

Fordham Urban Law Journal

Volume 44
Number 4 *Colloquium - Getting There From
Here: An Exploration of Regionalism and
Transportation in the United States*

Article 6

2017

Community Engagement and Transportation Equity

Edward W. De Barbieri

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Recommended Citation

Edward W. De Barbieri, *Community Engagement and Transportation Equity*, 44 Fordham Urb. L.J. 1103 (2017).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol44/iss4/6>

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COMMUNITY ENGAGEMENT AND TRANSPORTATION EQUITY*

*Edward W. De Barbieri***

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INTRODUCTION

In their provocative article, *Confronting Inequality in Metropolitan Regions: Realizing the Promise of Civil Rights and Environmental Justice in Metropolitan Transportation Planning*, Professors Richard A. Marcantonio, Aaron Golub, Alex Karner, and Nelson Dyble (“the Authors”) argue that regional transportation system planning, beginning in the mid-twentieth century, unfairly burdened urban areas while benefiting white suburban residents.¹ The Authors argue that federal law requiring metropolitan planning organizations (“MPOs”)—regional planning boards²—to engage in “equity analysis” of regional plans provides an opportunity for addressing inequality.³ The Authors link MPO governance to key civil rights and environmental laws, namely Title VI of the Civil Rights Act of 1964, Executive Order 12898 on Environmental Justice, and the duty under

* A response to Richard A. Marcantonio, Aaron Golub, Alex Karner & Nelson Dyble, *Confronting Inequality in Metropolitan Regions: Realizing the Promise of Civil Rights and Environmental Justice in Metropolitan Transportation Planning*, 44 *FORDHAM URB. L.J.* 1017 (2017).

** Assistant Professor of Law, Albany Law School (edeba@albanylaw.edu). Many thanks to Susan Moskovits and the staff of the *Fordham Urban Law Journal* for superb editing assistance.

1. Richard A. Marcantonio et al., *Confronting Inequality in Metropolitan Regions: Realizing the Promise of Civil Rights and Environmental Justice in Metropolitan Transportation Planning*, 44 *FORDHAM URB. L.J.* 1017, 1018-19 (2017).

2. Responsible for allocating billions of dollars in transportation funds.

3. Marcantonio et al., *supra* note 1, at 1022.

the Fair Housing Act to “affirmatively further fair housing” (“AFFH”).⁴ Regional equity analyses, they claim, can address disparities in governance, fairly distribute the benefits and burdens of transportation infrastructure planning, and tackle inequality across regions.⁵

The Authors’ final conclusion is that the U.S. Department of Transportation (“DOT”) adopt a rule similar to the U.S. Department of Housing and Urban Development’s (“HUD”) AFFH rule, which requires meaningful action to address fair housing and identifies six concrete fair housing goals for state, local, and regional authorities receiving HUD funds. The likelihood of the DOT adopting such a rule under the current administration remains to be seen. Especially given President Trump’s focus on transportation project rebuilding,⁶ infrastructure development and regional plan adoption will be critical in the coming months and years. Methods for conducting MPO equity analysis are, therefore, crucial.

This Article makes three observations about the Authors’ article, corresponding to the three areas for reform listed in Part V of their piece. Each area is addressed in turn: (1) a lack of meaningful bargaining for benefits and burdens; (2) an insufficient MPO equity analysis metric; and (3) MPO governance issues. For each of the proposed areas this Article discusses potential issues and proposes ways that state and local government can innovate to address them in the absence of stronger equity requirements from the DOT.

I. INEQUITABLE DISTRIBUTION OF BENEFITS AND BURDENS

The Authors’ article begins by tracing the history of metropolitan growth and interstate freeway construction as contributing factors to inequality across regions.⁷ While freeways benefited suburban middle-income whites, they had a negative impact on low-income residents of color who had different needs and who bore the brunt of freeway construction.⁸ Many freeways built with urban renewal funding displaced low-income communities, dubbed “slums,” to make way for private investment.⁹

4. *Id.* at 1040-53.

5. *Id.* at 1033-34.

6. *See, e.g.*, Melanie Zanona, *Trump’s Infrastructure Plan: What We Know*, HILL (Jan. 13, 2017, 6:00 AM), <http://thehill.com/policy/transportation/314095-trumps-infrastructure-plan-what-we-know> [https://perma.cc/7ZLW-6WCU].

7. Marcantonio et al., *supra* note 1, at 1026-27.

8. *Id.*

9. *Id.*

The Authors argue that the benefits of transportation development should be measured, but so should the burdens.¹⁰ The DOT, they write, should direct MPOs to use a standard similar to the AFFH rule recently adopted by HUD to take “meaningful actions” to address significant disparities in housing needs and in access to opportunity.¹¹ Federal guidance should also be applied to define “burdens,” to avoid physical or economic displacement of low-income community residents and businesses, or increasing exposure to health risks.¹² As an example, the Authors offer Portland Metro, the MPO for the Portland, Oregon region, which in 2015 convened a working group of government and non-governmental organizations and interested people to develop an equity analysis to screen projects for the regional plan.¹³ This creates an a priori approach to developing equity analysis before a regional plan is created instead of analyzing the plan after the fact.¹⁴

This proposed solution is compelling. However, one wonders who specifically will participate in such an effort, and who will be responsible for organizing the respective parties. Such organizing work takes resources and time. Groups have their own dynamics which can sometimes delay effective results.¹⁵

While communities do organize around individual development projects to advocate for community benefits agreements (“CBAs”) related to expanding transportation infrastructure, these campaigns require resources and momentum. In Somerville, Massachusetts, for example, a group called Union United is seeking a CBA to avoid displacement of long-time residents by a new transit-oriented mixed-use development project.¹⁶ Such a campaign takes significant resources both to organize and negotiate, yet only benefits a single project.¹⁷

10. *Id.* at 1037-38.

11. *Id.* at 1050.

12. *Id.* at 1075-76.

13. *Id.* at 1076-77.

14. *Id.*

15. Bruce W. Tuckman, *Developmental Sequence in Small Groups*, 63 *PSYCHOL. BULL.* 384, 386 (1965) (describing the stages of small group process, from forming-storming-norming-performing).

16. *Union United—Development without Displacement*, UNION UNITED, <http://unionunitedsomerville.com/> [<https://perma.cc/5RHM-E2WL>].

17. *See, e.g.*, Edward W. De Barbieri, *Do Community Benefits Agreements Benefit Communities?*, 37 *CARDOZO L. REV.* 1773, 1805 (2016) (describing the organizing efforts of the Kingsbridge Armory Redevelopment Alliance over seventeen years around the Kingsbridge National Ice Center CBA).

Given the effort that it takes to deliver benefits through a CBA, an equity analysis before the fact is very appealing. It would be interesting for more MPOs to follow the Portland Metro example and develop an equity analysis prior to creating a regional plan. Studying such equity analyses prior to plan creation could be a fruitful area of further study.

Those who study CBA campaign research argue that agreements must be negotiated by diverse, inclusive, and accountable parties which represent community interests.¹⁸ To the extent that CBA negotiations function like mini equity analysis committees in how they consider benefits and burdens of a particular development project, studying the effectiveness of CBA negotiations and campaigns might be useful to MPO equity analysis committees. A typical CBA involves a coalition of organizations negotiating directly with a developer about a particular development project.¹⁹ Community coalitions usually exchange non-opposition against a project's approval for a slate of developer provided benefits.²⁰ The arms-length exchange of benefits in a CBA could be similar to MPO equity analysis. Specifically, parties could agree to provide certain terms that address equity issues across metropolitan regions.

There is one local government, the City of Detroit, attempting to codify a CBA approach with a recently enacted CBA ordinance. The focus of the ordinance, which was approved by city voters in November 2016, was in part motivated by transportation infrastructure projects, including a massive bridge, to be called the Gordie Howe Bridge after the late hockey great, connecting to

18. For CBAs to provide benefits to communities, for instance, they must be negotiated and implemented in a transparent and accountable manner. *See id.* at 1824.

19. *See, e.g., Community Groups, Facebook, and the Cities of East Palo Alto and Menlo Park Partner to Create Affordable Housing and Economic Opportunities*, LAW OFF. OF JULIAN GROSS (Dec. 2, 2016), http://juliangross.net/docs/CBA/Facebook_ETB_Partnership_Release.12.216.pdf [<http://perma.cc/FY3T-X8BQ>] (noting that Facebook recently entered into a CBA with local community groups around the development of its Menlo Park, CA campus); Kirk Pinho, *Milder community benefits ordinance passes in Detroit*, CRAIN'S (Nov. 9, 2016, 10:00 AM), <http://www.craindetroit.com/article/20161109/NEWS/161109838/milder-community-benefits-ordinance-passes-in-detroit> [<http://perma.cc/54HX-6UPZ>] (noting that Detroit voters recently adopted a CBA ordinance requiring developments above a certain size enter into CBA negotiations).

20. *See, e.g., Redevelopment of Kingsbridge Armory*, NW. BRONX CMTY. & CLERGY COAL., <http://northwestbronx.org/wp-content/uploads/2013/09/Cooperation-Agreement-Kingsbridge-Armory-CBA.pdf> [<http://perma.cc/6EWZ-8SGQ>]. Section 2 of this Cooperation Agreement—often the first part of a CBA—contains a covenant not to oppose the project in exchange for a Community Benefits Program).

Canada.²¹ It will be seen in the coming years whether the Detroit CBA ordinance furthers MPO equity analysis through direct negotiation between community groups and developers.

One challenge with this CBA ordinance is that individual CBAs are negotiated for only one project even though the ordinance applies citywide. Thus, if a CBA is reached on one project, and is able to address particular equity issues caused by a particular development, it might not address equity issues of another project down the street. Perhaps the mere existence of a CBA will assist MPO boards in viewing equity analysis in a different light. However, on their own, CBAs are unlikely to replace MPO equity analysis.

II. ACCESS TO OPPORTUNITY

The Authors discuss MPO analysis as generally flawed and unable to affirmatively produce equitable plans. The current method used determines whether the plan delivers benefits of some sort (such as investments of access to jobs) to all communities, and if it does, then the MPO would conclude that the plan is equitable.²² The Authors point out four ways that this over-simplistic equity analysis fails to address equity in a meaningful way. First, the focus on access to jobs overlooks other important issues like access to schools, healthy food, or healthcare centers.²³ Second, it often ignores actual access to automobiles in communities and assumes improvements in automobile-based mobility benefit all communities equally.²⁴ Third, a plan which fairly distributes new benefits will not necessarily close existing gaps in access—in other words, some communities may need to be favored in order to overcome existing disparities.²⁵ Lastly, opportunity based solely on mobility fails to consider restrictions to housing in high opportunity suburban areas, such as minimum lot sizes, and restrictions on multifamily housing.²⁶

The Authors' arguments make a great deal of sense. Complimentary arguments have been made vis-à-vis the theory of "architectural exclusion." Sarah Schindler identified the notion that architecture has been used to exclude certain populations, primarily

21. Erick Trickey, *The Test Just Began for the Community Benefits Movement*, NEXT CITY (Feb. 20, 2017), <https://nextcity.org/features/view/detroit-test-began-community-benefit-agreements-movement> [http://perma.cc/F2A2-U4HW].

22. Marcantonio et al., *supra* note 1, at 1072.

23. *Id.* at 1072-73.

24. *Id.* at 1073.

25. *Id.*

26. *Id.*

low-income and people of color, from certain places, for instance with low bridges to keep out buses, or the absence of sidewalks to limit pedestrian traffic.²⁷ Schindler argues that we fail to recognize aspects of the built environment as discriminatory because (1) lawmakers and litigants do not see architecture as a form of regulation and (2) existing law is insufficient to address the harms architecture causes.²⁸

Schindler's argument offers a useful framework that can be applied to MPO equity analysis. By viewing the built environment aspects of transportation infrastructure as exclusionary, it is possible to address equity claims, or lack of access. Schindler is more sanguine about legislative solutions to exclusionary infrastructure than she is to court-based solutions. She suggests an architectural inclusion version of the Americans with Disabilities Act as a possible fix at state and local levels to discriminatorily built places.²⁹

As the Authors point out, it is myopic to focus on employment opportunities while ignoring the ways marginalized communities access opportunities through the built environment, including centers of education, health care, and retail shopping. The Authors mention former Transportation Secretary Anthony Foxx's "Ladders of Opportunity" initiative as an example of an approach that finds gaps in transportation systems and seeks to remedy them.³⁰ Foxx's initiative piloted federal funding for local transportation development in seven cities.³¹ The report detailed the successes of locally led transportation planning, and provided recommendations for streamlining federal support of transportation projects that are led by local community groups.³² Given the initial successes detailed in the Ladders of Opportunity pilot, the Authors are correct to look beyond mere access to employment opportunities for analysis regarding transportation equity. Among the goals for the pilot, the report lists: economic mobility, public engagement, the enhancement of public-private alliances, and sustainable smart growth.³³

27. Sarah B. Schindler, *Architectural Exclusion: Discrimination and Segregation Through Physical Design of the Built Environment*, 124 YALE L. J. 1934, 1934, 1953 (2015).

28. *Id.* at 1934.

29. *Id.* at 2021-23.

30. Marcantonio et al., *supra* note 1, at 1072.

31. U.S. DEP'T OF TRANSP., LADDERS OF OPPORTUNITY: TRANSPORTATION EMPOWERMENT PILOT, LADDERS^{TEP}, 2015-2016 REPORT 3 (2016), https://www.transportation.gov/sites/dot.gov/files/docs/LadderSTEP_2015-2016_Report_December_2016_final2.pdf [<https://perma.cc/J4EU-B45R>].

32. *Id.*

33. *Id.* at 3-4.

State and local governments could adopt their own forms of the federal Ladders of Opportunity initiative, or continue to use federal funds for local community-driven transportation projects. Piloting of this process occurred at the end of the Obama Administration.³⁴ For instance, the city of Charlotte, North Carolina, used the Transportation Empowerment Pilot, “LadderS^{TEP},” to bring together government and community stakeholders to prioritize transportation infrastructure projects, including city-funded design work for Phase 2 of the Gold Line Streetcar project, also supported with a grant from the Knight Foundation.³⁵ State and local government officials could continue that approach going forward.

Officials in rural areas are already concerned that the president’s public-private partnership plans will not generate revenue sufficient to fund transportation projects in rural areas.³⁶ Decision makers are concerned about private market funding for transportation infrastructure in rural areas where revenue generated from tolls and other fees is likely to be lower.³⁷ Rural and urban areas do face unique challenges in achieving transportation equity, and it is certain that state and local officials will advocate for policies that support their constituents’ transportation needs. MPO boards should be prepared to account for the needs of diverse groups when considering equity metrics.

III. FAIR GOVERNANCE

Finally, the Authors discuss addressing MPO equity analysis through the composition of MPO voting boards. As the Authors point out, MPO boards typically have disparities in voting power since board seats, and consequently votes, are allocated on a one-city, one-vote basis.³⁸ The Authors argue that this board composition trend leads to disparities in racial and ethnic diversity.³⁹

34. *Id.* at 1.

35. *Id.* at 1-2.

36. *See, e.g.*, Mark Niquette & David Carey, *Tapping Private Sector for Roads and Bridges Poses Hurdles for Trump*, BLOOMBERG (Feb. 13, 2017, 5:00 AM), <https://www.bloomberg.com/news/articles/2017-02-13/trump-tapping-private-sector-for-roads-and-bridges-faces-hurdles> [<https://perma.cc/7WNH-YPRM>].

37. *Id.* Advocates are lobbying Congress for federal funds to support transportation infrastructure in rural areas. Brandon Ross, *Private Infrastructure Financing Called a No-Go for Rural Areas*, TRANSP. WATCH (Feb. 9, 2017).

38. Marcantonio et al., *supra* note 1, at 1069-70.

39. To support their assertions, the Authors cite a Brookings report finding that while metro areas are about forty percent nonwhite, only about twelve percent of board members were nonwhite. *Id.* at 1069, n.299 (citing THOMAS W. SANCHEZ, METRO. POLICY PROGRAM, BROOKINGS INST., AN INHERENT BIAS?: GEOGRAPHIC

The Authors offer an example typical of MPOs with board compositions that do not reflect their localities' populations: Boston, where in 2011 a complaint was filed with the Federal Transit Administration that the Boston Region MPO's board composition led to unequal voting and disparately impacted racial and ethnic minorities in the region, benefiting suburban interests and disadvantaging African American and minority communities.⁴⁰

Given the overrepresentation of white, suburban interests, it is difficult to alter MPO board compositions to more accurately reflect their localities' populations. Typically, bylaws govern MPO boards. Often, bylaws can only be amended with a supermajority vote. In one instance, MPO bylaw amendments could only be made with a two-thirds majority.⁴¹ Such provisions are more likely to keep entrenched interests in power than allow boards to shift focus and encourage public participation from groups that typically do not participate already.⁴²

Certain populations, such as those who are transportation disadvantaged or disabled, are less likely to participate in MPO public hearings,⁴³ and if they are less likely to participate in decision-making they are less likely to serve on MPO boards. Aside from actively recruiting diverse board members, MPO governance will probably remain the same. It is therefore incumbent on MPO boards to study the needs of vulnerable populations since board composition itself is not likely to change rapidly across MPOs.

AND RACIAL-ETHNIC PATTERNS OF METROPOLITAN PLANNING ORGANIZATION BOARDS 12-13 (2006), https://www.brookings.edu/wp-content/uploads/2016/06/20060124_mpos.pdf [<https://perma.cc/LJ8L-THHZ>].

40. Marcantonio et al., *supra* note 1, at 1069-70.

41. *See, e.g.*, SRPEDD Bylaws, SE REGIONAL PLAN. & ECON. DEV. DISTRICT, <http://www.srpedd.org/manager/external/ckfinder/userfiles/files/AboutSRPEDD/SRPEDD%20BYLAWS.pdf> [<https://perma.cc/48T9-J2J2>] (although the bylaws require a two-thirds majority vote to amend, they also allow for balancing "at-large" board seats among four categories, including nonprofits the assist low-income and minority residents).

42. MPOs ought to consider the needs of particularly vulnerable populations, such as HIV positive individuals, when deciding issues of transportation equity. A Human Rights Clinic at UMass Dartmouth School of Law is currently studying the transportation needs of HIV positive individuals. *See infra* note 45. The results of this study could aid an MPO in planning transportation to better access health care centers.

43. *See, e.g.*, HILLSBOROUGH CTY. METRO. PLAN. ORG., PUBLIC PARTICIPATION PLAN: MEASURES OF EFFECTIVENESS FOR HILLSBOROUGH MPO 62-67 (April 2016), http://www.planhillsborough.org/wp-content/uploads/2017/01/PPP-MOE-CH8_Summary-Results-Recommendations.pdf [<https://perma.cc/GW6Q-MYE3>].

State and local government officials can look beyond altering MPO bylaws to address issues of board composition since it is unlikely that those with voting power will voluntarily decrease their voting power.⁴⁴ One new method of studying equity involves MPO boards partnering with law school clinics to conduct research. At the University of Massachusetts School of Law Human Rights at Home Clinic (“UMass Clinic”), students are studying the transportation needs of transportation-disadvantaged residents who need regular medical treatment.⁴⁵ The students in the UMass Clinic are studying transportation in local communities by riding bus routes to examine conditions and timeliness.⁴⁶ This study is being conducted to assist local transportation entities in assessing how to provide better service to those who depend on public transportation.⁴⁷ The UMass Clinic study recognizes that transportation is a human rights issue. Access to transportation affects quality of life and access to education, medical care, as well as employment.⁴⁸ Such studies might provide evidence to convince MPO boards to better evaluate equity in projects to be included in a regional plan.

While it is unlikely that state or local legislatures will enact laws to treat access to transportation as a basic right, adopting a human rights approach to transportation can help local advocates push MPO boards to focus greater attention on equity analysis. Law school clinics, or legal services offices, could assist MPO boards in analyzing transportation equity. These analyses could improve MPO decision-making by including more data and community transportation needs.

Another option might be for MPO boards to partner with grassroots community groups, which have been shown to be effective at decreasing causes of poverty.⁴⁹ Grassroots groups tend to have

44. It is beyond the scope of this response to address what it would take for a municipality to voluntarily give up some of its voting power on an MPO board. However, it is likely that municipalities giving up some of their voting power would require significant other benefits, such as protections for certain types of development, or direct compensation for infrastructure that benefits the municipality and its residents.

45. *UMass Law Launches Clinic Dedicated to Protecting Human Rights within the U.S.*, UMass LAW (Dec. 11, 2016), <http://www.umassd.edu/news/lawnews/humanrightsathomerelease.html> [https://perma.cc/BEL6-5PJ3]; E-mail from Margaret Drew, Dir. of Clinics & Experiential Learning, U. Mass. Sch. L., to author (Feb. 14, 2017, 07:50 EST) (on file with author).

46. E-mail from Margaret Drew, *supra* note 45.

47. *Id.*

48. *Id.*

49. See generally Eileen Auld, *CityViews: Results Show Grassroots Groups Can Make a Dent in Causes of Poverty*, CITY LIMITS (Feb. 3, 2017), <http://citylimits.org/>

community buy-in and support. By partnering with groups that already have the trust of community members, MPO boards might be better at arriving at new methods of studying equity with increased participation from populations traditionally excluded from the MPO process.

CONCLUSION

The Authors' article about confronting inequality in metropolitan regions is a detailed history of transportation planning and federal law requirements as implemented in recent years. As they point out, federal law equity requirements have not translated into transportation equality in practice. The Authors have identified three key areas to increase equity by addressing inequitable distribution of benefits and burdens, analyzing access to opportunity, and achieving fair governance. This response has discussed those three areas in connection with the MPO equity analysis.

Further, while the Authors conclude that a rulemaking similar to AFFH for the DOT would be ideal in compelling MPOs to engage in equity analysis,⁵⁰ if the DOT does not act, state and local governments can exercise their rights with respect to transportation equity and use what powers they possess to promote equitable policies.⁵¹ This Article builds upon the Authors' advocacy for transportation equity reform by addressing how state and local governments might approach the three areas identified by the Authors as needing attention. Even in the absence of federal guidance, local and state governments can, by their own initiative,

2017/02/03/cityviews-results-show-grassroots-groups-can-make-a-dent-in-causes-of-poverty/ [https://perma.cc/4YL4-M2GV].

50. Marcantonio et al., *supra* note 1, at 1077. The response assumes that U.S. DOT has been empowered by Congress explicitly or implicitly to engage in such a rulemaking.

51. There is precedent for state and local governments using their authority to address issues of equality during transportation projects. In Lexington, Kentucky, for example, state and local authorities arranged for the creation of a land trust to own and maintain affordable housing to maintain existing community cohesion and avoid displacement of longtime residents during the extension of a highway. Fed. Highway Admin., *Preserving Community Cohesion through Southend Park Neighborhood Redevelopment*, LEXINGTON CMTY. LAND TR., https://www.fhwa.dot.gov/environment/environmental_justice/resources/case_studies/caes8.pdf [https://perma.cc/6ZZ7-T7ZH]. The Lexington approach contrasts with others, such as the replacement of the I-81 viaduct in Syracuse, New York, where local officials expect displacement of residents, including residents of public housing, when the highway is demolished. Mike McAndrew, *Syracuse South Side Residents Express Concern about Interstate 81 Project*, SYRACUSE.COM (May 16, 2016), http://www.syracuse.com/news/index.ssf/2016/05/interstate_81_impact_syracuses_south_side.html [http://perma.cc/HRW8-E8DT].

reshape transportation planning processes through CBA ordinances, federal funding initiatives, partnerships with law school clinics and grass roots organizations, and by other means within their power.