AND 2014, [https://www.rita.dot.gov/bts/publications/passenger\\_travel\\_2016/tables/table2\\_1](https://www.rita.dot.gov/bts/publications/passenger_travel_2016/tables/table2_1) [<https://perma.cc/YGE7-4JDM>].

116. Garrett & Taylor, *supra* note 113, at 18-23; Taylor & Morris, *supra* note 113, at 362-65.

117. Grengs, *supra* note 114, at 166-70.

118. DRAFT PLAN BAY AREA, *supra* note 95, at 3.

concentrations of people of color and low-income people still reside.<sup>119</sup> Still, the ultimate outcomes for those populations were not clear-cut, as public transit investments can also increase property values and spark gentrification and displacement.<sup>120</sup>

The Metropolitan Transportation Commission (“MTC”) and the Association of Bay Area Governments (“ABAG”), the agencies responsible for adopting the plan, appeared to place equity and meaningful participation at the center of their process. In 2010, the agencies applied for a grant to support outreach and engagement,<sup>121</sup> and formed groups of equity stakeholders to support SCS development.<sup>122</sup> The apparent commitment to equity opened an opportunity for policy advocates to partner with community groups to create a regional transportation investment and land use plan that would put the needs of disadvantaged communities first. The “Six Wins” for social equity network was launched at an October 2010 retreat to develop a strategy to advance equity principles in SB 375 planning.<sup>123</sup>

In June 2011, when MTC and ABAG released five staff-developed alternative scenarios, Six Wins immediately issued its alternative equity-focused plan, the Equity, Environment, and Jobs (“EEJ”) scenario.<sup>124</sup> The agencies initially refused to analyze the EEJ alternative against those developed by staff, and no components of the EEJ were included in the final “preferred alternative” developed by the agencies. Continued Six Wins advocacy, including quantitative analyses, written comments, outreach with elected officials, and high

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119. *Id.* at 5.

120. See generally Ghebreegziabihier Debrezion et al., *The Impact of Railway Stations on Residential and Commercial Property Value: A Meta-Analysis*, 35 J. REAL EST. FIN. & ECON. 161, 177-78 (2007) (demonstrating the effect of public transit on property values.); Noah Quastel, *Political Ecologies of Gentrification*, 30 URB. GEOGRAPHY 694, 711-14 (2009) (demonstrating that the principles of smart growth—compact, walkable communities well-served by public transit—can facilitate gentrification.).

121. See DRAFT PLAN BAY AREA, *supra* note 95, at 5; see also METRO. TRANSP. COMM’N, PUBLIC PARTICIPATION PLAN FOR THE SAN FRANCISCO BAY AREA 2 (2010) (In their application, the agencies described their plans to engage equity advocates during SCS development and use funds to support public engagement efforts in disadvantaged communities.).

122. Memorandum from Ann Flemer, Deputy Exec. Dir. for Pol’y, Metro. Transp. Comm., & Ezra Rapport, Exec. Dir., Ass’n of Bay Area Gov’ts, to MTC Plan. Comm. & ABAG Admin. Comm., Re: Plan Bay Area: Alternative Scenarios (July 6, 2011) (on file with authors).

123. Marcantonio & Karner, *supra* note 97, at 7.

124. *Id.*



attendance at public meetings, led to the EEJ's analysis during the environmental review process.<sup>125</sup>

Despite outperforming the agency's preferred plan on key metrics—including greenhouse gas emissions, trips made by walking and public transit, and air pollution emissions—the EEJ was not adopted as the preferred scenario.<sup>126</sup> But sustained advocacy and the alternative's performance led to the adoption of three amendments that bode well for the future. These include a commitment to increasing transit funding, protecting against displacement via restrictions embedded in the OBAG program, and allocating cap-and-trade revenues such that twenty-five percent of the anticipated three billion dollars truly benefit disadvantaged communities.<sup>127</sup>

These amendments, and the momentum generated by the advocacy effort, demonstrate the relationship between MPO planning and the three drivers of inequality. Specifically, the amendments hold out the promise that disadvantaged communities in the Bay Area will enjoy increased access to opportunities and a more equitable distribution of the benefits and burdens of investments in the future. They were also driven in part by the governance structure at the agencies that elevated the importance of public engagement as well as the sustained commitment of advocacy organizations and members of the public.

### III. LEGAL FOUNDATIONS FOR ADDRESSING EQUITY IN REGIONAL PLANNING

MPOs must do more than avoid or reduce discrimination; they must also proactively analyze and address the conditions of inequality. An MPO's affirmative obligations to address equity emerge from three sources: Title VI regulations, the EJ Executive Order, and the Fair Housing Act.<sup>128</sup> This Part describes these broad legal frameworks that shape MPO equity obligations and the shortcomings thereof. It sets up a more detailed discussion about the MPO equity analysis in Part IV.

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125. *Id.*

126. Metro. Transp. Comm. & Ass'n of Bay Area Gov'ts, Draft of Plan Bay Area Environmental Impact Report, State Clearinghouse No. 2012062029 (comparing the performance of alternative scenarios using a simulation model of land use and travel behavior that can generate estimates of travel behavior, congestion, and air pollution in a future year).

127. Marcantonio & Karner, *supra* note 97, at 12.

128. These obligations apply not only to MPOs, but to other entities like transit agencies and state departments of transportation.

### A. Title VI: Affirmative Obligations and Judicial Enforcement

Title VI of the Civil Rights Act of 1964 broadly prohibits a wide range of discriminatory policies and practices.<sup>129</sup> An entity receiving any federal funding is subject to Title VI, which prohibits the exclusion from or denial of benefits of federally funded programs (or programs receiving any amount of federal money) on the basis of race, color, or national origin.<sup>130</sup> Thus, MPOs are subject to Title VI's prohibition of discrimination because they receive federal support for their activities. Local and regional transportation agencies subject to MPO authority may also be subject to Title VI if they receive federal funds.<sup>131</sup>

Title VI also provides for administrative oversight and enforcement. Because it is the “sleeping giant” of civil rights statutes,<sup>132</sup> Title VI grants federal agencies providing financial assistance the oversight authority to “effectuate [the law’s] provisions . . . by issuing rules, regulations, or orders of general applicability,”<sup>133</sup> and also provides for enforcement actions and remedies in individual cases.<sup>134</sup> The DOT is one of the federal agencies charged with oversight authority.<sup>135</sup> Regulations promulgated by the DOT incorporate the language of Title VI by requiring federal funds recipients to take prompt measures to ensure no person is denied participation in, or the benefits of, its programs due to race, color, or national origin, and to comply with process requirements when collecting and evaluating data and forming their plans.<sup>136</sup>

While affirmative obligations have not played the game-changing role that earlier generations of civil rights advocates had argued

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129. Note that this prohibits any form of discriminatory practice or impact, as opposed to, for example, the Fair Housing Act or Title VII, which enumerate categories of prohibited discrimination.

130. 42 U.S.C. § 2000d (“No person shall on the ground of race, color, or national origin, be excluded from participation in, denied the benefits of, or be subjected to discrimination under any program receiving Federal financial assistance.”).

131. *Id.* § 2000d-4a (defining “program or activity” for the purposes of 42 U.S.C. § 2000d); *see also* CAL. GOV’T CODE § 11135 (West 2017).

132. Jerett Yan, *Rousing the Sleeping Giant: Administrative Enforcement of Title VI and New Routes to Equity in Transit Planning*, 101 CAL. L. REV. 1131, 1134 (2013).

133. 42 U.S.C. § 2000d-1.

134. *Id.* § 2000d-7.

135. *See* CAL. DEP’T OF TRANSP., TITLE VI PROGRAM PLAN 66-68 (2016), [http://www.dot.ca.gov/hq/bep/title\\_vi/documents/Title6PgmPlan1.pdf](http://www.dot.ca.gov/hq/bep/title_vi/documents/Title6PgmPlan1.pdf) [<https://perma.cc/Q43J-Y7BC>].

136. *Id.*

for,<sup>137</sup> they remain an important subtext in our civil rights law and in how they pertain to MPO activities. Affirmative assurances and obligations, at a minimum, require that MPOs not simply avoid discrimination but evaluate the potential for discrimination in their programs and activities in a prophylactic manner. They can reasonably be read as creating a buffer zone of protection to ensure that the potential for discrimination is identified and averted before it becomes actual. For example, the DOT's Title VI regulation includes important affirmative obligations, such as the obligation to remove or overcome the effects of discrimination where "prior discriminatory practice" existed,<sup>138</sup> or "[e]ven in the absence of prior discriminatory practice . . . to take affirmative action" to ensure no future discrimination occurs.<sup>139</sup> The regulation also requires that entities seeking federal assistance self-certify compliance with these requirements, provide adequate detail about their "method of administration," and give a "reasonable guarantee" that programs will meet the requirements.<sup>140</sup> Entities must make available "compliance reports" that include racial and ethnic data showing the extent to which they are beneficiaries of programs receiving federal funding—in sum, a rudimentary equity analysis.<sup>141</sup>

Judicial enforcement of Title VI became much more difficult in 2001 when the United States Supreme Court decided *Alexander v. Sandoval*, a challenge to Alabama's English-only driver's license examination.<sup>142</sup> A five-justice majority decided that while Congress

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137. Alan Freeman, *Antidiscrimination Law: The View from 1989*, 64 TUL. L. REV. 1407, 1407-09 (1989). Perhaps the most substantive example of an affirmative obligation is the requirement, in § 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 701 et seq.) and the Americans with Disability Act (42 U.S.C. § 12111) that employers, housing providers, and others make reasonable accommodations to the disability of their employees, applicants, and tenants.

138. 49 C.F.R. § 21.5(b)(7).

139. *Id.* Stating that "[t]he Secretary of Transportation's regulation more broadly requires the recipients of federal funds to take 'affirmative action to assure that no person is excluded from participation' in a federally funded program '[e]ven in the absence of prior discriminatory practice or usage,'" the California Supreme Court ruled that "[t]he unmistakable import of this language is not that race-based remedies are required, but simply that they are permitted, so far as the Secretary is concerned, if no other law precludes them." *Coral Constr. v. City & Cty. of S.F.*, 235 P.3d 947, 962 (2010) (emphasis added).

140. 49 C.F.R. § 21.7(b).

141. *See* 49 C.F.R. § 21.9(b) (requiring both primary recipients and subrecipients to maintain compliance reports that include "racial and ethnic data showing the extent to which members of minority groups are beneficiaries of programs receiving Federal financial assistance.").

142. 532 U.S. 275 (2001).

intended to create an implied private right of action for Title VI, that right protected only against intentional discrimination and not disparate impact claims.<sup>143</sup> With this ruling, the Court imposed a prohibitive standard of proof on individuals and advocacy groups seeking to enforce Title IV through private litigation.

In some places, state law analogues to Title VI<sup>144</sup> still support disparate impact claims by private plaintiffs.<sup>145</sup> Even before *Sandoval*, other cases indicated that disparate impact cases would be met by skeptical courts. One such case in the transportation context was the Second Circuit case *Urban League v. New York*.<sup>146</sup> At issue was the allocation of resources between modes by the Metropolitan Transportation Authority (“MTA”), which determined the balance between operating subsidies and fare revenue for mass transit systems in the New York region.<sup>147</sup> The plaintiffs showed that riders of buses and subways, who were predominately minority residents of New York City, paid a much higher proportion of system operating costs than did the passengers of commuter rail systems, nearly all of whom were white.<sup>148</sup> Plaintiffs sought an injunction against proposed fare increases that would increase this cost disparity by raising bus and subway fares by twenty percent while raising commuter rail fares by only eight and a half percent.<sup>149</sup> Though the district court found for

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143. *Id.* at 291. The Court was willing to “assume for the purposes of deciding this case” that regulations adopted on its authority “may validly proscribe activities that have a disparate impact on racial groups” which may be enforced through administrative action. *Id.* at 281. Justice Scalia, writing for the majority, was not willing to extend that assumption to the implied private right of action, however, and interpreted the statute to mean that Congress had only intended to prohibit intentional discrimination. *Id.* at 291.

144. *See e.g.*, CAL. GOV’T CODE § 11135 (Deering 2017).

145. *See, e.g.*, *Munguia v. Ill.*, No. 10 C 0055, 2010 WL 3172740, at \*11 (N.D. Ill. Aug. 11, 2010) (finding no showing of discriminatory impacts under Illinois law in a case challenging funding disparities between rail transit systems in wealthy suburban communities versus poor minority communities); *Crenshaw Subway Coal. v. L.A. Cty. Metro. Transp. Auth.*, No. CV 11-9603 FMO (JCx), 2015 WL 6150847, at \*38 (C.D. Cal. Sept. 23, 2015) (finding no prima facie showing of discriminatory impact under California civil rights statutes in considering a plan for light rail construction through an African American business corridor); *see also Darensburg v. Metro. Transp. Comm’n*, 611 F. Supp. 994 (N.D. Cal. Aug. 4, 2009).

146. *N.Y. Urb. League, Inc. v. New York*, 71 F.3d 1031 (2d Cir. 1995).

147. *Id.* at 1033-38.

148. The district court had noted that about fifty-four percent of bus and subway riders were people of color, while about eighty percent of commuter rail users were white. *See N.Y. Urb. League, Inc. v. Metro. Transp. Auth.*, 905 F. Supp. 1266, 1271-72 (S.D.N.Y. 1995).

149. *Id.* at 1268.

the plaintiffs, the decision was overturned on appeal.<sup>150</sup> The appellate court found the plaintiff's metrics insufficient and was persuaded by the MTA's justifications, including the reduction of traffic and pollution and stimulus resulting from greater subsidies for suburban commuters.<sup>151</sup>

Another case exemplifying the challenge of addressing metropolitan inequality through a disparate impact framework is *Darensburg v. Metropolitan Transportation Commission*,<sup>152</sup> the most recent Title VI case brought in federal court against an MPO. The *Darensburg* plaintiffs argued a disparate impact theory under a state law claim that mirrored Title VI and its interpretation prior to *Sandoval*.<sup>153</sup> Silvia Darensburg and Vivian Hain, two bus riders of color, represented a class of bus riders of AC Transit, a large bus transit system serving Oakland, California, and two surrounding East Bay counties.<sup>154</sup> They claimed that MTC, in its funding decisions, favored two regional rail systems over the urban bus systems like AC Transit.<sup>155</sup> They also objected that BART passengers, who were disproportionately white and affluent, were subsidized at a rate of \$6.14 per trip compared to \$2.78 per trip for AC Transit riders.<sup>156</sup> Plaintiffs highlighted a long pattern of bus service cuts as rail service expanded; AC Transit service basically stagnated after the late 1970s, while BART service more than tripled, even though BART ridership did not exceed AC Transit until around 1990. At the heart of their claim was that MTC had created and maintained a separate and unequal regional transit system.<sup>157</sup> The decline in local bus service

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150. *N.Y. Urban League, Inc.*, 71 F.3d at 1040.

151. *Id.* at 1038 (plaintiffs had analyzed differences in farebox recovery ratios to show discrimination).

152. *See* *Darensburg v. Metro. Transp. Comm'n*, 611 F. Supp. 994 (N.D. Cal. 2009).

153. CAL. GOV'T CODE § 11135(a) (Deering 2017). The *Darensburg* plaintiffs also asserted an intentional discrimination claim under Title VI, but that claim was dismissed on summary judgment. *See Darensburg v. MTC*, PUB. ADVOCS., <http://www.publicadvocates.org/our-work/transportation-justice-issues/darensburg-v-mtc> [<https://perma.cc/2U4N-7PDV>]; *Darensburg v. MTC*, ACLU N. CAL. (Jan. 25, 2010), <https://www.aclunc.org/our-work/legal-docket/darensburg-v-mtc> [<https://perma.cc/47RA-VVHG>]; Kate Baldrige, *If You Give a Mouse a Cookie: California's Section 11135 Fails to Provide Plaintiffs Relief in Darensburg v. Metropolitan Transportation Commission*, 43 GOLDEN GATE U. L. REV. 7, 10-11 (2013).

154. Baldrige, *supra* note 153, at 10.

155. *Id.*

156. *See* PUB. ADVOCS., *supra* note 153.

157. Golub et al., *supra* note 53, at 719-20.

caused harm to low-income communities of color, isolating them from opportunity on a large scale.<sup>158</sup>

The metropolitan context of the case posed significant challenges to finding evidence of discrimination, however. The nine-county Bay Area region under the MTC's jurisdiction included approximately two dozen transit agencies, of which seven, among them AC Transit, BART, and Caltrain, accounted for ninety-five percent of the region's transit ridership.<sup>159</sup> In the aggregate, sixty-one percent of Bay Area transit riders were people of color; about two-thirds of bus riders were people of color, however, compared to just over half of rail riders.<sup>160</sup> Disaggregating further among the seven large transit systems, three—which plaintiffs' expert characterized as “high minority” systems—carried seventy percent or more people of color, whereas four others ranged from under forty percent to just over fifty-five percent.<sup>161</sup>

Plaintiffs asserted that MTC's system for funding buses and rail systems had discriminatory effects.<sup>162</sup> Bus service relied primarily on operating subsidies,<sup>163</sup> while rail service required large capital subsidies, both to maintain and expand services. Ultimately, MTC found itself with operating shortfalls for its bus systems, which it failed to cover, while it used its discretionary funds to fully cover BART and Caltrain's large capital shortfalls.<sup>164</sup> Further, MTC's multi-billion dollar program of transit capital expansion identified many expansion priorities for BART and Caltrain, but few for AC Transit. The final program devoted ninety-four percent of seventeen billion dollars to rail expansion, but less than five percent to bus projects like bus rapid transit.<sup>165</sup>

The trial court found that MTC's actions indeed contributed to service reductions at AC Transit, but it dismissed the plaintiff class' case regarding disparate funding instruments, finding they had not

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158. The trial court noted “the predicament of the members of the Plaintiff Class, who have experienced declines in bus services on which they depend to meet their basic needs, such as getting to school and work safely and on time.” *Darensburg*, 611 F. Supp. 2d at 1060.

159. *Id.* at 997-98.

160. *Id.* at 1047.

161. *Id.*

162. *Id.*

163. AC Transit's reliance on operating subsidy was due in part to the fact that the low income of its riders limited the fares it could charge. In addition, capital purchases were a relatively small proportion of the costs of operating bus service.

164. *Darensburg*, 611 F. Supp. 2d at 998.

165. *Id.* at 1013, 1043.

met their prima facie burden.<sup>166</sup> And while the trial court found the plaintiffs had made a prima facie case with respect to MTC's transit capital funding program, MTC was able to rebut these allegations.<sup>167</sup> Plaintiffs showed that MTC favored rail projects, assuming automatically that they would mitigate congestion, while bus projects proposed by AC Transit were required to prove congestion-reducing impacts.<sup>168</sup> Similarly, they showed that MTC did not apply a rigorous cost-effectiveness measure to the projects it funded, further disfavoring bus proposals.<sup>169</sup> Nonetheless, the court found plaintiffs' showing to be "non-robust" and reduced MTC's burden for rebutting the claim, requiring just a "legitimate justification" for its allocation of funds, so as not to second guess the MTC's "policy decisions."<sup>170</sup> The court concluded that, because MTC had convened a Partnership Board of local transportation and transit agencies working to reach a consensus, even if it was less than unanimous, it was a sufficiently legitimate justification.<sup>171</sup> The court decided this even though the Board had no accountability to residents in general—and residents of color in particular—and despite testimony that consensus by such boards is "often heavily coerced."<sup>172</sup>

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166. *Id.* at 1043-44. Plaintiffs compared operators of "high minority" and "low minority" operators (supported by MTC's use of a seventy percent benchmark for Title VI monitoring purposes) and found significant disparities, while MTC's statistical experts analyzed the operators on a continuum and did not find a statistical correlation between MTC funding and level of minority ridership.

167. *Id.* at 1060. On appeal, the Ninth Circuit affirmed the judgment in favor of MTC, while rejecting the trial court's conclusion that plaintiffs proved a prima facie case. *See generally* *Darensburg v. Metro. Transp. Comm'n*, 636 F.3d 511 (9th Cir. 2011).

168. *Darensburg*, 611 F. Supp. 2d at 1014.

169. *Id.* at 1043.

170. *Id.* at 1054 ("[A]n overly strict requirement of establishing transportation necessity in the sense of indispensability is not appropriate for judging the complex policy decisions and tradeoffs that MTC must make in allocating funds that are always too scarce among competing legitimate needs to achieve the myriad goals for the region mandated by the planning statute.").

171. *Id.* at 1055.

172. *Id.* The court went on to reject plaintiffs' argument that "MTC could score and rank bus and rail projects together . . . based on how well they perform against criteria that have a relationship to improved air quality, cost effectiveness and other regional and statutory objectives." *Id.* at 1060. In the court's view, "Plaintiffs presented no evidence as to whether this alternative would be equally effective in using [transit capital expansion] funds while lessening any racial disparity." Also, the "Court recognizes that [transit] operators do not always feel at complete liberty to risk giving offense to MTC." *Id.* at 1055.

## B. Environmental Justice

The EJ Executive Order, issued by President Bill Clinton in 1994, requires federal executive agencies and entities receiving federal funds to “identify[] and address[], as appropriate, disproportionately high and adverse human health or environmental effects of [their] programs, policies, and activities on minority populations and low-income populations . . . .”<sup>173</sup> The Order also prohibits the exclusion of persons (or populations) from participating in, reaping the benefits of, or being discriminated against under such programs, policies, and activities, because of their race, color, or national origin.<sup>174</sup>

It is notable that this prohibition explicitly applies to “populations” in addition to individuals. By using the word “populations” rather than “communities,” the Order extends not only to the residents of specific geography but also to “populations” who are similarly-situated with respect to the benefits or burdens of a plan or project, but may live far apart.<sup>175</sup> This is especially relevant to transportation, as users of a particular portion of the transportation network, such as buses, and who are “similarly affected” by a plan or policy, may comprise a protected population. The EJ Executive Order overlaps with, but is distinct from, Title VI. The EJ Executive Order extends its protections to “low-income populations” not otherwise protected under federal civil rights law.<sup>176</sup>

Under the DOT’s official policy, all DOT operating administrations must fully consider and incorporate environmental justice principles.<sup>177</sup> The FHWA and FTA are among these DOT

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173. Exec. Order No. 12898, 59 Fed. Reg. 7629 (Feb. 11, 1994).

174. *Id.*

175. “Minority Population” is defined as “any readily identifiable groups of minority persons who live in geographic proximity, and if circumstances warrant, geographically dispersed/transient persons (such as migrant workers or Native Americans) who will be similarly affected by a proposed DOT program, policy or activity.” UPDATED DOT ENVIRONMENTAL JUSTICE ORDER 5610.2(A), *supra* note 94, at app. § 1(e). For a similar definition of “low-income population,” see *id.* at app. § 1(d).

176. Exec. Order No. 12898, 59 Fed. Reg. 7629. Additional differences are noted in the DOT’s Updated Environmental Justice Order: “engaging in environmental justice analysis under Federal transportation planning and NEPA provisions will not necessarily satisfy Title VI requirements. Similarly, a Title VI analysis would not necessarily satisfy environmental justice requirements, since Title VI does not include low-income populations. Moreover, Title VI applies to all Federally-funded projects and activities, not solely those which may have adverse human health or environmental effects on communities.” UPDATED DOT ENVIRONMENTAL JUSTICE ORDER 5610.2(A), *supra* note 94.

177. See UPDATED DOT ENVIRONMENTAL JUSTICE ORDER 5610.2(A), *supra* note 94, at intro.



operating administrations; they are also charged with overseeing MPO compliance with Title VI in the regional planning process. The FHWA defines environmental justice as “identifying and addressing disproportionately high and adverse human health or environmental effects, including the interrelated social and economic effects of their programs, policies, and activities on minority populations and low-income populations in the United States” to achieve an equitable distribution of benefits and burdens.<sup>178</sup> The FTA identifies three guiding principles for agencies incorporating environmental justice into their mission: (1) avoid disproportionately high and adverse effects; (2) ensure the full and fair participation by all potentially affected communities; and (3) prevent the denial of, reduction in, or significant delay in the receipt of benefits by minority and low-income populations.<sup>179</sup>

FTA’s prohibition of delay originated in the DOT Order on Environmental Justice.<sup>180</sup> Long-range planning already requires explicit analysis of timing. Federal law mandates modeling plan investments in “year of expenditure dollars,”<sup>181</sup> meaning that assumptions must be made about the timing of investments. However, those assumptions are rarely made transparent and so it is unclear how common these delays are. At least one instance of delay in the provision of benefits to underserved populations has been documented.<sup>182</sup>

### C. The Fair Housing Act: Affirmative Obligations and Judicial Enforcement

The Fair Housing Act, enacted in 1968 as Title VIII of the Civil Rights Act of 1968, requires all executive departments and federal agencies to administer their “programs and activities relating to housing and urban development” in furtherance of the civil rights goals codified in the Fair Housing Act and to cooperate with the

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178. See FED. HIGHWAY ADMIN., U.S. DEP’T OF TRANSP., ORDER 6640.23A, FHWA ACTIONS TO ADDRESS ENVIRONMENTAL JUSTICE IN MINORITY POPULATIONS AND LOW-INCOME POPULATIONS (2012) [hereinafter FHWA ENVIRONMENTAL JUSTICE ORDER 6640.23A].

179. FED. TRANSIT ADMIN., CIRCULAR 4703.1, ENVIRONMENTAL JUSTICE POLICY GUIDANCE FOR FEDERAL TRANSIT ADMINISTRATION RECIPIENTS, at ch. I, § A (2012) [hereinafter FTA CIRCULAR 4703.1].

180. UPDATED DOT ENVIRONMENTAL JUSTICE ORDER 5610.2(A), *supra* note 94, at app. § 1(f).

181. See 23 C.F.R. § 450.324(f)(11)(iv) (2017).

182. See Petition for Writ of Mandate in Intervention, Cleveland Nat’l Forest Found. v. San Diego Ass’n of Gov’ts Bd. of Dirs., No. 37-2011-00101593-CU-TT-CTL (Cal. App. Dep’t Super. Ct. Jan. 2, 2012).

Secretary of the U.S. Department of Housing and Urban Development (“HUD”) to achieve those ends.<sup>183</sup> The Act’s obligation to “affirmatively further” fair housing is particularly important to solving metropolitan segregation, exclusion, and inequality.<sup>184</sup> While this requirement applies to the DOT, the DOT has not yet taken steps to implement it.

The Fair Housing Act requires agencies to affirmatively replace segregation with “truly integrated and balanced living patterns.”<sup>185</sup> The affirmative elements of the Act remained dormant for decades due to a political context beset by antagonistic race relations and hostility toward affirmative action programs.<sup>186</sup> Until recently, HUD ignored requirements to affirmatively promote integration and ameliorate the legacies of discrimination.<sup>187</sup>

HUD recipients are expected to conduct an “Analysis of Impediments to Fair Housing Choice” and self-certify compliance with the obligation to affirmatively further fair housing. For many years, that obligation was specified only in general terms in a HUD Planning Guide.<sup>188</sup> However, a 2009 case brought under the False Claims Act (described in greater detail later in this Section) exposed

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183. 42 U.S.C. § 3608(d) (“All executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of this title and shall cooperate with the Secretary to further such purposes.”).

184. *Id.* § 3608(e) (“The Secretary of Housing and Urban Development shall . . . administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter . . .”).

185. *Id.* §§ 3608(d)-(e); Robert G. Schwemm, *Overcoming Structural Barriers to Integrated Housing: A Back-to-the-Future Reflection on the Fair Housing Act’s “Affirmatively Further” Mandate*, 100 KY. L.J. 125, 125 (2012).

186. See BILES, *supra* note 48, at 180-87 (President Nixon ordered Secretary of Housing George Romney to cease his efforts to use his authority under Title VI to desegregate and improve housing affordability in suburbs, eventually forcing him out of the cabinet); Nikole Hannah-Jones, *Living Apart: How the Government Betrayed a Landmark Civil Rights Law*, PROPUBLICA (June 25, 2015, 1:26 PM), <https://www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law> [<https://perma.cc/T4CY-EKG9>].

187. In 1993, HUD promulgated a sub-regulatory handbook on AFFH. U.S. DEP’T OF HOUS. & URB. DEV., FAIR HOUSING PLANNING GUIDE (1993) [hereinafter FAIR HOUSING PLANNING GUIDE], <https://www.hud.gov/offices/fheo/images/fhpg.pdf> [<https://perma.cc/AF2L-TT8K>]. While far less rigorous and detailed than the 2015 rule, it was relied upon by courts in support of some basic propositions. See, e.g., *Cty. of Westchester v. U.S. Dep’t of Hous. & Urb. Dev.*, 802 F.3d 413 (2d Cir. 2015).

188. See generally FAIR HOUSING PLANNING GUIDE, *supra* note 187.

the need for clearer guidance.<sup>189</sup> As a result, in July 2015, nearly fifty years after the adoption of the statutory requirement, HUD adopted a comprehensive new rule on affirmatively furthering fair housing applicable specifically to state and local jurisdictions that receive HUD funds and to public housing authorities.<sup>190</sup> The rule explicitly promotes the use of “regional approaches to address fair housing issues,” recognizing the cross-jurisdictional character of segregation and disparity,<sup>191</sup> and requires “meaningful action” to address disparities in housing needs, segregated living patterns, and change racially and ethnically concentrated areas of poverty into areas of opportunity.<sup>192</sup> The final rule identifies six specific goals of assessing fair housing that provide procedural requirements for efficient and complete data collection, evaluation of integrated solutions with defined goals, metrics, and milestones, and ways to measure progress upon implementation of HUD programs.<sup>193</sup>

HUD grantees are also required to consider neighborhood-level transportation and transit access, educational and economic opportunity, and environmental health factors when evaluating programs.<sup>194</sup> This creates clear guidelines for MPOs that receive funds from HUD, but other MPOs will not be held to the same standards.<sup>195</sup>

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189. United States *ex rel.* Anti-Discrimination Ctr. of Metro N.Y. v. Westchester Cty., 495 F. Supp. 2d 375, 387 (S.D.N.Y. 2007).

190. Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272 (July 16, 2015) (to be codified at 24 C.F.R. pts. 5, 91, 92, et al.).

191. *Id.* at 42,273; *see also id.* at 42,286 (describing the importance of a regional analysis of fair housing issues and solutions).

192. 24 C.F.R. § 5.152 (2015). Other protected categories include disability and familial status.

193. *Id.* § 5.154(d). Specifically, the “assessment of fair housing” (“AFH”) must: (1) identify, with robust community engagement, current patterns and conditions of segregation, racially concentrated poverty, disparities in access to opportunity, and disproportionate housing needs, utilizing data HUD provides and other relevant regional data; (2) identify key contributing factors of the patterns and conditions identified; (3) prioritize the most significant contributing factors and set goals that will meaningfully address the high priority factors, with “metrics and milestones” for each goal; (4) tailor near-term actions and investments consistent with those goals; and (5) measure progress over the near term. *See id.*

194. U.S. DEP’T OF HOUS. & URB. DEV., ASSESSMENT OF FAIR HOUSING TOOL 3-4 (2015), <https://www.huduser.gov/portal/sites/default/files/pdf/Assessment-of-Fair-Housing-Tool.pdf> [<https://perma.cc/9XMT-FYKP>].

195. *See* Exec. Order No. 12898, 59 Fed. Reg. 7629 (Feb. 11, 1994); *see also* E.O., Comment to *Role of MPOs in the Coordination and Administration of HUD Programs*, HUDUSER.GOV (Nov. 5, 2015, 3:05 PM), <http://www.huduser.gov/forums/node/361> [<https://perma.cc/2NAQ-BUKW>]. The DOT has not implemented the AFFH obligation in the Fair Housing Act, and MPOs (unless they are HUD grantees) are not directly subject to HUD’s AFFH rule. *See supra* notes 183-84 and

While the DOT has not yet adopted its own AFFH rule, in 2016 the Transportation Secretary joined the Secretaries of HUD and the U.S. Department of Education in authoring a “dear colleague” letter to transportation agencies nationally, to “identify impediments to accessing opportunity,” integrate the principles of AFFH into their decision-making, and coordinate with local jurisdictions on efforts to address segregation.<sup>196</sup> The letter recognizes that housing, transportation, and education must be dealt with together to ensure improved equity of opportunity, sustainable economic growth, and environmental responsibilities.<sup>197</sup> It encourages collaboration between MPOs and other transportation, housing, and education agencies “to align public transportation routes, sidewalk construction, and related bus stops with schools and housing facilities,” to “[e]nhance bicycle and pedestrian safety in and around local schools,” and to “[i]nclude local school districts, housing authorities, Head Start programs, community colleges, and other related entities in developing coordinated mass transit plans” like the RTP.<sup>198</sup> It continues:

HUD strongly encourages regional coordination in preparing an Assessment of Fair Housing . . . [as] many of the issues at stake are not confined to any one local jurisdiction’s borders, nor are the tools to address those issues always within the power of a single agency acting alone.<sup>199</sup>

Lawsuits challenging regional inequality based on the provisions of the Fair Housing Act, which includes an explicit private right of action, have generally fared much better than those brought under Title VI. As an example, in *Hills v. Gautreaux*, a case brought against the Secretary of HUD (Hills), the Supreme Court set an important precedent for fair housing enforcement extending beyond city limits.<sup>200</sup> At issue were public housing policies that systematically concentrated poverty in the predominantly African American

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accompanying text. This is true, despite that fact that the focus of the rule on overcoming patterns of segregation is already part of the direct Title VI and EJ Executive Order obligations of MPOs. See 49 C.F.R. § 21.5(b)(1) (2017); UPDATED DOT ENVIRONMENTAL JUSTICE ORDER 5610.2(A), *supra* note 94, at app. § 1(f).

196. Letter from Julian Castro, Sec’y of U.S. Dep’t of Hous. & Urb. Dev., John B. King, Jr., Sec’y of U.S. Dep’t of Educ., & Anthony R. Foxx, Sec’y of U.S. Dep’t of Transp., to Colleagues (June 3, 2016) [hereinafter Tri-Agency letter], <https://www2.ed.gov/documents/press-releases/06032016-dear-colleagues-letter.pdf> [<https://perma.cc/5SMJ-4MFV>].

197. *Id.*

198. *Id.*

199. *Id.* (emphasis added).

200. See 425 U.S. 284 (1976).

neighborhoods of Chicago.<sup>201</sup> The Court held that the policies violated the Fifth Amendment and the Civil Rights Act of 1964, and ordered HUD to end its discriminatory policies and adopt programs that dispersed subsidized housing.<sup>202</sup> The Court noted that HUD had erred by limiting housing options for minority groups to housing within city limits.<sup>203</sup> Professor David Troutt, the founding director of the Rutgers Center on Law in Metropolitan Equity, observed that “Gautreaux stands for the proposition that the benefit of fair housing entails mobility to areas of (suburban) high opportunity.”<sup>204</sup>

Even relying on the AFFH provisions of Section 808, which unlike the rest of the Fair Housing Act does not include an explicit private right of action, plaintiffs have had substantial success in court. In *Thompson v. U.S. Department of Housing and Urban Development*, for example, a Maryland district judge found that federal regulators had failed to further the Act’s policies by not considering a regional approach to desegregation of public housing under the FHA’s requirement.<sup>205</sup> Highlighting regional solutions, the judge concluded that “[g]eographic considerations, economic limitations, population shifts, etc. have rendered it impossible to effect a meaningful degree of desegregation of public housing by redistributing the public housing population of Baltimore City within the City limits.”<sup>206</sup>

HUD’s authority to enforce AFFH requirements in a rigorous and meaningful manner was addressed most forcefully in *County of Westchester v. U.S. Department of Housing and Urban Development*.<sup>207</sup> The Anti-Discrimination Center of Metropolitan New York brought an action under the False Claims Act against Westchester County asserting that the county had falsely certified its compliance with fair housing requirements, thereby accepting HUD funding to which it was not entitled.<sup>208</sup> Westchester argued that the Fair Housing Act did not obligate it to identify racial discrimination and segregation as impediments to “fair housing.”<sup>209</sup> The Court

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201. *Id.* at 285.

202. *Id.* at 284-85.

203. *Id.* at 286.

204. David D. Troutt, *Inclusion Imagined: Fair Housing as Metropolitan Equity*, 65 BUFFALO L. REV. 5, 39 (2017).

205. 348 F. Supp. 2d 398, 524 (D. Md. 2005) (affirming HUD’s rejection of the County’s analysis that it would affirmatively further fair housing).

206. *Id.* at 408.

207. 802 F.3d 413 (2d Cir. 2015).

208. *Id.* at 418.

209. United States *ex rel.* Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cty., 495 F. Supp. 2d 375, 383-84 (S.D.N.Y. 2007).

disagreed, ruling that a grantee of federal funds must consider impediments erected by race discrimination, and if such impediments exist, take appropriate action to overcome its effects.<sup>210</sup> The Second Circuit affirmed the lower court's opinion upon appeal, affirming HUD's authority to enforce AFFH based on criteria that considered, among other things, the exclusionary effect of local zoning ordinances, and to deny funding on that basis.<sup>211</sup>

#### D. The Role of Federal Administrative Enforcement

Administrative enforcement of MPOs' equity analyses is an important tool for advocates who hope to push agencies to address regional equity concerns. While there are only a few cases of administrative complaints dealing with equity analyses,<sup>212</sup> there are reasons why administrative complaints can provide an important avenue to addressing regional equity.

One notable administrative complaint involved a rail extension called the Oakland Airport Connector ("OAC"), a decades-old dream of regional planners to connect the BART system to the Oakland airport.<sup>213</sup> Original designs, approved by voters nine years earlier as part of a regional tax measure, included stops along the job-rich and heavily minority Hegenberger corridor.<sup>214</sup> However, budget cuts removed the intermediate stops, drastically reducing the benefits for the local community, while preserving all of the burdens of the new tracks which sat above ground on pilings, creating an eyesore and blocking views.<sup>215</sup> Furthermore, the complaint contended that the twelve-dollar round-trip price (double the cost of the existing airport shuttle) would make it unaffordable for the local community and for

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210. *Id.* at 387.

211. *Cty. of Westchester*, 802 F.3d at 422.

212. A Title VI complaint against the City of Beavercreek (Dayton, OH) involved administrative enforcement (though not equity analysis). Complainants alleged civil rights infringement arising from the failure to allow bus stops near a shopping center in suburban Beavercreek. Bus stops would serve urban Dayton RTA passengers, who are disproportionately minority and low income. FHWA investigated and found the complaint to have merit and ordered Beavercreek to allow the stops. See Letter from Ellis Jacobs, Att'y, Advoc. for Basic Legal Equal., Inc., to Title VI Program Coordinator, Off. of Civ. Rts., U.S. Dep't of Hous. & Urb. Dev. (Aug. 10, 2011), [http://www.lawolaw.org/images/stories/INTERNET/GET\\_INFO/beavercreek-lead-dot-complaint081111.pdf](http://www.lawolaw.org/images/stories/INTERNET/GET_INFO/beavercreek-lead-dot-complaint081111.pdf) [<https://perma.cc/5TPV-9MLV>].

213. See Complaint Under Title VI of the Civil Rights Act of 1964 and Exec. Order 12898, *Urban Habitat Program v. Bay Area Rapid Transit Dist.*, [http://www.publicadvocates.org/wp-content/uploads/fta\\_titlevi\\_complaint\\_09109\\_final.pdf](http://www.publicadvocates.org/wp-content/uploads/fta_titlevi_complaint_09109_final.pdf) [<https://perma.cc/5CHZ-WTR4>].

214. *Id.* at 3.

215. *Id.* at 6.

the airport workers who stood to benefit from the project.<sup>216</sup> In September 2009, Public Advocates filed a successful civil rights and environmental justice administrative complaint with the FTA on behalf of partners Urban Habitat, Genesis, and TransForm.<sup>217</sup>

The complaint alleged that in BART's rush to build the OAC, the agency did not produce a proper equity analysis for the project. BART instead relied on outdated project evaluations in unrelated Title VI analyses, which did not include this project.<sup>218</sup> The original project evaluated assumed a capital cost of around forty percent of the final projected cost, and a round-trip fare of only two dollars.<sup>219</sup> The complaint also contended that an investment in high-performance bus service was not fairly considered, and thus the environmental impact statement was without merit.<sup>220</sup>

The outdated project evaluation concluded that environmental justice communities near the project would not suffer any burdens from development induced by the investment.<sup>221</sup> However, FTA Circular 4702.1A requires an analysis of both the burdens and the benefits, and it was fairly clear that environmental justice communities would not reap any benefits from the investment.<sup>222</sup>

The FTA investigated the administrative complaint, and found it meritorious. It also determined that BART was out of compliance with a number of other Title VI and EJ requirements articulated in the FTA Title VI Circular, and required it to adopt and implement a comprehensive Corrective Action Plan.<sup>223</sup> A year earlier, MTC, the MPO serving the nine-county San Francisco bay area,<sup>224</sup> had allocated seventy million dollars in funding under the American Recovery and Reinvestment Act ("ARRA") to the OAC project.<sup>225</sup> Because of a

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216. *Id.* at 9.

217. *Id.* at 24.

218. *Id.* at 1.

219. *Id.* at 7.

220. *Id.* at 1.

221. *Id.* at 13.

222. *Id.* at 13.

223. See FED. TRANSIT ADMIN., SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT TITLE VI CORRECTIVE ACTION PLAN, ACTION PLAN ITEM 5.1 (2010), [https://www.bart.gov/sites/default/files/docs/Temp\\_Rollback\\_TitleVI\\_ExecSum.pdf](https://www.bart.gov/sites/default/files/docs/Temp_Rollback_TitleVI_ExecSum.pdf) [<https://perma.cc/L5Z5-H9Z7>].

224. See *About MTC*, METRO. TRANSP. COMM'N, <http://mtc.ca.gov/about> [<https://perma.cc/Z8GF-6W9L>].

225. Letter from Peter Rogoff, Adm'r, Fed. Transit Admin., to Steve Heminger, Exec. Dir., Metro. Trans. Comm'n, and Dorothy Dugger, Gen. Manager, S.F. Bay Area Rapid Transit Dist. (Feb. 12, 2010), [http://mtcwatch.com/pdffiles/2-10\\_FTA\\_MTC.html](http://mtcwatch.com/pdffiles/2-10_FTA_MTC.html) [<https://perma.cc/2LCX-E72Z>].

looming ARRA deadline, and BART's inability to ensure compliance in time to meet that deadline, the FTA required MTC to reallocate those funds, which went instead to maintain existing transit service by bus and rail operators throughout the region.<sup>226</sup> The decision was the first time a Title VI complaint resulted in the withdrawal of federal stimulus funds.<sup>227</sup> While the case involved a smaller geography than region-wide plans or investments, the fate of OAC had region-wide implications because it was part of the regional transit expansion program at the heart of the then ongoing *Darensburg* complaint against MTC and was typical of high-priced rail expansion projects favored over lower cost bus investments.<sup>228</sup>

In 2003, the U.S. Commission on Civil Rights ("USCCR") studied EJ Executive Order and Title VI enforcement by HUD, DOT, and other federal agencies, and found that they fell short of fulfilling basic directives.<sup>229</sup> The Obama Administration initiated a process to coordinate and invigorate environmental justice enforcement throughout the federal government, which included a commitment by the Department of Justice ("DOJ") Civil Rights Division to provide legal and technical assistance and to litigate "when informal resolution or fund termination are not viable solutions."<sup>230</sup> There is good reason to believe the Trump Administration will roll back this process. With the important role that administrative enforcement now plays in addressing metropolitan inequality, many of the recent gains will likely stall.

#### IV. THE MPO EQUITY ANALYSIS IN PROMISE AND PRACTICE

MPOs are subject to federal requirements to conduct analyses of the impacts of their plans on populations and communities protected by both Title VI and the EJ Executive Order and to take affirmative

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226. *Id.*

227. *Id.* Public Advocates also filed a second administrative complaint with FTA in June 2010, this time against MTC. Plaintiffs asserted that MTC had failed to ensure that BART, its subrecipient of federal funds, was in compliance with Title VI, and also that MTC was in violation of its obligation to certify that the metropolitan planning process complied with Title VI. *See* Complaint Under Title VI of the Civil Rights Act of 1964 and Exec. Order 12898, *supra* note 213.

228. *See* text accompanying *supra* notes 152-58.

229. U.S. COMM'N ON CIV. RTS., NOT IN MY BACKYARD: EXECUTIVE ORDER 12,898 AND TITLE VI AS TOOLS FOR ACHIEVING ENVIRONMENTAL JUSTICE (2003), <http://www.usccr.gov/pubs/envjust/ej0104.pdf> [<https://perma.cc/VE8M-YQRH>].

230. *See* Daria E. Neal, *Recent Developments in Federal Implementation of Executive Order 12,898 and Title VI of the Civil Rights Act of 1964*, 57 *How. L.J.* 941, 942 (2014).



steps to address inequities.<sup>231</sup> In principle, the Title VI analysis of the plan will serve to support the required Title VI certification.<sup>232</sup> DOT requires a separate Environmental Justice analysis to “identify and address” disproportionate adverse impacts on low-income and minority populations. Despite some differences, the Title IV Environmental Justice analyses of the LRTP share the same fundamental purpose: “to assess the benefit and impact distributions of the investments included in the plan,”<sup>233</sup> in order to ensure that racial and ethnic minorities (Title VI) and low-income and minority populations (Environmental Justice Order) receive an equitable distribution of benefits without bearing an unfair share of burdens.<sup>234</sup> Due to the range of impacts of the LRTP, planning processes must be meaningful and deliberate. Explicit categories of analysis are important, as is identification of concrete goals. Current regulatory requirements help promote this kind of analysis, but they should go further. This Part focuses on the six functions of an equity analysis and how they are implemented in practice.

#### A. Equity Analysis in Promise

As planners and advocates work to ensure the enforcement of MPO equity requirements, it is critical to set out what a robust equity

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231. See, e.g., UPDATED DOT ENVIRONMENTAL JUSTICE ORDER 5610.2(A), *supra* note 94, at § 7(a) (“[E]ngaging in *environmental justice analysis* under Federal transportation planning and NEPA provisions will not necessarily satisfy Title VI requirements. Similarly, a *Title VI analysis would not necessarily satisfy environmental justice requirements*, since Title VI does not include low-income populations. Moreover, Title VI applies to all Federally-funded projects and activities, not solely those which may have adverse human health or environmental effects on communities.”) (emphasis added); Memorandum from Kenneth R. Wykle, Adm’r, Fed. Highway Admin., and Gordon J. Linton, Adm’r, Fed. Transit Admin., to the FHWA Div. Adm’rs and FTA Reg’l Adm’rs (Oct. 7, 1999) [hereinafter FHWA & FTA Memorandum], [https://cms.fta.dot.gov/sites/fta.dot.gov/files/docs/Implementing\\_TitleVI\\_Requirements.pdf](https://cms.fta.dot.gov/sites/fta.dot.gov/files/docs/Implementing_TitleVI_Requirements.pdf) [<https://perma.cc/U8BC-7TVK>] (requiring “an analytical process . . . to assess *the benefit and impact distributions of the investments included in the plan*”) (emphasis added); FTA CIRCULAR 4702.1B, *supra* note 84, at ch. V, § 2(d)-(e) (requiring MPOs to “analyze the impacts of the distribution of State and Federal funds in the aggregate for public transportation purposes” on “minority and non-minority populations” in order to identify “any disparate impacts on the basis of race, color, or national origin”).

232. As noted above, each MPO is required to “certify . . . that the metropolitan transportation planning process is being carried out in accordance with . . . Title VI of the Civil Rights Act of 1964.” 23 C.F.R. § 450.334(a)(3); see also FTA CIRCULAR 4702.1B, *supra* note 84, at ch. VI, § 3.

233. See, e.g., FHWA & FTA Memorandum, *supra* note 231.

234. See FED. HIGHWAY ADMIN., ENVIRONMENTAL JUSTICE REFERENCE GUIDE 1 (2015) [hereinafter ENVIRONMENTAL JUSTICE REFERENCE GUIDE]; FTA CIRCULAR 4703.1, *supra* note 179, at ch. I.

analysis would look like if the spirit of the federal requirements was upheld. Such an approach would serve the following functions: (1) prophylactically prevent unfair decisions from being made or carried out; (2) support active reversals of discrimination; (3) facilitate administrative enforcement; (4) improve civic engagement; (5) improve plan outcomes; and (6) aid local jurisdictions in complying with AFFH.

### 1. *Prophylactic Function*

Preventing unfair decisions at the front end of metropolitan planning is critically important, not only because legal remedies at the back end are not guaranteed, but also due to the practical difficulty of reversing the durable impacts of transportation investments, many of which physically alter the built environment. Further, the mere adoption of a long-range plan, before any of its projects are built, sends signals to private developers and land speculators about intended infrastructure that can contribute to harmful impacts in the near term. For instance, in 2013 MTC adopted PBA, a long-range plan. By signaling that the transportation investment would focus on “priority development areas” near transit, areas that overlapped extensively with historical low-income communities of color that the agency identified as “Communities of Concern,”<sup>235</sup> the agency acknowledged, albeit indirectly, that the investment would contribute to increased risk of displacement.<sup>236</sup> Because of the almost immediate consequences of announcing a plan, adequate equity analysis must occur at the earliest possible stage, when alternatives are being developed and assessed.

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235. METRO. TRANSP. COMM’N & ASS’N OF BAY AREA GOV’TS, DRAFT PLAN BAY AREA: DRAFT EQUITY ANALYSIS REPORT 4-18 (2013), [http://www.planbayarea.org/sites/default/files/pdf/Draft\\_Plan\\_Bay\\_Area/Draft\\_Equity\\_Analysis\\_Report.pdf](http://www.planbayarea.org/sites/default/files/pdf/Draft_Plan_Bay_Area/Draft_Equity_Analysis_Report.pdf) [<https://perma.cc/CL57-MDUV>].

236. See Memorandum from Steve Heminger, Exec. Dir., Metro. Transp. Comm’n, to MTC Plan. Comm. and the Ass’n of Bay Area Gov’ts Admin. Comm. (Oct. 7, 2016) (on file with authors). Under the heading “Why are Communities of Concern performing better on select performance targets?” MTC’s executive director noted:

With regards to displacement risk, the Draft Preferred Scenario did not concentrate growth as significantly in highly-populated Communities of Concern—such as those in East Oakland and East San Jose—as extensively as other scenarios like Big Cities. This reduced the risk of gentrification of those locations and resulted in much lower displacement risk as compared to areas outside Communities of Concern.

See *id.*

## 2. *Support Creation of an Action Plan*

In addition to avoiding discriminatory programs, plans must also actively invest in programs to reverse inequities. The EJ Executive Order, with its “identify *and address*” language recognizes the connection between the analysis and the crafting of an action plan.<sup>237</sup> As does the HUD rule on affirmatively furthering fair housing, which requires “[s]trategies and actions [which] must affirmatively further fair housing,”<sup>238</sup> and thereby makes that connection even more explicitly.

## 3. *Facilitate Administrative Enforcement*

MPO planning should also facilitate administrative enforcement. Sadly, where administrative enforcement has been most likely to succeed has been in cases in which the local agency altogether failed to comply with a clearly-articulated requirement, as was the case in BART’s OAC project, discussed above in Section III.D.<sup>239</sup> Because “anything goes” in terms of equity analyses, a complainant needs to show complete disregard for the process to find remedy.

A more uniform and rigorous planning and equity analysis process, however, would allow local stakeholders to enforce standards more easily by illustrating clearly (a) whether the MPO appropriately identified the most significant contributors to inequality in its region (including those of greatest concern to the low-income and minority communities whose concerns are required to be sought out and considered in the planning process) and (b) whether the MPO had committed to actions appropriately tailored to overcoming or significantly reducing those contributors. Since state departments of transportation are responsible for monitoring the Title VI compliance of MPOs, clear guidance that serves this function would also improve oversight at the state level.<sup>240</sup>

## 4. *Improve Civic Engagement*

As previously mentioned, federal law explicitly requires MPO public participation plans to “describe explicit procedures, strategies,

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237. See UPDATED DOT ENVIRONMENTAL JUSTICE ORDER 5610.2(A), *supra* note 94, at § 7(b) (emphasis added).

238. 24 C.F.R. § 5.154(d)(5). This was already required by former HUD regulation, 24 C.F.R. § 91.225(a)(1).

239. See text accompanying *supra* notes 213-20. One counter-example is FHWA’s enforcement action against the city of Beavercreek, Ohio, based on its discriminatory refusal to allow the siting of bus stops on its streets. See Letter from Ellis Jacobs, *supra* note 212.

240. See *generally* FTA CIRCULAR 4702.1B, *supra* note 84.

and desired outcomes” for “[s]eeking out and considering the needs of those traditionally underserved by existing transportation systems.”<sup>241</sup> MPOs must also describe the steps taken to identify and consider the mobility needs of minority populations.<sup>242</sup>

Civic engagement is critical to address the historic and ongoing exclusion of the voices of residents of low-income communities and communities of color.<sup>243</sup> Whereas transportation planning practice has historically emphasized automobile congestion mitigation, the concerns of communities of color require analyses, which may differ from those typically undertaken.<sup>244</sup> Public engagement, in itself, can improve feelings of trust and a shared commitment to plan implementation. MTC’s analysis of displacement risk during Plan Bay Area, a result of the Six Wins engagement, demonstrated the superior performance of the EEJ scenario on that outcome and substantial shortcomings in the agency’s preferred plan. As an added benefit, high-quality equity analyses can also engage the broader region in discussions about ongoing inequity and its consequences.<sup>245</sup>

### 5. Improve Plan Outcomes

Observers of urban and regional planning have long asserted that more inclusive planning processes incorporating the views and experiences of a diverse public make for better outcomes.<sup>246</sup> Again,

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241. 23 C.F.R. § 450.316(a)(1)(vii).

242. FTA CIRCULAR 4702.1B, *supra* note 84, at ch. VI, § 2.

243. *See generally* Rothstein, *supra* note 3 (describing white domination of residential zoning policies that excluded minorities).

244. Susan Handy, *Regional Transportation Planning in the US: An Examination of Changes in Technical Aspects of the Planning Process in Response to Changing Goals*, 15 TRANSPORT POL’Y 113, 113-15 (2008) (describing the historical emphasis of transportation planning on automobile performance). Among such concerns are environmental health, spatial mismatch, displacement risk, public transit accessibility, physical access for disabled persons, and combined housing and transportation cost burdens. *See, e.g.*, ALEX KARNER ET AL., WE CAN GET THERE FROM HERE: NEW PERSPECTIVES ON TRANSPORTATION EQUITY 18-24 (Nat’l Ctr. for Sustainable Transp. ed., 2016); Karen Lucas & Peter Jones, *Social Impacts and Equity Issues in Transport: An Introduction*, 21 J. TRANSPORT GEOGRAPHY 1, 1-3 (2012).

245. For example, the EEJ scenario (described in *supra* Section II.D) embodied a land use plan that increased the amount of affordable housing in high opportunity suburban areas. This allowed low- and middle-income commuters to live closer to their jobs, reducing environmental impacts and overall congestion. These results, demonstrating that the entire region prospers when equity is a guiding planning principle, can build support for unfamiliar equity-promoting policies.

246. Innes and Booher cite the potential for improved decisions as a result of the incorporation of “local knowledge” as one important purpose of public participation in planning. *See* Judith E. Innes & David E. Booher, *Reframing Public Participation: Strategies for the 21st Century*, 5 PLAN. THEORY & PRAC. 419, 422 (2004). Nicholas

the experience of the EEJ in the Bay Area makes the point: developed by community groups across the region, the scenario outperformed the official plan not only in better meeting the needs of underserved community residents, but on a host of other measures, including reduction of greenhouse gas emissions and local street and road repaving.<sup>247</sup>

Improved plan outcomes include environmental health and sustainability because underserved residents' greater dependence on public transit and affordable housing near entry-level jobs makes them a natural constituency for climate-friendly policies and investments. Those solutions also promote economic growth and sustainable growth across metropolitan regions, which prosper in proportion to their reduction of regional inequality. Studies on regional equity conducted over decades have demonstrated the superior economic and health outcomes that can accrue when regions pursue equity-promoting policies. Such benefits are driven by increased social capital, access to a more diverse labor pool, reduced political polarization, knowledge-sharing, and a sense of shared prosperity, among other drivers.<sup>248</sup>

#### 6. *Aid Local Jurisdictions in Complying with Their AFFH Obligations*

Finally, through robust equity analyses MPOs can achieve the regional coordination now strongly encouraged by HUD under its 2015 rule on AFFH and jointly supported by the Secretaries of HUD, DOT, and the Department of Education. The MPO, a regional entity whose plans affect transportation, housing, and education, is best situated to promote more comprehensive standards to its equity analysis, in spite of gaps in regulatory guidance from the DOT.

### **B. Equity Analyses: Federal Guidance**

This Section focuses on guidance that the DOT has, and has not, provided to MPOs (in the absence of implementing the AFFH

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Freudenberg theorized that enhanced participation and community capacity (including qualitative factors such as leadership, cohesion, and sense of community, among others) can result in more equitable environmental health outcomes. See Nicholas Freudenberg et al., *Strengthening Community Capacity to Participate in Making Decisions to Reduce Disproportionate Environmental Exposures*, 101 AM. J. PUB. HEALTH S123, S125-S129 (2011).

247. Marcantonio & Karner, *supra* note 97, at 12.

248. See, e.g., BENNER & PASTOR, *supra* note 18; CHRIS BENNER & MANUEL PASTOR, EQUITY, GROWTH, AND COMMUNITY: WHAT THE NATION CAN LEARN FROM AMERICA'S METRO AREAS 10-12 (2015).

requirement of the Fair Housing Act) to support the development and implementation of the equity analyses described above in Section IV.A. Various shortcomings reviewed here have contributed to the failure of MPOs across the country to conduct and follow through on robust equity analyses that function in the manner described in the previous Section. The joint FHWA/FTA Memorandum on MPO Planning, while it incorporates requirements for a public participation plan and Title VI certification, is silent with respect to the requirement of MPOs to conduct and respond to an equity analysis of LRTPs or TIPs. Thus, the most explicit bases for an equity analysis are sub-regulatory.<sup>249</sup>

1. *1999 FHWA/FTA Title VI Memo*

To clarify how the requirements of Title VI and the EJ Executive Order apply to MPO planning, FHWA and FTA jointly issued the 1999 Memorandum titled “Implementing Title VI Requirements in Metropolitan and Statewide Planning.”<sup>250</sup> The Memorandum clarifies that Title VI and EJ Executive Order requirements apply to project evaluation as well as to plans and planning processes.<sup>251</sup>

According to the Memorandum, MPOs must incorporate an analytical process to assess the benefit and impact distributions of the investments envisioned in a long-range transportation plan.<sup>252</sup> This analytical process, more specifically, should be geared to assessing the regional benefits and burdens of transportation system investments for different socio-economic groups, and must be backed by a data collection process and analysis effort.<sup>253</sup>

The memo also addresses the scope of FHWA and FTA’s main oversight role. Though MPOs are left to self-certify compliance with Title VI, the two agencies retain the power to periodically review MPO self-certifications.<sup>254</sup> FHWA and FTA conduct a certification review at the conclusion of each MPO planning cycle. The agencies determine whether MPOs have, among other things, “[e]nsured that members of minority communities are provided with full opportunities to engage in the transportation planning process” and

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249. See, e.g., UPDATED DOT ENVIRONMENTAL JUSTICE ORDER 5610.2(A), *supra* note 94, at 8; FHWA ENVIRONMENTAL JUSTICE ORDER 6640.23A, *supra* note 178; FTA CIRCULAR 4702.1B, *supra* note 84, at ch.VI; FHWA & FTA Memorandum, *supra* note 231.

250. FHWA & FTA Memorandum, *supra* note 231.

251. *Id.*

252. *Id.*

253. See, e.g., *id.*

254. See FTA CIRCULAR 4702.1B, *supra* note 84, at ch. VI.

“[m]onitored the activities of subrecipients with regard to Title VI compliance, where the MPO passes funds through to subrecipients.”<sup>255</sup> FHWA and FTA also determine whether an MPO’s criteria for certification appear reasonable, are well documented, include responses to public comments, and address Title VI requirements.<sup>256</sup>

While the language of the 1999 memo is strong in its explicit requirement to analytically assess the benefit and impact distributions of investments,<sup>257</sup> it offers no specific guidance on how to conduct such an assessment, nor does it specify the importance of taking action to ensure an equitable distribution of benefits and burdens.

## 2. FTA Title VI Circular

In 2007, FTA issued a major revision of its Title VI guidance, in Circular 4702.1A.<sup>258</sup> The Circular, consistent with the 1999 Memorandum, requires that MPOs have an analytic basis for certifying their compliance with Title VI.<sup>259</sup> In language that echoed the EJ Executive Order’s command to “identify and address,” it requires that such analytic basis “identif[y] the benefits and burdens of metropolitan transportation system investments for different socioeconomic groups” and “identif[y] imbalances and respon[d] to the analyses produced.”<sup>260</sup>

Despite the clarity of the 2007 Circular in regards to MPO requirements, FTA omitted much of its stronger language when it reissued the Circular in 2012.<sup>261</sup> While the 2012 Circular added new guidance for transit agencies regarding fare and service changes, it weakened the guidance relating to MPOs. The Circular no longer

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255. *Id.* at ch. VI, § 3(c)-(d).

256. *See Transportation Management Area Planning Certification Review Primer*, TRANSP. PLAN. CAPACITY BUILDING, [https://www.planning.dot.gov/documents/primer/intro\\_primer.asp#2.11](https://www.planning.dot.gov/documents/primer/intro_primer.asp#2.11) [<https://perma.cc/7QMM-S9RQ>].

257. *See, e.g.*, FHWA & FTA Memorandum, *supra* note 231 (requiring “an analytical process . . . to assess *the benefit and impact distributions of the investments included in the plan*”) (emphasis added).

258. FED. TRANSIT ADMIN., CIRCULAR 4702.1A, TITLE VI AND TITLE VI-DEPENDENT GUIDELINES FOR FEDERAL TRANSIT ADMINISTRATION RECIPIENTS, at ch. VII-1 (2007) [hereinafter FTA CIRCULAR 4702.1A]. The first version of the circular was published in 1988. FED. TRANSIT ADMIN., CIRCULAR 4702.1, TITLE VI AND TITLE VI-DEPENDENT GUIDELINES FOR FEDERAL TRANSIT ADMINISTRATION RECIPIENTS (1988).

259. *See* FTA CIRCULAR 4702.1A, *supra* note 258.

260. *Id.*

261. *See* FTA CIRCULAR 4702.1B, *supra* note 84, at ch. VI. The amendment process followed in the wake of FTA’s groundbreaking administrative decision in the case of the BART Oakland Airport Connector. *See supra* Section III.D.

mentions the need for an “analytic basis” to support Title VI self-certification. It does, however, require an MPO “in its regional transportation planning capacity,” to “submit to the State [department of transportation] as the primary recipient, and also to FTA” a Title VI Program incorporating five required analyses: (1) the general Title VI program requirements; (2) demographic profiling that identifies locations of minority populations in the aggregate; (3) minority access and mobility evaluations; (4) demographic mapping that overlays the percent minority and non-minority populations as identified by Census or American Community Survey data and charts analyzing impacts of state and federal funds; and (5) identification of disparate impacts on the basis of race, color, or national origin, any substantial legitimate justification for policies that result in such impacts, and possible alternatives having a less discriminatory impact.<sup>262</sup>

The second requirement for demographic profiling is important as a supplement to the requirement in the MPO Planning Regulation that the public participation plan involve communities traditionally underserved by existing transportation systems, such as low-income and minority households.<sup>263</sup> While the fourth and fifth analyses—demographic mapping and disparate impacts, respectively—are weak substitutes for meaningful guidance on the conduct of a meaningful Title VI analysis, they at least have the virtue of tailoring the analysis to the disparate impact burden-shifting test of *Inclusive Communities*.<sup>264</sup> The Circular’s disparate impact guidance stops short of requiring an assessment of alternatives more generally, nor does it even require the adoption of a less-discriminatory alternative.<sup>265</sup>

State departments of transportation are responsible for monitoring Title VI compliance of the MPOs in their states.<sup>266</sup> However, if the MPO passes planning funds through to one or more subrecipients, the MPO is responsible for ensuring those subrecipients comply with

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262. See FTA CIRCULAR 4702.1B, *supra* note 84, at ch. VI.

263. 23 C.F.R. § 450.316(a)(1)(vii) (2017).

264. Tex. Dep’t of Hous. and Cmty. Affairs v. Inclusive Cmty. Project, 135 S.Ct. 2507, 2514-15 (2015).

265. FTA CIRCULAR 4702.1B, *supra* note 84.

266. *Id.* at ch. VI, § 3 (“Since States ‘pass through’ planning funds to the MPO, MPOs are subrecipients of the State and must submit Title VI compliance reports for planning activities to the State in order to assist the State in demonstrating compliance with Title VI. The State is thus responsible for monitoring the Title VI compliance of the MPO for those activities for which the MPO is a subrecipient.”). Some states do simultaneous reviews alongside federal reviews. See, e.g., OR. DEP’T OF TRANSP., TITLE VI GUIDANCE FOR TRANSPORTATION PLANNING 4-6 (2009).



Title VI.<sup>267</sup> In its capacity as a primary recipient, the MPO must also describe to FTA how it assists subrecipients, including in their efforts to service minority populations.<sup>268</sup> The Title VI Circular also incorporates requirements relating to facilitating involvement for residents with limited English proficiency).<sup>269</sup>

Overall, the 2012 Circular represents a step backward from the greater clarity of both the 1999 Memorandum and the 2007 Circular. In particular, the elimination of language explicitly requiring MPOs to rest their Title VI self-certification on a valid “analytical basis” has condoned systemic abuse, including the complete failure to take race and ethnicity into account.<sup>270</sup>

### 3. Agency Environmental Justice Orders

The EJ Orders of the DOT and its operating administration, FHWA, incorporate much of the EJ Executive Order.<sup>271</sup> Notably, FHWA’s order tracks the language of the EJ Executive Order closely. Yet, FHWA’s order fails to require the EJ Executive Order’s broader analysis of “equitable distribution of benefits and burdens.” Moreover, nothing in either Order directly addresses MPOs.

Still, the similarities between the two are important. The DOT defines “minority”<sup>272</sup> and low-income.<sup>273</sup> “Adverse effects” are

267. FTA CIRCULAR 4702.1B, *supra* note 84.

268. *Id.*

269. *Id.* at ch. III, § 8 (“The content and considerations of Title VI, the Executive Order on LEP, and the DOT LEP Guidance shall be integrated into each recipient’s established public participation plan or process . . . .”); *see also* Exec. Order No. 13,166, 65 Fed. Reg. 159 (Aug. 16, 2000).

270. For further discussion, see *infra* Section IV.C.2.

271. *See generally* FHWA ENVIRONMENTAL JUSTICE ORDER 6640.23A, *supra* note 178; UPDATED DOT ENVIRONMENTAL JUSTICE ORDER 5610.2(A), *supra* note 94. The FTA has also issued an Environmental Justice Circular, but it does not prescribe requirements. *See* FTA CIRCULAR 4703.1, *supra* note 179, at ch. I (“This Circular is designed to provide a framework to assist you as you integrate principles of environmental justice into your transit decision-making process. The Circular contains recommendations for State DOTs, MPOs and transit providers on (1) how to fully engage EJ populations in the transportation decision-making process; (2) how to determine whether EJ populations would be subjected to disproportionately high and adverse human health or environmental effects of a public transportation project, policy, or activity; and (3) how to avoid, minimize, or mitigate these effects.”).

272. “Minority” means a person who is: African American; Hispanic or Latin; Asian American; American Indian and Alaskan Native; or Native Hawaiian and other Pacific Islander. *See* UPDATED DOT ENVIRONMENTAL JUSTICE ORDER 5610.2(A), *supra* note 94, at app. § 1(c).

273. “Low-Income means a person whose median household income is at or below the Department of Health and Human Services poverty guidelines.” *Id.* at app. § 1(b).

defined as “the totality of significant individual or cumulative human *health or environmental effects, including interrelated social and economic effects.*”<sup>274</sup> Included in that definition are “isolation, exclusion or separation of minority or low-income individuals within a given community or from the broader community,” as well as “the denial of, reduction in, or *significant delay in the receipt of, benefits . . .*”<sup>275</sup> It defines “[d]isproportionately high and adverse effect” as one that is: “(1) is *predominately borne* by a minority population and/or a low-income population, or (2) will be suffered by the minority population and/or low-income population and is *appreciably more severe or greater in magnitude* than the adverse effect that will be suffered by the non-minority population and/or non-low-income population.”<sup>276</sup>

### C. Equity Analyses in Practice

The lack of clear federal guidance has resulted in an increasing number of analyses that fail to meet the requirements of a robust equity analysis highlighted above in Section IV.A.<sup>277</sup> This Section describes the approach that agencies typically undertake and its limitations.

#### 1. Emergence of a Consistent Approach

MPOs tend to approach the analysis similarly, despite the relatively wide latitude they are afforded. In part, the approach taken by an agency depends upon their available resources. Larger agencies with well-developed travel demand models are likely to employ them in their analyses, while smaller agencies might rely on alternative methods ranging from the visual inspection of maps to blanket statements about the equitability of a particular plan or project.<sup>278</sup> The use of more quantitative or model-based methods does not necessarily produce an analysis that provides a clear picture of the equity impacts of a particular plan, however, and smaller agencies

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274. *Id.* at app. § 1(f) (emphasis added).

275. *Id.* (emphasis added).

276. *Id.* at app. § 1(g) (emphasis added).

277. See Alex Karner & Deb Niemeier, *Civil Rights Guidance and Equity Analysis Methods for Regional Transportation Plans: A Critical Review of Literature and Practice*, 33 J. TRANSP. GEOGRAPHY 126, 128-31 (2013).

278. Alex Karner, *Planning for Transportation Equity in Small Regions: Towards Meaningful Performance Assessment*, 52 TRANSPORT POL'Y 46, 48-50 (2016) (assessing different equity analysis practices in a sample of small California MPOs).

have the potential to produce innovative analyses using census data, for example.<sup>279</sup>

A three-step process for equity analysis has become popular among agencies with a travel demand model. The process compares existing conditions or expected plan performance for “target” and reference populations. It is thought that performance outcomes observed for the target population are representative of those actually or likely to be faced by that population. The three steps are: (1) identifying target populations or communities; (2) calculating performance measures (benefits and burdens); and (3) assessing equity by comparing measures between communities and reference populations.<sup>280</sup>

First, to identify target populations or communities, agencies often use a “threshold” approach where geographic units, such as transportation analysis zones (“TAZ”) or census tracts, are categorized as the target population if they exceed a threshold concentration of the demographic group.<sup>281</sup> For example, where the threshold is thirty percent, any TAZ with more than thirty percent low-income people would be a target community. Other approaches exist that are neither quantitative nor spatial.<sup>282</sup>

Second, performance measures typically reflect either the benefits or burdens of transportation projects and plans.<sup>283</sup> The benefits of transportation investments have almost universally been defined to encompass accessibility, and burdens can include environmental costs like air and water pollution, as well as other amenity costs like noise and visual impacts.<sup>284</sup>

In the third and final step, a final equity determination is made based on an assessment of the expected effect of a plan, project, or program on the target demographic groups.<sup>285</sup> Such assessments can vary in the degree of their ambitions.<sup>286</sup> A weak assessment might simply compare changes in outcomes for each demographic group of interest, for example measuring the percentage by which the benefits

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279. *Id.* at 52-53.

280. Karner & Niemeier, *supra* note 277, at 128.

281. *Id.*

282. *See, e.g.*, Alex Karner & Jonathan London, *Rural Communities and Transportation Equity in California’s San Joaquin Valley*, 2452 *TRANSP. RES. REC.* 90, 91 (2014); Dana Rowangould et al., *Identifying Environmental Justice Communities for Transportation Analysis*, 88 *TRANSP. RES. PART A* 151, 154 (2016).

283. Karner & Niemeier, *supra* note 277, at 128.

284. *Id.*

285. *Id.*

286. *Id.*

and burdens change for each demographic group. A stricter assessment might require that performance for the underserved population improve at a rate that exceeds that of the reference population.

The three-step approach is implemented in a variety of ways because of the many variables and analytical judgment involved. Outcomes depend on the way communities are defined, the performance measures set, and the goals of the equity assessment.

## 2. *Continued Methodological Deficiencies*

These standard approaches have been subjected to wide-ranging critiques within the academic literature.<sup>287</sup> A key question addressed in the literature is the extent to which the results of a given equity analysis actually reflect transportation conditions faced by disadvantaged populations. The question is complicated by the wide array of potential analytical approaches, metrics, and methods that agencies employ. There are three longstanding issues related to equity analysis practice: community definition, the long-range focus of typical equity analyses, and the failure to articulate a normative equity standard or clear decision rule that would identify when a plan would be judged fair or just.

First, the approach to community definition discussed above embodies a number of shortcomings. Fundamentally, its focus is on identifying *communities* (e.g., low-income neighborhoods) rather than *populations* (e.g., low-income people). This means that members of protected populations who reside outside identified communities would not be included in calculated performance metrics while non-protected populations living within identified geographies would be included. Some protected populations tend to concentrate spatially, so community definitions might be of some use; however, performance metrics calculated for groups likely to be widely dispersed (e.g., seniors, single-parent households, bus riders, or low-income people) would not be accurate.<sup>288</sup> Other approaches that combine multiple protected populations into a single community definition are even less likely to result in accurate measures.<sup>289</sup>

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287. See generally Karner, *supra* note 278, at 46-54; Karner & Niemeier, *supra* note 277, at 126-34; Karel Martens et al., *A Justice-Theoretic Approach to the Distribution of Transportation Benefits: Implications for Transportation Planning Practice in the United States*, 46 TRANSP. RES. PART A 684 (2012).

288. Jen Duthie et al., *Environmental Justice Analysis: Challenges for Metropolitan Transportation Planning*, 2013 TRANSP. RES. REC. 8, 11 (2007).

289. For example, the San Francisco Bay Area's PBA identified communities of concern using eight different "disadvantage factors" that included minority, low-

Second, the long-range focus of most MPO planning means that many MPOs model the effects of transportation investments to generate the data used for their Title VI and EJ Executive Order analyses. This raises serious concerns because MPO models cannot currently predict, with reasonable certainty, the future locations of racial or ethnic groups at a neighborhood scale. Further, observed differences in travel behavior between racial and ethnic groups are not used as inputs to travel demand models.<sup>290</sup> This is particularly problematic in the U.S. where racial demographics have shifted dramatically in just ten years.<sup>291</sup> This colorblind approach cannot comply with Title VI and the DOT EJ Order, which require a determination of whether the LRTP and its investments are fair to minority populations defined by “race, color or national origin.”<sup>292</sup>

Finally, determining whether there is a discriminatory or disproportionately high and adverse effect on federally protected populations ultimately comes down to interpretation. In 2014, Martens and Golub reviewed the equity analysis practice of the ten largest MPOs in the United States.<sup>293</sup> They focused on whether and how the equity assessments accounted for accessibility changes, the time periods considered, and whether any normative standards were employed in the assessment of equity.<sup>294</sup> The study found that MPOs rarely justified their analytical choices, described their methods in explicit detail, or provided straightforward interpretations of their results. Some agencies produced voluminous reports with

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income, senior, and zero-vehicle populations, among others. This approach virtually ensures that calculated performance metrics will not represent the conditions faced by any one of the constituent populations. *See* METRO. TRANSP. COMM’N, PLAN BAY AREA: TECHNICAL SUMMARY OF PREFERRED SCENARIO EQUITY ANALYSIS METHODOLOGY 2, 4-6 (2012).

290. *See* Staff Memorandum, from Metro. Transp. Comm’n, to Equity Working Grp. (Sept. 6, 2011) (on file with authors).

291. According to Census 2000 and 2010 results, many California cities lost large numbers of their African American populations over that period; these range from a low of twelve percent in Los Angeles to a high of twenty-four percent in Oakland and Richmond. *See* STEVEN G. WILSON ET AL., BUREAU OF THE CENSUS, U.S. DEP’T OF COM., PATTERNS OF METROPOLITAN AND MICROPOLITAN POPULATION CHANGE: 2000 TO 2010, at 46-48 (2012), <https://www.census.gov/content/dam/Census/library/publications/2012/dec/c2010sr-01.pdf> [<https://perma.cc/EB8S-6VFK>]. Large shifts in the racial composition of cities and neighborhoods should be expected over the life of an RTP. *See id.*

292. *See* UPDATED DOT ENVIRONMENTAL JUSTICE ORDER 5610.2(A), *supra* note 94.

293. Karel Martens & Aaron Golub, A Fair Distribution of Transportation Benefits: Interpreting Civil Rights Regulations for Transportation Investment Programs (2014) (unpublished working paper) (on file with authors).

294. *Id.*

sophisticated analyses covering a wide range of equity concerns while others presented only minimal analyses of accessibility impacts.<sup>295</sup> Even when more explicitly employed, decisions about equity were based on a “proportionality” criterion, wherein a population group was judged to receive a fair share of the benefits of the plan if they received a share equivalent to their share of the overall population.<sup>296</sup> But such a criterion ignores longstanding legacies of discrimination and foregone benefits. A more appropriate “gap closing” mode of analysis would identify existing disparities and seek to close them.<sup>297</sup>

## V. REFORMS NEEDED

Strong, clear guidance from the DOT, akin to HUD’s AFFH rule, is needed to ensure that MPOs meet their affirmative obligation to identify and address inequities. Given likely changes in federal practice and oversight under the Trump Administration, especially in the areas of enforcement, improvement will need to come from the local level. Advocates with their state legislatures and state departments of transportation should lead the way by adopting their own statutes and regulatory guidance for MPOs.<sup>298</sup> Further, individual MPOs have the power to act on their own. This final Part proposes three kinds of analyses, keyed to each of the three drivers of regional equality identified in Part II: improvements in governance, access to opportunities, and the distribution of the benefits and burdens of regional investments.

### A. Achieving Fair Governance

MPOs should be required to analyze the equity of their governance by quantifying the relative voting power of minority residents. As previously mentioned, MPO boards are generally constituted based on one-government, one-vote structures, or more complex schemes that incorporate disparities associated with unelected representation of cities, regardless of size. This often results in boards that lack racial and ethnic diversity relative to the region’s population.<sup>299</sup>

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295. *Id.*

296. *Id.*

297. *Id.*

298. *See, e.g.*, Assemb. B. 686, 2017-18 Leg., Reg. Sess. (Cal. 2017) (introducing a state analogue to the HUD final rule on AFFH). Others already in place are California Government Code § 11135 and the California Environmental Quality Act (“CEQA”). *See generally* CAL. GOV’T CODE § 11135 (West 2017); CAL. PUB. RES. CODE § 21000 (West 2017).

299. *See supra* Part II; *see also* THOMAS W. SANCHEZ, METRO. POLICY PROGRAM, BROOKINGS INST., AN INHERENT BIAS?: GEOGRAPHIC AND RACIAL-ETHNIC

Instead, MPO boards are typically dominated by small jurisdictions that are disproportionately more white and affluent than the region. This calls into question MPOs as legitimate democratic regional institutions.<sup>300</sup>

Ultimately, MPO reform should move to the direct election of board members so they are accountable to regional constituencies.<sup>301</sup> In the meantime, the DOT should require MPO equity analyses to include a component that quantifies and addresses voting power disparities. An administrative complaint brought to FTA in 2011 illustrates a useful methodology for analyzing such disparities. A Boston-based advocacy group, Alternatives for Community and Environment Inc. (“ACE”), filed the complaint, specifically challenging the representational structure of the Boston Region Metropolitan Planning Organization (“Boston MPO”) as discriminatory.<sup>302</sup> Typical of MPOs throughout the United States,<sup>303</sup> the composition of the Boston MPO’s board strongly favored suburban interests and severely disadvantaged the region’s African American and minority communities.

In support of its complaint, Boston ACE submitted an analysis of differences in voting power among jurisdictions represented in the MPO governing board, which had fourteen seats representing municipalities within its boundaries.<sup>304</sup> By dividing the number of votes per municipality by its population, Boston ACE calculated a measure of relative voting power. Suburban locations had much higher voting power than central areas like Boston and the “inner

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PATTERNS OF METROPOLITAN PLANNING ORGANIZATION BOARDS 12-13 (2006), [https://www.brookings.edu/wp-content/uploads/2016/06/20060124\\_mpos.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/20060124_mpos.pdf) [<https://perma.cc/LJ8L-THHZ>]. Sanchez studied fifty MPO’s from across the country and found that the racial and ethnic composition of MPO voting boards were very different from the metropolitan areas they represented. *See id.* While the metro areas were about forty percent nonwhite, only about twelve percent of board members were nonwhite. *See id.*

300. *See id.* Sanchez found that suburban jurisdictions were systematically overrepresented: fifty-six percent of residents in the metro areas lived in urban jurisdictions but only had twenty-nine percent of board votes, while forty-four percent of residents lived in suburban areas with fifty-five percent of the votes. *See id.* at 9.

301. Portland, Oregon, has the only directly elected regional government—Portland Metro. Nate Berg, *The Only Elected Regional Government in the U.S.*, CITYLAB (Mar. 1, 2012), <http://www.citylab.com/politics/2012/03/only-elected-regional-government-us/1371> [<https://perma.cc/ZA4X-D3VT>].

302. *See* Complaint, from Boston Alts. for Cmty. & Env’t, to the Fed. Transit Admin. (Dec. 22, 2011) (on file with authors).

303. Sanchez & Wolf, *supra* note 61, at 265.

304. *Id.* at app. A.

core communities” sub-region of the metropolitan area.<sup>305</sup> Those suburban locations also had a higher percentage of white residents. Such an analysis is easily performed using readily available census data and an understanding of the voting rules for the MPO.<sup>306</sup>

DOT guidance should not only require these analyses of voting power discrepancy to be completed, but should specify a threshold beyond which imbalances will be considered discriminatory, and a range of actions that should be taken to correct those imbalances. Given that MPO board composition is, to some extent, constrained by federal statute,<sup>307</sup> fully addressing this governance question will ultimately require congressional or administrative action. Still, a bottom-up approach can more immediately address these issues, and not only bring greater transparency and inclusivity to regional decision-making, but also aid in ensuring that important perspectives are not excluded from this important forum for regional dialog and decision-making.

### B. Improving Access to Opportunity

The most lasting and important benefits of transportation systems are derived from the accessibility they provide.<sup>308</sup> Despite the importance of accessibility as an outcome of transportation investments, the DOT provides no guidance for its analysis. This Section describes a robust analysis of access to opportunity for inclusion in MPO equity analyses.

Accessibility is affected by both land use and transportation infrastructure. If activity density increases in a location, accessibility will also increase, potentially without any transportation-related intervention. Increasing density is known to affect travel demand, so

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305. *Id.* at 265.

306. Boston ACE argued this was a decision with discriminatory impacts that violated Title VI. However, the FTA adopted a narrow interpretation of “discrimination” that did not include underrepresentation or discriminatory voting structures: “[f]or a voting structure to violate Title VI, a complainant would need to present facts demonstrating that the voting structure is creating or has created intentional or unintentional discrimination,” by establishing “that the interests of smaller towns are aligned” or a “nexus between voting structure and project prioritization.” Response to FTA Complaint No. 2013-0039, from Dawn Sweet, Complaint Lead Off. of Civ. Rts., Fed. Transit Admin., to Eugene Benson, Dir. of Legal Counsel, Boston Alts. for Cmty. & Env’t (June 7, 2013) (on file with authors). The only federally mandated requirement for MPO governance was to comply with “applicable State or local law.” *Id.* According to FTA, this requirement was fulfilled. *See id.*

307. *See* 23 C.F.R. § 450.310 (2017).

308. *See generally* Martens, *supra* note 108 (arguing that the core benefit of transportation is accessibility).



travel outcomes would also likely change.<sup>309</sup> Travel mode (e.g., automobile or transit) also affects calculated accessibilities, as do the types of destinations considered. Former Secretary of Transportation Anthony Foxx's "Ladders of Opportunity" initiative is specifically motivated to seek funding to address connectivity gaps that affect accessibility, for example through grants to improve local bus services and address the mobility needs of those with transportation disadvantages, or through its "Local Foods, Local Places" program which provides technical support that helps local communities integrate local food systems into neighborhood planning.<sup>310</sup> It is unlikely the Trump Administration will continue these initiatives.

Many MPOs already include accessibility metrics in their equity analyses and often rely upon a cumulative opportunities measure that provides an average number of job opportunities accessible from each origin location in a region within a given amount of time by a particular mode.<sup>311</sup> For example, an MPO might calculate the average number of jobs that can be reached within forty-five minutes on public transit from "low-income communities" and compare that result to the overall regional mean.<sup>312</sup> If the total number of jobs accessible to low-income communities exceeds the regional mean, the MPO would conclude that the plan is equitable.

These approaches can be strengthened through the adoption of four improvements. First, community definitions and the types of destinations considered in the analysis should be defined based on meaningful public engagement. It may be the case that communities are concerned less about job access and more about access to schools, healthy food, or dialysis centers. It may also be the case that low-income populations must be assessed alongside low-income communities to get an accurate representation of the transportation conditions they face.<sup>313</sup>

Second, the relative performance of modes should be assessed. While low-income communities might enjoy more transit access than

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309. See, e.g., Reid Ewing & Robert Cervero, *Travel and the Built Environment: A Meta-Analysis*, 76 J. AM. PLAN. ASS'N 265, 276-77 (2010).

310. U.S. DEP'T OF TRANSP., LADDERS OF OPPORTUNITY, [https://www.transportation.gov/sites/dot.gov/files/docs/FactSheet\\_USDOTLadders.pdf](https://www.transportation.gov/sites/dot.gov/files/docs/FactSheet_USDOTLadders.pdf) [<https://perma.cc/ZP2U-G6K8>].

311. Rowangould et al., *supra* note 282, at 154-58.

312. *Id.*

313. Emerging travel demand modeling frameworks tend to simulate the behavior of travelers at the individual level. Known as "activity-based models," these analytical tools hold great promise for equity analysis that has generally not been realized. See, e.g., Karner & Niemeier, *supra* note 277, at 131.

other communities, the total level of transit access likely pales in comparison to that by automobile.<sup>314</sup> If rates of automobile ownership are low in low-income communities, their opportunities are likely to be severely constrained by their reliance on transit. Thus, the difference between automobile and transit accessibility should be considered as well.

Third, the analysis should be oriented towards mitigating identified gaps between automobile and transit and between low-income and non-low income populations, rather than taking existing disparities for granted. A cumulative impact approach should be used to highlight existing disparities; a marginal improvement from an unequal starting point does not mean that equity has been achieved.

A fourth and final way to strengthen MPO equity analyses is to meaningfully consider the fundamental conditions that restrict access to housing in high-opportunity suburban areas, especially for low-wage workers. The historical overview given in Part I documented how local control allowed high opportunity areas to restrict access to housing by race and income. While such measures are no longer legal, there are exclusionary practices that communities continue to employ to effectively reduce affordable housing production.<sup>315</sup> On the other hand, there is some work demonstrating that locations that provide housing opportunities well-suited to the wage levels of locally employed workers experience lower commute distances for those workers, even when controlling for other aspects of the built environment known to affect commute distance.<sup>316</sup> This result suggests that measures of the *fit* between local jobs and housing affordability could be employed to understand where there are mismatches and how to mitigate them through the regional planning process.<sup>317</sup>

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314. See generally Aaron Golub & Karel Martens, *Using Principles of Justice to Assess the Modal Equity of Regional Transportation Plans*, 41 J. TRANSP. GEOGRAPHY 10 (2014) (directly comparing accessibility by transit versus accessibility by automobile and defining an “access poverty” threshold).

315. See generally Rachel G. Bratt & Abigail Vladeck, *Addressing Restrictive Zoning for Affordable Housing: Experiences in Four States*, 24 HOUS. POL’Y DEBATE 594, 594-96 (2014); Rolf Pendall, *Local Land Use Regulation and the Chain of Exclusion*, 66 J. AM. PLAN. ASS’N 125, 127-130 (2000).

316. Alex Karner, Asst. Prof., Univ. of Ga., & Chris Benner, Dorothy E. Everett Glob. Info. & Soc. Entrepreneurship Chair, Univ. of Cal., Santa Cruz, *The Convergence of Social Equity and Environmental Sustainability: Jobs-Housing Fit and Commute Distance*, Address at 95th Annual Meeting of the Transp. Res. Board (2015).

317. See, e.g., Benner & Karner, *supra* note 106, at 885-89.

### C. Analyzing and Addressing the Inequitable Distribution of Benefits and Burdens

As described in Part I, the benefits that suburbanizing middle-income whites received from regional transportation investments did not translate into corresponding benefits for low-income residents of color, whose needs were markedly different. In fact, those residents were more likely to bear the brunt of the burdens of freeway (and some regional public transit) construction and urban renewal than to benefit from those plans and projects.<sup>318</sup>

A meaningful assessment of whether the benefits and burdens of the LRTP and its investments are equitably distributed requires clarity about what counts as a benefit to an underserved community. It also requires clarity about the specific harms that—both historically and presently—befall underserved communities and their residents. Finally, it requires clarity about how to identify the projects or alternatives that are likely to bestow those benefits, or avert those harms.

The California Air Resources Board (“CARB”) has pioneered an approach to answering these questions. CARB requires that a fair share of revenues from the state’s Greenhouse Gas Reduction Fund (“GGRF”) be spent to benefit disadvantaged communities, as required by California Senate Bill 535 (“SB 535”).<sup>319</sup> While SB 535 only applies to projects funded by the GGRF,<sup>320</sup> it stands as a national best practice for an equity assessment of a LRTP.

Under CARB’s Funding Guidelines, benefits “meaningfully address an important community need” in a disadvantaged community.<sup>321</sup> This definition of a “benefit” should be used by MPOs

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318. *See supra* Part II.

319. *See* AIR RES. BD., CAL. ENVTL. PROT. AGENCY, FUNDING GUIDELINES SUPPLEMENT FOR FY 2016-17 FUNDS 5 (2016) [hereinafter CARB FUNDING GUIDELINES SUPPLEMENT], [https://www.arb.ca.gov/cc/capandtrade/auctionproceeds/final\\_supplemental\\_ggrf\\_funding\\_guidelines\\_12\\_30.pdf](https://www.arb.ca.gov/cc/capandtrade/auctionproceeds/final_supplemental_ggrf_funding_guidelines_12_30.pdf) [https://perma.cc/3HFD-4963] (defining “disadvantaged communities” using CalEnviroScreen, a state-developed tool that identifies areas facing disproportionately high burdens and cumulative exposures); *see also* CAL. HEALTH & SAFETY CODE § 39713 (West 2017).

320. CARB FUNDING GUIDELINES SUPPLEMENT, *supra* note 319, at 1. One difference between SB 535 and the requirement that MPO plans provide for an equitable distribution of benefits and burdens is that SB 535 requires a set-aside of funds to benefit disadvantaged communities, rather than simply an equitable distribution of benefits. The ARB guidance discussed in this Section, however, is geared specifically at the question of what counts as a benefit, a critical question that must be answered in both contexts.

321. AIR RES. BD., CAL. ENVTL. PROT. AGENCY, CAP-AND-TRADE AUCTION PROCEEDS: FUNDING GUIDELINES FOR AGENCIES THAT ADMINISTER CALIFORNIA

to achieve equitable outcomes,<sup>322</sup> and to prevent the delay of benefits to minority and low-income populations.<sup>323</sup>

The GGRF program requires that twenty-five percent of each year's funding benefits disadvantaged communities.<sup>324</sup> The DOT should so too explicitly require MPOs to ensure an appropriate share, if not annually, at least over the four-year lifetime of the TIP, benefits disadvantaged communities. It should also require MPOs to transparently phase the plan's project and investment implementation, and to specifically identify which investments, in which years, are expected to meet the priority needs of minority and low-income populations. The San Diego Association of Governments ("SANDAG") case exemplifies the importance of "significant delay" issues in the MPO context.<sup>325</sup> In that case, the benefits of SANDAG's LRTP for underserved communities were buried in the last decade of the plan, a fact the trial and appellate courts found to be unjust.<sup>326</sup>

Other provisions of the CARB guidelines could be recommended for DOT consideration, including that state funding agencies give priority to those investments that provide the most benefits to disadvantaged communities,<sup>327</sup> defined as projects which provide "direct, meaningful, and assured benefits to one or more disadvantaged communities."<sup>328</sup>

In terms of the burdens of investment, CARB's GGRF Funding Guidelines require that projects "be designed to *avoid substantial burdens*, such as physical or economic displacement of low income disadvantaged community residents and businesses or increased

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CLIMATE INVESTMENTS 2-6 (2015) [hereinafter CARB FUNDING GUIDELINES], <https://www.arb.ca.gov/cc/capandtrade/auctionproceeds/arb-funding-guidelines-for-ca-climate-investments.pdf> [<https://perma.cc/PT8L-LMZH>]; see *id.* at 1.A-12 (requiring reporting on "disadvantaged community benefits and . . . strategies the agency will use to maximize benefits" to them).

322. ENVIRONMENTAL JUSTICE REFERENCE GUIDE, *supra* note 234, at 1, 3.

323. FTA CIRCULAR 4703.1, *supra* note 179, at 2; see also UPDATED DOT ENVIRONMENTAL JUSTICE ORDER 5610.2(A), *supra* note 94, at app. § 1(f) (defining "adverse effects").

324. See CARB FUNDING GUIDELINES SUPPLEMENT, *supra* note 319, at 5.

325. See *generally* Petition for Writ of Mandate in Intervention, Cleveland Nat'l Forest Found. v. San Diego Ass'n of Gov'ts Bd. of Dirs., No. 37-2011-00101593-CU-TT-CTL (Cal. App. Dep't Super. Ct. Jan. 2, 2012)

326. See *id.* at app. 1.

327. See CARB FUNDING GUIDELINES, *supra* note 321, at 2.A-6.

328. *Id.* at 2-2.

exposure to toxics or other health risks.”<sup>329</sup> Further, CARB’s guidelines recommend *avoiding*, rather than mitigating, substantial burdens on protected populations.<sup>330</sup> DOT guidance along these lines would help meet many of the key functions described earlier with respect to this driver of inequality. Currently, where federal plan approval is required the National Environmental Policy Act of 1969 (“NEPA”), may require some environmental justice impacts to be analyzed as part of an Environmental Impact Statement (“EIS”).<sup>331</sup> While NEPA has been a useful tool for promoting environmental justice,<sup>332</sup> MPO plans are not subject to a NEPA-type review.<sup>333</sup>

This Article also advocates for an approach that defines the parameters and goals of the equity analysis before review of a given plan. An a priori approach develops equity measures and standards before the LRTP is assembled instead of merely analyzing the plan after the fact. Such an approach was taken by Portland Metro, the MPO for the Portland, Oregon, region, when it convened a working group of community-based organizations, representatives of local government, and anyone else interested, over a two-year period to develop an equity analysis to screen projects for inclusion in the LRTP.<sup>334</sup> This kind of approach would invite greater community

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329. CARB FUNDING GUIDELINES SUPPLEMENT, *supra* note 319, at Appendix-6 (emphasis added).

330. *See generally id.*

331. *See* Memorandum on Guidance on Environmental Justice and NEPA from Gloria M. Shepherd, Assoc. Adm’r for Plan., Env’t, and Realty, Fed. Highway Admin., to Dirs. of Field Servs., Fed. Lands Highway Div. Eng’rs, U.S. Dep’t of Transp. (Dec. 16, 2011), [https://www.environment.fhwa.dot.gov/projdev/guidance\\_ej\\_nepa.asp](https://www.environment.fhwa.dot.gov/projdev/guidance_ej_nepa.asp) [<https://perma.cc/6X32-ACGF>]; *see also* FTA, CIRCULAR 4703.1, *supra* note 179, at ch. V. *But see* FTA CIRCULAR 4702.1B, *supra* note 84, at ch. I (“Recipients are cautioned that while there may be overlap, engaging in an EJ analysis under Federal transportation planning and NEPA provisions will not satisfy Title VI requirements . . .”).

332. An example is the “Zoo Interchange” complaint. *See Milwaukee Inner-City Congregations Allied for Hope v. Gottlieb*, 944 F. Supp. 2d 656, 660-74 (W.D. Wis. 2013).

333. There is no formal link between plan making and NEPA evaluations. 23 C.F.R. § 450.338. There is interest, however, to link them by strengthening the planning process so that certain planning goals can be used directly as inputs to NEPA—especially “purpose and need” statements for NEPA. For more discussion about these links, see AM. ASS’N OF ST. HIGHWAY & TRANSP. OFFICIALS, PRACTITIONER’S HANDBOOK: USING THE TRANSPORTATION PLANNING PROCESS TO SUPPORT THE NEPA PROCESS (2008), [http://environment.transportation.org/pdf/programs/practitioners\\_handbook10.pdf](http://environment.transportation.org/pdf/programs/practitioners_handbook10.pdf) [<https://perma.cc/2CKV-WC9U>].

334. *2018 Regional Transportation Plan: Equity*, OR. METRO, <http://www.oregonmetro.gov/public-projects/2018-regional-transportation-plan/equity> [<https://perma.cc/PVL3-9WVH>].

engagement in the planning processes, in addition to yielding more equitable outcomes.

#### CONCLUSION

Requiring that MPO equity analyses identify and address governance disparities, as well as the fair distribution of benefits and burdens and impediments to full and equal access to opportunity, would provide a significant tool for tackling patterns of inequality at the metropolitan regional scale. This must involve explicit identification of the drivers of inequality to produce adequate remedies tailored to address those drivers.

Though states and MPOs themselves can lead the way in developing community-centered approaches to action-oriented, multi-dimensional equity analyses, and draw guidance from the HUD AFFH rule, new rules at the federal level would ensure uniform processes and judicial recourse. This Article emphasizes the need for the DOT to adopt its own AFFH rule, or a rule that requires MPOs to conduct their Title VI and EJ Executive Order analyses in a manner that generally tracks the HUD rule. Doing so is crucial, not only to realize HUD's vision for regional coordination in addressing segregation and discrimination in housing, but also to ensure that MPO transportation plans are identifying and addressing today's inequality with near-term actions and investments that are responsive to the critical needs of underserved communities and populations.