I. INTRODUCTION

Transportation inequity is deeply rooted in American history. In 1896, the Supreme Court held that maintaining “separate but equal” railroad cars for black train passengers was constitutional. The Plessy decision laid the foundation for segregated rail and bus transportation in the Jim Crow South. Although the desegregation cases and Title VI of the Civil Rights Act of 1964 formally outlawed racial segregation in intrastate and interstate transportation, inequity remains.

1 J.D., Notre Dame Law School, expected 2006; Ph.D., University of Notre Dame, 2001; M.S.Chem., Georgia Institute of Technology, 1996; B.S., University of Tennessee, 1993.
4 See, e.g., Boynton v. Virginia, 364 U.S. 454 (1962) (finding state law barring Negroes from a restaurant at an interstate bus terminal is unconstitutional); Browder v. Gayle, 142 F.Supp. 707 (M.D.Ala. 1956), aff’d per curiam, 352 U.S. 903 (1956) (statutes and ordinances requiring segregation violated due process and equal protection clauses of the Fourteenth Amendment); Cooper v. Aaron, 358 U.S. 1, 17 (1958) (“[The Fourteenth Amendment] must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws”); Bailey v. Patterson, 369 U.S. 31, 33 (1962) (“We have settled beyond question that no State may require racial segregation of interstate or intrastate transportation facilities... The question is no longer open; it is foreclosed as a litigable issue.”) (internal citations omitted).
6 Dr. Martin Luther King, Jr. described the cause and effects of transportation inequity in 1968:

Urban transit systems in most American cities, for example, have become a genuine civil rights issue – and a valid one – because the layout of rapid-transit systems determines the accessibility of jobs to the black community. If transportation systems in American cities could be laid out so as to provide an opportunity for poor people to get meaningful employment, then they could begin to move into the mainstream of American life. A good example of this problem is my home city of Atlanta, where the rapid-transit system has been laid out for the convenience of the white upper-middle-class suburbanites who commute to their jobs downtown. The system has virtually no consideration for connect-
Inequity lingers in old Southern cities like Atlanta,7 but also in New York, Philadelphia, and Boston – the great Northern cities with the nation’s oldest and largest mass transit systems.8

Transportation equity is inextricably linked to environmental justice.9 Air quality in affluent areas with rail-based transit is superior to that in depressed communities which are primarily served by buses.10 Civil rights activists and environmentalists have joined forces to ensure that “the benefits and burdens of transportation . . . are equally distributed among various income levels”11 since “[a]ll Americans have a right to be protected from pollution – not just those who can afford to live in the cleanest, safest communities.”12

The transportation infrastructure in Boston provides a clear example of how government action – or inaction – can aggravate inequity. Boston is the birthplace of public transportation in America.13 The city initiated public ferryboat service in 1630, and opened the nation’s first subway in 1897.14 The Massachusetts Bay Transportation Authority (MBTA),15 which provides subway, trolley, bus, ferry, and commuter rail service to metropolitan Boston, is the nation’s oldest and fourth largest public transportation system.16

7 See infra notes 72-73.
8 See infra Parts III, IV.
9 See infra Part II.A.
12 Klesh, supra note 11, at 662 (quoting Statement on the Executive Order on Environmental Justice, 30 WEEKLY COMP. PRUS. DOC. 279 (Feb. 11, 1994)).
13 American Public Transportation Association, Milestones in U.S. Public Transportation History, Table 1, at http://www.apta.com/research/stats/history/milestone.cfm (last visited March 17, 2006).
14 Id.
15 Locals refer to the MBTA as “The T.” All MBTA revenue vehicles bear a “T” insignia.
16 Massachusetts Bay Transportation Authority, Inside the T, http://www.mbta.com/insidetheet/index.asp (last visited Mar. 4, 2005) [hereinafter MBTA WEBSITE]. The MBTA serves about 1.2 million riders per day. BOSTON REDEVELOPMENT AUTHORITY, THE BOSTON ECON-
The Central Artery/Tunnel Project ("The Big Dig"),\textsuperscript{17} which has been described as "the largest and most complex urban infrastructure project ever undertaken in the modern world,"\textsuperscript{18} has drawn considerable attention to urban transportation in Boston. The Commonwealth of Massachusetts committed to several public transit improvements in order to mitigate the negative impact that the $15 billion Central Artery/Tunnel Project will have on air quality.\textsuperscript{19} The Commonwealth must honor these transit commitments in order to comply with the Clean Air Act.\textsuperscript{20} The MBTA has woefully "dragged its feet" on honoring these commitments, which adversely affects low-income, minority residents in transit-dependent parts of town.\textsuperscript{21} The MBTA's stalling, avoidance, and broken promises are a breach of the social contract that the Commonwealth created with residents: to endure highway construction and increased vehicle use in return for transit improve-
ments.\textsuperscript{22} The Central Artery/Tunnel Project may not have gone forward but for the transit commitments.\textsuperscript{23}

This article begins, in Part II, with an overview of transportation equity and its inextricable relationship with environmental justice. This Part also examines the laws and policies that exacerbate transportation disparities, and their effect on the society, health, and financial well-being of the low-income residents of the urban core. Part III highlights successful and unsuccessful Title VI equity-based lawsuits against transportation authorities in New York, Philadelphia, and Los Angeles. These cases shared a common claim: that metropolitan transportation authorities spent a disproportionate amount of federal transportation subsidies on commuter rail service to high-income suburbs at the expense of city transit.

Part IV of this Article is a case study of transit inequity in Boston. This Part begins with a survey of the history and structure of the regional transit system, and continues with a description of the transit authority’s unfulfilled promises and obligations and their impact on the affected communities. The case study examines two transit commitments that the MBTA has delayed, modified, or avoided pursuant to the Central Artery/Tunnel Project: (1) the replacement of the Orange Line Elevated along Washington Street in Roxbury with “equal or better” service;\textsuperscript{24} and (2) the restoration of trolley service to the Arborway in Jamaica Plain. This Part also examines the balancing of interests that the MBTA must undertake in order for transportation equity to obtain in Greater Boston.

Part V begins by asking the question, “Is race the real issue?” This Part first examines the inescapable tie between race and transit inequity, but acknowledges the difference between disparate impact and discrimination. This Part concludes with practical suggestions for transit authorities to reduce the disparities between transit in the urban core and the suburbs. Part VI closes by explaining the role of the courts in achieving equity.


\textsuperscript{23} Anthony Flint, As Post-Dig Transit Projects Stall, Lawsuit Looms, Boston Globe, Nov. 8, 2004, at B1.

II. Transportation Equity

The need for transportation touches every aspect of the lives and daily routines of Americans. Access to reliable transportation impacts the quality of life, employment opportunities, financial security, and freedom of movement. Although many Americans enjoy the speed and convenience of cars, public transportation is the only method of travel for millions of inner-city residents. In these urban areas where blacks and Latinos comprise 54 percent of transit users, clean and reliable mass transit is needed for easy access to jobs, shopping, health care, and child care. An equitable transportation system allows all Americans to participate fully in society without regard to age, ability, ethnicity, income, or car ownership.

A. Principles

Transportation equity obtains when fairness in mobility and accessibility levels across race and class becomes a reality in all places. Evaluating transportation equity requires an examination of: (1) the negative environmental consequences of transportation policies; (2) the discrepancies in resource allocation and investment; and (3) distribution of service among the various population groups, particularly among socioeconomically disadvantaged people.

The principles of transportation equity are deeply rooted in environmental justice. Environmental justice embraces the fundamental principle that all people and communities are entitled to fairness and equal protection of the environmental, health, housing, transportation

26 Stolz, supra note 11 at 1.
27 Bullard, supra note 25 at 4.
28 Id.
30 Thomas W. Sanchez, et al., The Civil Rights Project at Harvard University, Moving To Equity: Addressing Inequitable Effects of Transportation Policies on Minorities 10 (2003).
and civil rights laws.\textsuperscript{32} The EPA Office of Environmental Justice has defined fairness in the following way:

Fair treatment means that no group of people, including racial, ethnic, or socioeconomic group[,] should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies.\textsuperscript{33}

In the transportation context, environmental justice seeks to eliminate unfair and inequitable conditions; to demand that transportation plans and policies avoid, minimize, and mitigate negative impacts to particular communities; and to ensure that disadvantaged groups receive their fair share of benefits.\textsuperscript{34}

Analysts use several models to evaluate transportation equity. These models attempt to elucidate the disparate outcomes in transportation planning, operation, maintenance, infrastructure, and expenditures.\textsuperscript{35} To facilitate the evaluation, analysts place transportation users into groups based on geography, income, age, employment status, race/ethnicity, travel behavior, transportation access, and tax payments.\textsuperscript{36}

Professor Todd Litman sets forth three types of transportation equity.\textsuperscript{37} \textit{Horizontal equity}\textsuperscript{38} addresses the fairness and cost-benefit allocation between individuals who are similarly situated in ability and need. Public policies should avoid favoring one group over another because customers should generally “get what they pay for and pay for what they get.”\textsuperscript{39} \textit{Vertical equity with regard to income and social class}\textsuperscript{40} addresses the distribution of costs and burdens between groups

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{32} \textit{Id.} at 25.
\item \textsuperscript{33} \textit{Id.} (internal citation omitted).
\item \textsuperscript{34} \textit{Id.}
\item \textsuperscript{35} \textit{Id.} at 26.
\item \textsuperscript{36} Todd Litman, \textit{Evaluating Transportation Equity: Methods for Incorporating Distribu-
\textsuperscript{37}\textit{tional Impacts into Transport Planning}, 8 \textit{WORLD TRANSPORT POLICY & PRACTICE} 50, 51-53 (2002).
\item \textsuperscript{37} \textit{Id.} at 50.
\item \textsuperscript{38} Horizontal equity is also called “fairness” or “egalitarianism.” \textit{Id.} (internal citation omitted).
\item \textsuperscript{39} \textit{Id.}
\item \textsuperscript{40} Vertical equity with regard to income and social class is also called “environmental jus-
\textsuperscript{39}\textit{tice.”} \textit{Id.} at 54 (internal citations omitted).
\end{itemize}
\end{footnotesize}
which differ in income or social class.\textsuperscript{41} Equity obtains when transportation policies favor disadvantaged groups, thereby compensating for overall inequity.\textsuperscript{42} \textit{Vertical equity with regard to mobility need and ability} addresses the degree to which transportation systems serve groups who differ in transportation ability and need.\textsuperscript{43}

Professor Robert D. Bullard looked at disparate outcomes to define transportation inequity.\textsuperscript{44} \textit{Procedural inequity analysis} looks to the process by which transportation decisions are made; if the process includes a diverse group of public stakeholders; and if the decisions are carried out in a uniform, fair, and consistent manner.\textsuperscript{45} \textit{Geographic inequity analysis} explores how transportation decisions affect various geographic areas and spatial locations. This analysis identifies disparities in the quality of transit services within a region and determines if the services within a specific location adequately meet the transportation needs of that location.\textsuperscript{46} \textit{Social inequity analysis} evaluates the distribution of transportation benefits and burdens across social groups.\textsuperscript{47}

In Part IV of this Article, transit service in metropolitan Boston is evaluated under both the Litman and Bullard analytical frameworks.

\section*{B. Background}

\subsection*{1. The Structure of Transit Systems in Major Cities}

Transit authorities in large cities provide bus and rail service,\textsuperscript{48} which are both integral in making metropolitan areas livable and accessible.\textsuperscript{49} These cities design their transit networks using a "hub-and-spoke" model: rail lines form the heart of the transit network and

\begin{itemize}
\item \textsuperscript{41} \textit{Id.} at 50.
\item \textsuperscript{42} "Policies favoring disadvantaged groups are called \textit{progressive}, while those that make disadvantaged people relatively worse off are called \textit{regressive}." \textit{Id.} at 54.
\item \textsuperscript{43} \textit{Id.} at 50.
\item \textsuperscript{44} Bullard et al., \textit{supra} note 31, at 27. \textit{See also} \textit{JUST TRANSPORTATION: DISMANTLING RACE AND CLASS BARRIERS TO MOBILITY 1-6} (Robert D. Bullard & Glenn S. Johnson eds., New Society Publishers 1997).
\item \textsuperscript{45} \textit{JUST TRANSPORTATION}, \textit{supra} note 44, at 1-6.
\item \textsuperscript{46} \textit{Id.}
\item \textsuperscript{47} Bullard et al., \textit{supra} note 31, at 27.
\item \textsuperscript{48} Transit authorities in Boston, New York, Philadelphia, Chicago, Atlanta, Washington, D.C. have multiple rail lines and numerous bus routes.
\item \textsuperscript{49} \textit{TRANSPORTATION RESEARCH BOARD, THE ROLE OF TRANSIT IN CREATING LIVABLE METROPOLITAN COMMUNITIES} (Transit Cooperative Research Program, TCRP Report 22, 1997).
\end{itemize}
buses form the arteries. The bus routes originate and terminate at the stations scattered along the rail routes. Multiple rail lines often intersect at one or more points in the center of the city. Transit riders overwhelmingly agree on one point: rail service is the best modal choice because of its speed and limited station stops.

2. *The Face of Public Transportation*

The identity of mass transit riders depends on income, auto ownership, trip purpose, trip distance, the type of transit, accessibility, race, and other factors. Income is the primary determinant of travel mode. Transit use drops from 19.1 percent by households with no car to only 2.7 percent by households with one car, which means that most households abandon public transportation once they own a car.

Transit modal choice is also related to income. Bus usage decreases sharply as incomes rise: the poor are eight times more likely than the affluent to ride the bus. Rail is the mode of choice for the affluent both in the city and in the suburbs. Many transportation authorities have placed park-and-ride lots or garages at or near the

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51 Rail stations often attract restaurants, shops, and other small businesses. The neighborhoods around rail stations have also become targets for gentrification. See generally TRANSPORTATION RESEARCH BOARD, *TRANSIT AND URBAN FORM* (Transit Cooperative Research Program, TCRP Report 16, 1996) (exploring the relationship between transportation, land use, and urban development). Low-income persons who live near these stations are being "squeezed out" as property values rise, which forces them to move to areas with diminished transit access and quality. John Pucher & John L. Renne, *Socioeconomics of Urban Travel: Evidence from the 2001 NHTS*, 57 TRANSP. Q. 49, 60-61 (2003). See also Robert D. Bullard et al., *Dismantling Transit Racism in Metro Atlanta, in HIGHWAY ROBBERY: TRANSPORTATION RACISM & NEW ROUTES TO EQUITY* 49, 53-54 (Robert D. Bullard et al. eds., South End Press 2004) (describing the example of a "squeeze out" in Atlanta).

52 There is generally a transit hierarchy (in descending order): rail service with limited stops; light rail/trolley service; and the bus. Pucher et al., *supra* note 51, at 59-60.

53 The statistics used in this section come from Pucher et al., *supra* note 51.

54 *Id.* at 49.

55 *Id.* at 55.

56 *Id.* at 55, 57.

57 Households earning less than $20,000 account for 47.1% of bus riders but only 19.7% of rail riders, but households earning $100,000 or above account for 6.8% of bus riders and 27.2% of rail riders. *Id.* at 62.

58 Bus travel "is generally shorter, slower, and less comfortable. [and] also suffer[s] from an image of low-quality, lower class service." *Id.* at 59 (emphasis added).
terminus of rail lines in order to attract suburban passengers. On a typical workday, a suburban passenger can park at a suburban rail station and ride the train into the city, thereby avoiding traffic congestion and parking headaches. The time and money saved makes park-and-ride a bargain for suburban residents. Thus, rail transit attracts both the poor and affluent.

Variation in transit use among the races is striking. Blacks are eight times as likely as whites to ride the bus, three times as likely to use rail transit, and almost six times as likely to use public transit overall. Blacks and Hispanics account for 54 percent of all transit users, 62 percent of all bus riders and 35 percent of all rail riders. Thus, minorities rely on public transit far more than whites.

C. The History and Consequences of Transportation Inequity

I. Suburban Sprawl

"White flight" and the racial polarization of metropolitan areas lie at the heart of modern transit inequity. Both of these phenomena have been fueled by the construction of the interstate highway system. Transportation and urban development plans destroyed black communities, split them in half, or physically separated black residents from transportation, jobs, and white persons. These policies and

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59 Id. at 60; Bullard et al., supra note 51, at 56.
60 This bimodal behavior has been observed in Boston, New York, Chicago, Washington, D.C., and other cities with major metro systems. Pucher et al., supra note 51, at 60.
61 Id. at 67.
62 Id.
63 "If one includes low-income households as well, the combination of blacks, Hispanics, and low-income non-minority households [comprises] 73% of bus riders, 44% of rail riders, and 63% of transit riders overall." Id.
66 Stoltz, supra note 11, at 1-2. Black business districts and neighborhoods were purposefully targeted for new highway construction. More than 330,000 mostly black families were displaced between 1956-1966. Sheryll Cashin, The Failure of Integration: How Race and Class are Undermining the American Dream 113-114 (Public Affairs 2004) (internal citation omitted). The interstates "divided cities by race, often creating a firewall separating 'good' white neighborhoods from 'bad' black ones." Id. at 113. See also Amy J. Schulz et al., Racial and
practices laid the foundation for low-income minority enclaves, which were usually concentrated in central cities or unstable older communities. As jobs, wealth, and political power moved to the suburbs, transportation planning was directed toward highway development rather than transit access.

2. Disparate Treatment

The continued socioeconomic polarization of American cities directly impacts transportation policies. Transit authorities create and exacerbate the polarization by providing two types of transit: superior service for affluent riders and inferior service for captive riders from low-income neighborhoods. The disparate treatment is at least partially fueled by "white fear" and money.

Transit authorities are well-aware of white fear. If whites and blacks cannot live together, send their kids to the same schools, dine together in restaurants, or attend church together, why should the two groups feel comfortable riding a bus or train together? A considerable number of white persons would prefer to stand on a crowded bus or train rather than sit in an empty seat next to a black person. A regular transit customer in a large city knows which transit routes are

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Spatial Relations as Fundamental Determinants of Health in Detroit, 80 Milbank Q., 677 (2002) (discussing urban renewal projects and highway construction in Detroit which destroyed black communities).

67 Stolz, supra note 11, at 2.
68 Bullard, supra note 31, at 18-19.
69 Pucher, supra note 51, at 67. "Captive riders" are also called "transit-dependants." See infra Part IV.A.2.
70 Bullard et al., supra note 31, at 19. See also Cashin, supra note 66, at 12-17 (defining and presenting examples of "white fear"); JODY D. ARMOURE, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA (New York University Press, 1997) (mistrust, the media, personal experiences, and unconscious discrimination lead to white fear); Charles J. Ogletree, Jr., The Burdens and Benefits of Race in America, 25 Hastings Const. L.Q. 219, 255 (1998) (explaining that the roots of white fear come from a fear of violence).
71 Bruce Jacobs, author and Harvard alumnus, shares his experience on public transit: Rush hour on board a bus or a train... Dressed conservatively in a tweed jacket and tastefully bold tie, I am an unremarkable man on an unremembered train, as unnoticed as any other commuter. Except for one thing: amid the growing crush, the seat beside me remains empty. At stop after stop, as people come on board, glance around, and seat themselves, a succession of seemingly random individual decisions coalesce into a glaring pattern of unoccupied spaces next to black males -- including me. Soon the seats beside us are the only ones left. Other passengers remain standing, leaving these seemingly quarantined seats to those desperate souls who board once the car is choked past capacity. Bruce A. Jacobs, Race Manners: Navigating the Minefield between Black and White Americans 15-16 (Arcade 1999) (emphasis added).
“black” and which ones are “white.” Some suburban communities even design their own bus systems to ensure exclusivity.

Transportation policies favor high-income riders, both financially and in the service provided. When the distance traveled per trip is considered, low-income riders – who usually make short trips – subsidize high-income riders from the suburbs, especially if transit fares are uniform. Thus a suburban passenger who travels 20 miles may only pay 20 percent of the true cost of the trip, whereas an inner-city passenger who travels one mile may pay more than twice the true cost of the trip.

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72 Some white Atlanta residents have given MARTA, the regional transit authority, an unflattering nickname: “Moving Africans Rapidly Through Atlanta.” See Bullard et al., supra note 51 at 52; Orlyn O. Lockard, III, Note, Solving the “Tragedy”: Transportation, Pollution and Regionalism in Atlanta, 19 Va. Envtl. L.J. 161, 180 n.139 (2000). Note that the animosity cuts both ways, as Bruce Jacobs shows by describing the journey his white friend on a bus in a black neighborhood:

She is regularly shunned, sneered at, and called names by black strangers when she rides [the bus]. Some black passengers, forced to sit beside her, turn their backs on her entirely, sitting with their feet in the aisle and their bodies hunched away from her in an exaggerated pantomime of revulsion.

Jacobs, supra note 71, at 16. Jacobs suggests, however, that there is a difference between “white” rejection and “black” rejection:

[T]here is a difference. Most white people do not shoulder they way through a lifetime of being singled out for hostile caricature . . . . [Unlike its depiction of blacks, the media] depict[s] whiteness as a colorless, pleasantly inert state of normalcy. The “home turf” nastiness some black passengers may show a white commuter can best be understood as a sort of revenge. From the standpoint of many blacks, whites have done all but beg to be disliked.

Id. at 20.

73 The clearest example of this practice is metropolitan Atlanta. Aside from DeKalb Country, the predominately white counties that border mostly black Atlanta/Fulton Country have continually chosen not to fund MARTA or to let it provide service to their suburban communities. Instead, at least three of these counties have started their own bus systems. These private transit systems operate express buses from the suburbs to a MARTA rail station typically close to an interstate exit. Therefore the amount of time that the white suburban riders have to “interact” with low-income Atlanta residents is minimal. This lack of cooperation between MARTA and the neighboring counties places a burden on low-income Atlanta residents who must find transportation to jobs in the suburbs. See Sprawl City: Race, Politics, and Planning in Atlanta (Robert D. Bullard, Glenn S. Johnson & Angel O. Torres eds., Island Press 2000); see also Bullard et al., supra note 51, at 49-74.

74 Sanchez et al., supra note 30, at 14. Residents in suburban counties can use public transit while avoiding the extra sales tax that city residents pay for public transit. See Bullard et al, supra note 51, at 54-56.

75 Sanchez et al., supra note 30, at 14 (internal citation omitted).
Rail transit, the mode of choice for high-income passengers,\textsuperscript{76} almost always requires larger subsidies than bus transit.\textsuperscript{77} Buses carry more than 60 percent of transit riders but only receives 31 percent of capital funds.\textsuperscript{78} Federal guidelines often require that federal transportation dollars fund capital subsidies rather than labor subsidies.\textsuperscript{79} Because rail transit is capital-intensive and bus transit is labor-intensive, a system that depends on capital subsidies necessarily favors rail over bus; thereby benefiting high income riders.\textsuperscript{80} In spite of the benefits of rail transit, white riders will choose to drive if numerous minorities also ride the train.\textsuperscript{81}

The high-income customers who do ride the bus typically get more for their money – better equipment and better service – than minority customers in low-income communities. The bus fleet in a large metropolitan area is diverse; it typically includes older diesel-powered buses and newer alternative fuel buses.\textsuperscript{82} Transit agencies are gradually replacing aging diesel fleets with compressed natural gas (CNG) buses in response to the U.S. Department of Energy’s Clean Cities Program.\textsuperscript{83} For transit agencies that have a limited supply of CNG buses, it is no coincidence that the newer buses are often or

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\item \textsuperscript{76} Professor Boudreaux explains the social basis for the preference of rail over bus:
\begin{quote}
The attraction of rail over bus is explained in large part by the continuing appeal of social segregation. Expensive but limited rail systems, such as those in Los Angeles, have been preferred because they offer middle-class and affluent citizens the prospect of riding in a more exclusive environment, away from the poor people who ride the bus.
\end{quote}
\item \textsuperscript{77} Pucher et al., supra note 51, at 61.
\item \textsuperscript{78} Sanchez et al., supra note 30, at 14 (internal citation omitted).
\item \textsuperscript{79} Id.
\item \textsuperscript{80} Id.
\item \textsuperscript{81} “Atlanta’s racial divide has also been an obstacle to mass transit. The predominantly white outer counties have long opposed expansion of MARTA, Atlanta’s heavy rail transport system, because of their fear of being brought closer to the predominantly black inner-city.” Sheryll D. Cashin, Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism, 88 Geo. L. J. 1985, 2038 n.288 (2000); see also Lockard, supra note 72, at 161-195.
\item \textsuperscript{82} Several municipal and personal websites list equipment rosters for transit agencies across the country. See, e.g., Bus Rosters on the Web, \textit{available at} http://www.geocities.com/MotorCity/Downs/9036/Transit_A.html (listing equipment rosters for numerous cities); Colby’s Corner, \textit{available at} http://www.angelfire.com/mb2/orion/bjc/ (listing of MBTA bus rosters).
\item \textsuperscript{83} “The mission of the Clean Cities Program is to advance the nation’s economic, environmental, and energy security by supporting local decisions to adopt practices that contribute to the reduction of petroleum consumption.” Clean Cities Program, U.S. Department of Energy (USDOE), \textit{http://www.eere.energy.gov/cleancities} (last visited March 17, 2006). \textit{See also USDOE, Alternative Fuels in Public Transit: A Match Made on the Road} (March 2002), availa-
exclusively assigned to routes in higher-income neighborhoods while the diesel-powered buses continue to service low-income areas. A conscientious transit observer can still see that, in many metropolitan areas, “white” bus routes are often assigned newer, cleaner buses than “black” bus routes. In addition to bad equipment, buses which serve low-income neighborhoods are often overcrowded.

3. “Side Effects”

Transportation inequity adversely affects three critically important concerns of urban core residents: jobs, education, and health. The demand for transportation equity in the urban core extends far beyond “new” versus “old” or bus versus rail: it is firmly rooted in the health and prosperity of a people.


84 Professor Bullard discusses the disparity in bus assignments:

Transit providers routinely respond differently to their urban, inner-city, transit-dependent riders and their suburban “choice” riders . . . . Attempts to lure white commuters . . . . often compete with providing quality services for urban transit-dependent people of color . . . . There also appears to be an unwritten rule that the poor and people of color transit riders deserve fewer transit amenities than [whites]. Whether intended or unintended, some transit providers bend over backward to accommodate their mostly white suburban commuters with plush, air conditioned, clean-fuel and handicapped-accessible buses and trains, while inner-city transit riders are saddled with dilapidated, “dirty” diesel buses.

Bullard, supra note 25, at 5. Placing diesel bus garages and maintenance facilities in low-income neighborhoods is not uncommon. See Omar Saleem, Overcoming Environmental Discrimination: The Need for a Disparate Impact Test and Improved Notice Requirements in Facility Siting Decisions, 19 Colum. J. Envtl. L. 211, 230 n.80 (1994) (suggesting that emissions from the high number of diesel bus facilities in Harlem may explain the high incidence of asthma there); Diane Cardwell, Environmental Group Files Complaint Against M.T.A., N.Y. Times, Nov. 16, 2000, at B3 (describing a complaint filed by an environmental group against the M.T.A. for putting most of the diesel bus facilities in minority neighborhoods). See also infra Part IV.B.4.

85 The bus assignment procedure in metro Atlanta shows the disparity: In 2000, MARTA’s bus fleet was comprised of approximately 698 buses, 118 of which were clean-fuel CNG buses. The bus fleet was housed at three garages . . . . [including] the Hamilton garage which serves predominately black South Atlanta . . . . All of the buses at the Hamilton garage are “dirty” diesel buses . . . . MARTA had no plans in the next several years to bring clean-burning CNG buses to its mostly black areas served by the Hamilton garage . . . . On the other hand, the two MARTA garages with the largest concentration of nonminority bus routes are either currently served by a full fleet of CNG buses . . . . [O]r plans are underway to accommodate CNG buses . . . . Bus routes serving a large share of white passengers, such as the Emory University route, are serviced by newer buses only.

Bullard, supra note 51 at 63.

86 See id.
Although high-paying jobs have remained in cities, many entry-level jobs suitable for low-income residents have moved to the sprawling outer-ring suburbs.\textsuperscript{87} Public transportation is often inadequate or unavailable for inner-city residents to make the reverse commute.\textsuperscript{88} These residents must either find someone who owns a car as is willing to drive them, rely on employee shuttles, or make treacherous walks from the nearest transit stop.\textsuperscript{89} This "spatial mismatch" is a formidable challenge for the reverse commuters in the urban core,\textsuperscript{90} especially for welfare recipients who are making the mandatory transition\textsuperscript{91} from welfare to work.\textsuperscript{92}

Many students in the urban core depend on mass transit to attend school and college.\textsuperscript{93} The lack of funding for school buses and the renewed emphasis on neighborhood schooling forces many K-12 stu-

\textsuperscript{87} Robert H. Freilich, \textit{The Social Costs of Sprawl}, 29 \textit{U}. \textit{R}. \textit{L}. \textit{A}.w. 183, 192 (1997). The redistribution of jobs to the suburbs has increased poverty and unemployment in the urban core, and "makes middle-class employment inaccessible for many urban residents." \textit{Id.}

\textsuperscript{88} See Robert D. Bullard et al., \textit{The Costs and Consequences of Suburban Sprawl: The Case of Metro Atlanta}, 17 \textit{GA. St. U. L. REV.} 935, 964 (2001); Nicole S. Garnett, \textit{The Road from Welfare to Work: Informal Transportation and the Urban Poor}, 38 \textit{Harv. J. on Legis.} 173, 185 (discussing the scheduling limitations and other complexities in using public transit to travel from the urban core to the suburbs).

\textsuperscript{89} See Garnett, \textit{supra} note 88, at 192-229 (describing existing methods of transporting welfare recipients to suburban jobs and providing alternative approaches).

\textsuperscript{90} The "spatial mismatch" hypothesis refers to the disconnect between the location of entry-level jobs (suburbs) and locations of low-income housing (the urban core). Michael H. Schill, \textit{Deconcentrating the Inner City Poor}, 67 \textit{Chi-Kent L. Rev.} 795, 798-804 (1991). Jakowitsch and Ernst describe the domino effect of the "spatial mismatch":

The resulting "spatial mismatch" between jobs and housing concentrates high rates of poverty in the urban core and makes residential and economic development generated by new roads in outer suburbs virtually inaccessible by transit. . . [When] less funding is available for transit, it becomes a more expensive service [which disproportionately affects] low-income and minority families. . . Not only have the jobs left the urban core where they live, but [residents in these] communities in some instances have no way to get to the jobs in the [suburbs].


\textsuperscript{93} Sanchez et al., \textit{supra} note 30, at 22.
students in the inner city to depend on public transportation, particularly those who travel outside of their neighborhood to attend a “better” charter, magnet, or suburban school. Similarly, a significant number of college students from low-income neighborhoods live at home; thus, they use public transit to attend community colleges or urban university campuses. When mass transit becomes expensive, inaccessible, or inconvenient, students from the urban core start to miss school.

Transportation inequity has created or exacerbated health problems among the residents of the urban core. Researchers have linked the high levels of air pollution present in poor inner-city neighborhoods to asthma, heart disease, lung cancer, birth defects, brain damage, and premature death. The high rate of asthma in low-income neighborhoods, which is exacerbated and possibly caused by diesel exhaust fumes, has received nationwide attention.

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94 Id. at 22-23. Some school districts even pay for all or part of the transit fares. See, e.g., John Gehring, Minneapolis Enrollment Drops Report Says, Citing Competition, EDUC. W.K., Nov. 12, 2003, at 4 (describing a state open-enrollment policy which provides Minneapolis pupils with free transportation to the school of their choice).

95 The No Child Left Behind Act of 2001 allows open enrollment and mandates free transportation if certain conditions are met. 20 U.S.C. § 6301 et seq. A school district can satisfy the transportation requirement by paying for public transportation. GENERAL ACCOUNTABILITY OFFICE, REPORT TO THE SECRETARY OF EDUCATION (GAO-05-7, Dec. 2004), at 27.

96 Sanchez et al., supra note 30, at 23-24 (internal citation omitted).

97 Id.

98 Id. at 24-25. “Socioeconomic conditions such as polluted environments, inadequate housing, absence of mass transportation, lack of educational and employment opportunities, and unsafe working conditions are implicated in producing inequitable health outcomes.” Id. at 24 (internal citation omitted).

99 The fumes from vehicle exhaust adversely affects residents who reside in close proximity to traffic. Jakowitsch et al., supra note 90, at 167 (internal citation omitted). A recent study in Los Angeles found that the incidence of cancer along highway corridors which carry the most truck traffic is the highest in the region. Id. at 167 (internal citation omitted). Researchers at the University of Michigan found that low-income residents in Detroit near heavy truck traffic were exposed to twenty-two percent more airborne particulate matter than residents on the other side of town. Schulz et al., supra note 66, at 691.


101 See Minorities Top Asthma Admissions, 19 NURSING STANDARD 7 (2005); Phil Brown et al., The Health Politics of Asthma: Environmental Justice and Collective Illness Experience in the
The high air pollution in these areas has been caused by transportation policies and practices like highway construction,\textsuperscript{102} heavy vehicular traffic, and the extensive use of diesel-powered buses. Low-income residents may continue to face the health effects of their physical environment because they do not have the economic resources or political power to change zoning regulations or to reroute heavy vehicular traffic.\textsuperscript{103}

\section*{D. Federal Laws and Policies}

Since the birth of the interstate era the federal government has played a major role in steering the transportation plans and policies which have led to the social, economic, and infrastructural disparities between the urban core and outer-ring suburbs. The Urban Mass Transportation Act of 1964 (UMTA) was the federal government’s first major mass transit endeavor.\textsuperscript{104} UMTA provided a 50:50 capital fund match\textsuperscript{105} to cities and states for the construction of rail projects. Many states decided to spend their own money on highways because federal fund matching was higher for highway construction (80:20).\textsuperscript{106} This federal funding “inducement” fostered suburban growth and accelerated the decay of the urban core.

\textit{United States, 57 SOC. SCI. & MED. 453 (2003); Gregory K. Fritz, Pediatric Asthma and Minority Children, 18 BROWN U. CHILD & ADOLESCENT BEHAV. LETTUR. 8 (2002); Michelle M. Cloutier et al., Childhood Asthma in an Urban Community, 122 Chest 1571 (2002). Not only are blacks are almost twice as likely to have asthma as whites, but black children who live below the poverty level have the highest rate of asthma in the nation. Sanchez et al., supra note 30, at 24 (internal citations omitted).}

\textsuperscript{102} Most major cities have interstates which bisect or straddle low-income neighborhoods with a large concentration of minorities. See, e.g., Schulz et al., supra note 66, at 691 (Detroit’s impoverished neighborhoods are close to interstate highways); Larry Bennett, Restructuring the Neighborhood: Public Housing Redevelopment and Neighborhood Dynamics in Chicago, 10 J. Affordable Housing & Community Dev. L. 54, 65-66 (2000) (describing redevelopment plans for the Robert Taylor Homes: the massive housing project in Chicago adjacent to I-90/I-94 Dan Ryan Expressway).

\textsuperscript{103} Schulz et al., supra note 66, at 691-692 (internal citation omitted).


\textsuperscript{105} Capital costs must be distinguished from operating costs. Capital costs include infra-structure and equipment, like laying a railroad bed and buying rail cars and buses. Operating costs include salaries, fuel, and maintenance. A rail line requires a substantially higher capital investment than a bus system. Federal transportation projects like UMTA traditionally funded capital projects.

\textsuperscript{106} Jakowitsch et al., supra note 90, at 163.
The Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA)\textsuperscript{107} was “the first major federal transportation policy to give \textit{any} consideration to the health, economic, and social effects of transportation policy on racial minority and low-income communities.”\textsuperscript{108} The law changed the federal funding policy and dramatically altered future transportation planning. Mass transit and highways now received similar fund matching, thereby removing the highway bias.\textsuperscript{109} Highway funds could also be diverted to transit initiatives.\textsuperscript{110} Federal funds in metropolitan areas were given directly to Metropolitan Planning Organizations (MPOs) – diverse bodies empowered to plan and allocate transportation funding in metropolitan areas.\textsuperscript{111} The MPOs also had to develop – with local community involvement – short-term and long-term transportation projects.\textsuperscript{112} ISTEA authorized the Congestion Mitigation and Air Quality (CMAQ) program, which provided funding for MPOs and transit agencies to invest in projects to reduce air pollution.\textsuperscript{113}

President Clinton dedicated the power and resources of the Executive Branch to fight for environmental justice in the urban core two years after ISTEA enactment.\textsuperscript{114} EO 12898 was not new law but “an attempt to address environmental injustice within already existing federal [environmental and civil rights] laws and regulations.”\textsuperscript{115} The U.S. Department of Transportation (USDOT) and other federal agencies responded by incorporating environmental justice and civil rights


\textsuperscript{108} Sanchez et al., supra note 30, at 5 (emphasis added).

\textsuperscript{109} \textit{Id.}; Jakowitsch et al., supra note 90, at 163.

\textsuperscript{110} National Transportation Library, ISTEA Summary, at http://ntl.bts.gov/DOCS/ste.html (last visited Mar. 08, 2005).


\textsuperscript{112} \textit{Id.}

\textsuperscript{113} 23 U.S.C. § 149 (2004). The CMAQ program, created shortly after the amendments to the Clean Air Act, as amended 42 U.S.C. § 7401 et seq., could fund clean air buses, urban bicycle paths, and other “clean” projects.


\textsuperscript{115} Bullard, supra note 31, at 23. EO 12898 is rooted in directives of the Title VI; the Clean Air Act; and the National Environmental Policy Act of 1969, as amended 42 U.S.C. § 4321 et seq.
principles into their policies and regulations affecting transportation planning and decision making.\(^\text{116}\)

The Transportation Equity Act for the 21st Century (TEA-21) succeeded ISTEA and reauthorized transportation funding through 2003.\(^\text{117}\) TEA-21 maintained the transportation planning structure of ISTEA but went further by creating a new program to squarely address the "spatial mismatch" between residents of the urban core and jobs in the suburbs. The Job Access and Reverse Commute (JARC) program provided grants for transit authorities, service agencies, and employers to create or expand transportation to the suburbs for welfare recipients and low-income residents.\(^\text{118}\)

Even though Congress\(^\text{119}\) and the President\(^\text{120}\) seek to bring transportation equity to the urban core, "the executive orders, laws, and regulations are only as good as their enforcement."\(^\text{121}\) Residents in low-income communities must constantly fight for their rights in spite of clear-cut mandates.\(^\text{122}\) The continued disparate treatment has caused the transportation equity and environmental justice movement to seek relief through the courts.\(^\text{123}\)


\(^\text{118}\) Id.

\(^\text{119}\) Congress's intent appears on the face of the Act:

The National Intermodal Transportation System shall include significant improvements in public transportation necessary to achieve national goals for improved air quality, [mobility] for elderly individuals, individuals with disabilities, and economically disadvantaged individuals in urban and rural areas of the United States.


\(^\text{120}\) See EO 12898, supra note 114.

\(^\text{121}\) Bullard, supra note 31, at 25.

\(^\text{122}\) Id.

\(^\text{123}\) See infra Part III. A-D.
III. PRIOR EQUITY-BASED LAWSUITS AGAINST TRANSPORTATION AUTHORITIES

A. Title VI: Then and Now

The disparate impact that transit policies have on low-income, minority communities has led civil rights organizations to sue transit authorities in Philadelphia, New York and Los Angeles under Title VI. The statute has two operative parts: § 601 bars recipients of federal money from subjecting beneficiaries to racial discrimination, and § 602 instructs federal agencies to promulgate regulations which “effectuate the provisions of § 601.” The USDOT regulations mirror the language of Title VI.

“Disparate impact” plaintiffs have relied on Title VI and federal agency “disparate impact regulations” to achieve justice, since proof of a discriminatory impact—rather than a discriminatory intent—was enough to satisfy the plaintiff’s initial burden. Some litigants claimed – and the courts recognized – the existence of an implied private right of action to enforce disparate impact regulations. In 2001 the Supreme Court held in Alexander v. Sandoval that the implied private right of action does not exist: § 601 only allows a plaintiff to sue an agency or program for intentional discrimination. Discriminatory intent is often hard to prove.

124 An environmental advocacy organization has filed a transit justice suit in Boston. The plaintiffs seek relief under the Clean Air Act. See infra Part V.
126 Cf. 49 C.F.R. § 21.5(a)(2005). (“No person in the United States shall, on the grounds of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under, any program to which this part applies”).
127 The Court of Appeals for the Second Circuit has articulated the test: Courts considering claims under analogous Title VI regulations have looked to Title VII disparate impact cases for guidance. A plaintiff alleging a violation of the DOT regulations must make a prima facie showing that the alleged conduct has a disparate impact. Once such a showing has been made, the burden shifts to the defendant to demonstrate the existence of “a substantial legitimate justification” for the allegedly discriminatory practice. If the defendant sustains this burden, the plaintiff may still prove his case by demonstrating that other less discriminatory means would serve the same objective.
In the wake of Sandoval, a potential “discriminatory impact” litigant has several options. First, federal agencies are still allowed to promulgate regulations that proscribe disparate impact. Thus, an aggrieved plaintiff can file a complaint with the agency, which in turn can sue on his behalf.\textsuperscript{130} However, this route is impractical because many federal agencies have limited funds and resources to litigate these matters. Second, the Sandoval dissent suggests that a “violation of regulations adopted pursuant to Title VI may be established by proof of discriminatory impact in a 42 U.S.C. § 1983 action against state actors and also in an implied action against private parties.”\textsuperscript{131} The potential success of 42 U.S.C. § 1983 suits is uncertain because the Courts of Appeals are divided about its efficacy.\textsuperscript{132} Third, the Sandoval dissent also suggests that facially neutral actions that have a disparate impact may also be evidence of discriminatory intent because “[f]requently the most probative evidence of intent [is] objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor.”\textsuperscript{133} Thus an aggrieved plaintiff would have a private right of action to challenge the discriminatory intent.\textsuperscript{134}

\textsuperscript{130} See Sandoval, 532 U.S. at 292.

\textsuperscript{131} Id. at 301 n.6 (Stevens, J., dissenting) (internal citations omitted). This statute mimics the language of Title VI:

Every person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities . . . shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .


\textsuperscript{134} Id. at 294.
The three equity-based suits discussed below fall into two categories. The plaintiffs in both *Committee for a Better North Philadelphia v. Southeastern Pennsylvania Transportation Authority*¹³⁵ and *New York Urban League, Inc. v. Metropolitan Transportation Authority*¹³⁶ pleaded that the apportionment of federal subsidies and the fare structure disproportionately impacted racial minorities from low-income neighborhoods. In these pre-*Sandoval* cases no discriminatory intent was alleged. The plaintiffs in *Labor/Community Strategy Center, et al. v. Los Angeles Metropolitan Transportation Authority*¹³⁷ alleged discriminatory intent and impact. The resulting consent decree, which withstood *Sandoval* on appeal, was the first successful Title VI action against a transportation agency since the Civil Rights Movement.

**B. Committee for a Better Northern Philadelphia v. Southeastern Pennsylvania Transportation Authority**

The plaintiffs alleged that the allocation of an unfair portion of federal subsidies for the commuter rail division at the expense of the city transit division disproportionately impacted racial minorities in violation of Title VI.¹³⁸ After oral argument the parties unsuccessfully tried to negotiate a settlement.¹³⁹ The district court granted defendant’s motion for summary judgment, which was affirmed by the Court of Appeals for the Third Circuit.¹⁴⁰

The Southeastern Pennsylvania Transportation Authority (SEPTA) serves Philadelphia and surrounding suburbs in Pennsylvania, New Jersey, and Delaware. During the time of the alleged discriminatory conduct, SEPTA received federal funds through UMTA which, *inter alia*, “attempted to reduce the adverse impact that fare increases and service cuts would have upon low-income peo-

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¹³⁹ *Id.*
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pie." SEPTA nevertheless had complete control over the allocation of subsidies between the city transit and commuter rail divisions. SEPTA took over the commuter rail system in 1983. The commuter rail’s poor ridership generated low revenues before and after the takeover, notwithstanding contrary budgetary projections. The cash shortfall led SEPTA to “cross-subsidize” the commuter rail division. SEPTA conceded that city transit fares would have been lower if it “allocated the subsidies available to it in direct proportion to the passenger fare revenues rather than in response to operating deficits of its individual divisions.” CBNP argued that several non-discriminatory alternatives existed, such as cutting commuter rail service, raising commuter rail fares, or implementing a commuter rail tax. SEPTA argued that it cross-subsidized in order to balance its budget while maintaining commuter rail service, which SEPTA argued was a legitimate, non-discriminatory purpose.

The court found that CBNF failed to meet its burden because SEPTA “[had] the responsibility for operating an integrated mass transit system . . .while maintaining a balanced budget,” which required a “response to the economic realities of a diversified transportation business.” The transit authority’s goal was legitimate because it had to consider the transit needs of the entire service area. Thus CBNF’s action could not withstand summary judgment because it was “nothing more than an attack on the business judgment of SEPTA.”

C. New York Urban League, Inc. v. Metropolitan Transportation Authority

The plaintiffs alleged that the defendant’s proposed fare increase of 20 percent for urban transit, when compared to a 9 percent increase for commuter rail service, would disproportionately burden minority

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142 Id.
145 Id. at *3.
146 Id.
147 Id.
148 Id.
149 Id. at *4.
passengers in violation of Title VI and 49 C.F.R. § 21.5.\textsuperscript{150} The district court granted plaintiffs’ motion for a preliminary injunction, which was vacated four weeks later by the Court of Appeals for the Second Circuit.\textsuperscript{151}

The Metropolitan Transportation Authority (MTA) is a multi-component corporation that provides bus, rail, and commuter rail service to the New York metropolitan area. Bus and rail service within New York City is run by the New York City Transportation Authority (NYCTA), whereas commuter rail service to the suburbs is provided by the Metro-North Commuter Railroad (Metro-North) and the Long Island Railroad (LIRR). At the time of the suit ridership on the NYCTA was 60 percent minority, and ridership on the commuter rail lines was 80 percent white.\textsuperscript{152}

The MTA must rely on federal, state, and local subsidies to remain solvent and self-sustaining since fare revenue do not cover its operating and capital costs.\textsuperscript{153} Projected deficits in 1995 and 1996, due in part to reduced local and state subsidies, led the MTA to propose a fare increase.\textsuperscript{154}

The district court granted a preliminary injunction against the MTA because it found that the plaintiffs had demonstrated irreparable harm and a high likelihood of success on the merits.\textsuperscript{155} The court found irreparable injury because it would be very difficult to calculate individual damage awards for NYCTA riders.\textsuperscript{156}

The court determined the plaintiffs’ likelihood of success by applying the three-prong discriminatory impact test.\textsuperscript{157} Over the defendant’s objection, the court used the “farebox recovery method” to establish that the plaintiff had made a \textit{prima facie} showing.\textsuperscript{158} The

\begin{itemize}
  \item \textsuperscript{151} N.Y. Urban League, Inc. v. New York, 71 F.3d 1031 (2d Cir. 1995).
  \item \textsuperscript{153} \textit{Id.} at 1269. Self-support is required by bond covenants and New York state law. \textit{Id.} at 1277-78.
  \item \textsuperscript{154} \textit{Id.} at 1276.
  \item \textsuperscript{155} \textit{See FED R. CIV. P.} 65; \textit{See also} Ashcroft v. ACLU, 542 U.S. 646 (2004) (stating that a district court must consider the likelihood of success on the merits when deciding whether to grant a preliminary injunction.).
  \item \textsuperscript{156} \textit{New York Urban League}, 905 F.Supp. at 1273.
  \item \textsuperscript{157} \textit{See supra} note 127.
  \item \textsuperscript{158} The farebox recovery ratio is the ratio of total fares paid to the total operating costs. \textit{New York Urban League}, 905 F. Supp. at 1275.
\end{itemize}
data provided by the MTA revealed that the proposed lopsided fare increases would cause NYCTA riders to pay a higher percentage of their transportation costs than the commuter rail riders.\textsuperscript{159} The court also found no legitimate, nondiscriminatory purpose or evidence to support a business necessity for the disproportionate fare hikes.\textsuperscript{160}

The Court of Appeals for the Second Circuit vacated the preliminary injunction because the district court "assessed the impact of the NYCTA and commuter line fare increases without examining the larger financial and administrative picture of which those fare increases [were] a part."\textsuperscript{161} The Court of Appeals pointed to several errors in the district court's analysis. First, the district court's finding of disparate impact based solely on farebox recovery statistics was inappropriate because the lower court failed to find that the ratio was a reliable indicator of disparate impact.\textsuperscript{162} Second, the court determined that the expenses of each transit division need not bear a proportionate relationship since the NYCTA and commuter rail divisions differ fundamentally in infrastructure, maintenance requirements, scheduling, and labor contracts.\textsuperscript{163} Third, the district court failed to properly consider the MTA's justification for the allocation. Specifically, subsidizing commuter rail could benefit the city residents by reducing congestion and pollution. Fourth, setting fares is a managerial decision; increasing NYCTA's subsidies does not entitle riders to lower fares because the MTA has the discretion to use the subsidies for other goals.\textsuperscript{164}

\textbf{D. Labor/Community Strategy Center. v. L.A. County Metropolitan Transportation Authority}

The plaintiffs alleged that the defendant transit authority intentionally implemented policies and practices which benefited suburban rail customers but had a discriminatory effect on the mostly minority bus passengers in metropolitan Los Angeles.\textsuperscript{165} The suit was ulti-

\textsuperscript{159} Id. at 1277.
\textsuperscript{160} Id. at 1277-78.
\textsuperscript{162} \textit{New York Urban League}, 71 F.3d at 1038.
\textsuperscript{163} Id.
\textsuperscript{164} Id. at 1039.
\textsuperscript{165} Opposition by Plaintiff to Defendant's Motion for Summary Judgment, LCSC, No. 94CV5936.
mately settled by a consent decree issued by a federal district court.\textsuperscript{166} The consent decree, which withstood appeal, was the first recent successful use of Title VI against a transit authority.\textsuperscript{167}

Los Angeles has the greatest unmet demand for public transportation in the nation.\textsuperscript{168} The Los Angeles County Metropolitan Transportation Authority (LAMTA) was established in 1992 to oversee bus and rail transit in greater Los Angeles.\textsuperscript{169} Equity concerns were present in LA mass transit long before the LAMTA formation. The “bus versus rail” controversy stemmed from a funding mismatch between low-income, overwhelmingly minority inner-city communities, which received bus service, and higher-income white suburbs which were served by rail.\textsuperscript{170} Even within the bus system, however, bus lines to predominately white suburbs “had better service, more direct express routes, and newer buses.”\textsuperscript{171} So even after the formation of LAMTA, the bus system “was [still] understood to be the avenue of last resort for the urban poor, the elderly, the disabled, and students.”\textsuperscript{172}

Disparate treatment continued after LAMTA was formed. While 94 percent of LAMTA passengers ride the bus, before the lawsuit LAMTA customarily spent 70 percent of its budget on rail passengers.\textsuperscript{173} Bus service was cut during rush hours, which caused undependability, overcrowding and negative social effects.\textsuperscript{174} Rail ser-

\begin{thebibliography}{9}
\bibitem{166} Consent Decree, \textit{LCSC}, No. 94CV5936.
\bibitem{167} \textit{LCSC}, 263 F.3d 1041 (9th Cir. 2001); cert. denied, 535 U.S. 951 (2002).
\bibitem{169} Eric Mann, \textit{Los Angeles Bus Riders Derailed the MTA, in HIGHWAY ROBBERY: TRANSPORTATION RACISM & NEW ROUTES TO EQUITY}, 33, 37 (Robert D. Bullard et al. eds., South End Press 2004).
\bibitem{170} \textit{Id.} at 34.
\bibitem{171} \textit{Id.} cf. discussion infra Part IV.B.1 (discussing a similar disparity within the Boston bus system).
\bibitem{172} \textit{Id.} at 36 (stating that most of the 400,000 daily bus riders live in households with a total income of less than $15,000).
\bibitem{173} Garcia, \textit{supra} note 168.
\bibitem{174} “The report of the Governor’s Commission on the Los Angeles Riots... found that transportation agencies in Los Angeles County ‘handicapped minority residents in seeking and holding jobs, attending schools, shopping, and in fulfilling other needs.’” \textit{Id.} (internal citation omitted).
\end{thebibliography}
vice, however, did not experience overcrowding.\textsuperscript{175} Subsidies and spending on security were also disproportionate.\textsuperscript{176}

In 1994 the LAMTA board voted to raise bus fares by 23 percent, eliminate bus passes, and cut service on some routes in order to offset a $126 million bus system deficit.\textsuperscript{177} The board moved forward, however, with its ambitious plan to spend $123 million on a suburban rail system expansion.\textsuperscript{178} This “two-tiered, separate but unequal” policy allowed the plaintiffs to obtain a temporary restraining order and a preliminary injunction from a federal district court.\textsuperscript{179} The plaintiffs and affiliated groups ultimately initiated a civil rights class-action suit against LAMTA.\textsuperscript{180}

In October 1996 the plaintiffs and LAMTA settled the suit before trial through a consent decree entered by the federal district court.\textsuperscript{181} LAMTA promised to purchase more buses, to relieve overcrowding, to moderate fare increases, to add more transit police, to add new bus service to job centers and educational institutions, and to give transit-dependant riders a voice in policymaking.\textsuperscript{182} The district court appointed a Special Master to resolve disputes.\textsuperscript{183} LAMTA agreed to the largest settlement in civil rights history: the agency agreed to spend over $1 billion to improve the bus system over a ten-year period.\textsuperscript{184}

LAMTA was slow to fulfill certain obligations described in the consent decree. Fourteen months after the consent decree, LAMTA had failed to meet several service improvement goals.\textsuperscript{185} This led the Special Master, and eventually the district court, to order the transit agency to purchase 248 additional CNG buses to relieve overcrowding, “even if that meant diverting funds from other transportation services under [LAMTA’s] jurisdiction.”\textsuperscript{186} LAMTA appealed the district

\textsuperscript{175} Id.
\textsuperscript{176} Id. at 39.
\textsuperscript{177} Id. at 38-9.
\textsuperscript{178} Id. at 40.
\textsuperscript{179} Consent Decree, LCSC, No. 94CV5936.
\textsuperscript{180} Id.
\textsuperscript{181} Id.
\textsuperscript{182} Id.
\textsuperscript{183} Garcia, supra note 168.
\textsuperscript{184} LCSC, 263 F.3d at 1043.
\textsuperscript{185} Id.
court’s judgment, arguing that the Special Master did not have the authority to order the transit authority to purchase 248 new buses.\(^\text{187}\) The Court of Appeals for the Ninth Circuit found LAMTA’s argument unpersuasive. When LAMTA failed to comply with the consent decree, it submitted its own remedial scheme which the Special Master found to be inadequate.\(^\text{188}\) The Special Master made his own findings which allowed him to construct a reasonable remedial order.\(^\text{189}\) The Court of Appeals subsequently affirmed the order.\(^\text{190}\)

IV. CASE STUDY: BOSTON

The quality of transit service varies substantially throughout greater Boston. Even though the entire city is covered by a web of bus routes, certain neighborhoods receive the benefit of rail-based “rapid transit.”\(^\text{191}\) Where people live within the city greatly affects their transportation options to travel to work and to carry out their daily activities.\(^\text{192}\) Whereas the upper-middle class town of Brookline has several trolley lines, residents of the economically-depressed communities of Roxbury and Mattapan must rely primarily on bus service.\(^\text{193}\) The trolley riders in Brookline are mostly white, yet the bus riders in Roxbury and Mattapan are almost exclusively black or Hispanic.\(^\text{194}\) The inability or unwillingness of white and non-white Boston residents to sit side-by-side was exposed to the world during the school busing crisis of the 1970s.\(^\text{195}\) In spite of Boston’s lingering racial

\(^{187}\) Id. at 1048.

\(^{188}\) Id. at 1051.

\(^{189}\) Id.

\(^{190}\) Id.

\(^{191}\) The MBTA contains 162 bus/trackless trolley routes which cover 730 miles and 8 rapid transit lines which cover 65.5 miles. “Rapid transit” includes subway and trolley service. MBTA Website, Inside the T, http://www.mbta.com/insidethettaag_infrastructure.asp (last visited Mar. 17, 2006).

\(^{192}\) Sanchez, supra note 30, at 7.

\(^{193}\) For example, in 2000 the median family incomes in Roxbury and Brookline were $29,572 and $66,711, respectively. The percentage of families below poverty level is five times higher in Roxbury than in Brookline. See U.S. Census Bureau, Brookline Fact Sheet (2000), at http://factfinder.census.gov; Boston Redevelopment Authority, (BOSTON POPULATION 2000 SELECTED INCOME CHARACTERISTICS: EMPLOYMENT, INCOME, AND POVERTY IN BOSTON NEIGHBORHOODS (April 15, 2003), available at http://www.cityofboston.gov/bra/PDF%5CPublications%5Cpdr_565.pdf.

\(^{194}\) U.S. Census data shows that Brookline was 81.1% white in 2000, whereas Mattapan and Roxbury were 3.3% and 4.5% white, respectively. Id.

\(^{195}\) See Nancy A. Denton, The Persistence of Segregation: Links Between Residential Segregation and School Segregation, 80 Minn. L. Rev. 795 (1996); Reginald S. Avery, THE IMPACT
tension, should the quality of a neighborhood's transit service depend on its demographics or zip code?

The Conservation Law Foundation (CLF) has recently sued the Commonwealth of Massachusetts for violation of the Clean Air Act. The citizen suit was initiated "on behalf of [CLF] members who reside, work, or otherwise spend time in [Boston] who are adversely affected and will continue to be adversely affected by the delays in the implementation of required public transit improvements." The CLF seeks declaratory, injunctive, and other relief to compel the defendants to complete the transit projects on a judicially-enforceable schedule. Once a State Implementation Plan (SIP) is adopted by a state and approved by the EPA, "[it] becomes controlling and must be carried out by the state."

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196 See Formisano, supra note 195, at 2 ("Boston still wears the reputation, at least partially deserved, of being a racist city").

197 The Conservation Law Foundation (http://www.clf.org) is an environmental justice agency that has aggressively initiated lawsuits to compel the Commonwealth of Massachusetts to honor the legal commitments made pursuant to the Central Artery/Tunnel Project.

198 Complaint at 1-2, Conservation Law Foundation v. Romney, (D.Mass., filed Mar. 14, 2005), available at http://www.clf.org/uploadedFiles/CLF/Programs/Smart_Growth/Public_Transportation/Boston_Public_Transit_Commitments/20050314_MBTA_complaint.pdf. The list of defendants on the complaint includes the Governor of Massachusetts (Romney), the MBTA, the Secretary of the Executive Office of Transportation/Chairman of the MBTA, the General Manager of the MBTA, the Massachusetts Turnpike Authority, the Commissioner of the Massachusetts Highway Department, and the Commissioner of the Department of Environmental Protection.

199 The Clean Air Act has a citizen suit provision. 42 U.S.C. § 7604(a) (1990). "Approved SIPs are enforceable by either the State, the EPA, or via citizen suits brought under § 304(a) of the CAA." Bayview Hunters Point Community Advocates v. Metropolitan Transportation Commission, 366 F.3d 692, 695 (9th Cir. 2004) (internal citation omitted) (construing CAA, 42 U.S.C. § 7604(a) (1990)). For an overview of citizen suits under the CAA, see Roy S. Belden, Preparing for the Onslaught of Clean Air Act Citizen Suits: A Review of Strategies and Defenses, 1 ENVTL. LAW. 377 (1995).

200 Complaint at 2, Conservation Law Foundation, supra note 198.

201 Id. at 1-3.

202 See supra note 20.

203 Bayview Hunters, 366 F.3d at 695 (quoting Friends of the Earth v. Carey, 535 F.2d 165, 169 (2d Cir. 1976), cert. denied, 434 U.S. 902 (1977)).
A. Background

1. Residential Segregation and Economic Realities

Boston is known as one of the most segregated cities in the nation. Finding a truly integrated neighborhood or street in Boston is difficult. Blacks are conspicuously concentrated in Roxbury, Mattapan, and Dorchester; while Charlestown, East Boston, Beacon Hill, and the higher-income suburbs tend to be rigorously white. Jamaica Plain, which is nestled between Roxbury, Dorchester, and Brookline, is one of the more socioeconomically diverse neighborhoods in the city. Professor Adams describes the forces which led to the racial sorting:

There is no question that the predominantly white character of many neighborhoods within the city of Boston and its suburbs can be attributed to various discriminatory activities undertaken by private actors and private institutions; [however,] the extent and severity of such segregation would have been impossible [without] the active participation of various levels of government.

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207 Jamaica Plain is approximately 50% white. See id.

208 Michelle Adams, The Last Wave of Affirmative Action, 1998 Wis. L. Rev. 1395, 1418-19 (emphasis added). The behavior by private actors in Boston included:

[R]eal estate brokers’ pressure upon white homeowners not to sell their homes to minorities and their refusal to show blacks houses and apartments in white communities; the utilization of racially restrictive covenants, and developers’ and builders’ refusals to build housing in predominantly black areas; financial institutions’ failure to grant mortgages to blacks in predominantly white areas; the actions of neighborhood associations designed to keep blacks out of white communities; and the use of violence as a method to preserve white homogeneity.

Id. at 1418 (internal citation omitted). The Federal Housing Administration (FHA) and its successor, the Department of Housing and Urban Development (HUD), promulgated programs...
White residents of Roxbury, Dorchester, and Mattapan began their "urban exodus" to the suburbs in the mid-1950s.109 The migration was "the disastrous yet inevitable result of the federal government's encouragement of suburban growth."210 Boston's public housing was even segregated: the housing authority placed "white" projects in white neighborhoods and "black" projects in the black ghetto.211 This discriminatory policy,212 combined with federal highway construction and discriminatory mortgage lending practices, led to the concentration of minority, low-income families in the urban core.213

It is race, not income, which produces segregation in Boston.214 A study by the Civil Rights Project at Harvard University found that "while a substantial share of poor [w]hites live in middle-class, suburban neighborhoods," many poor Blacks and Hispanics "reside in much higher-poverty, urban, racially segregated areas."215 Minorities who succeed financially nevertheless remain trapped: a "surprisingly high share of minorities who are not poor also live in high-poverty neighborhoods in areas where middle-class [w]hites are very rarely found."216

and policies which concentrated blacks into inner-city Boston. The FHA "openly exhorted segregation" by accelerating the growth of the suburbs: the agency accomplished this by using discriminatory mortgage-lending practices and by recommending "that the developers place racially-restrictive covenants on all housing that they built to ensure its future worth." Id. at 1419 (internal citation omitted).


210 Adams, supra note 208, at 1419 (internal citation omitted).

211 Id. at 1420 (internal citation omitted).


213 See supra note 208 and accompanying text; see also Cashin, supra note 66, at 110-13.


215 Id.

216 Id. "Incredibly, even [b]lack and Latino households with incomes over $50,000 are more likely to live in high-poverty neighborhoods than are [w]hite households with incomes under $20,000." Id.
2. *Mass Transit in Boston: An Overview*

The MBTA serves a population of 4.7 million in 175 cities and towns with an area of 1,038 square miles. The MBTA uses eight different modes of transit based on the hub-and-spoke model. This diverse assemblage of routes and equipment makes the MBTA the most multimodal transit system in the nation:

The MBTA’s fleet of revenue vehicles is composed of 408 heavy rail rapid transit vehicles serving the Red, Orange, and Blue lines; 180 light rail vehicles [LRVs] serving the Green Line and [the] Mattapan High Speed Line; 377 commuter rail passenger coaches; 80 commuter rail locomotive units; 957 diesel motor bus coaches, 17 [CNG] buses for the Silver line; 2 hybrid buses; 40 electric trackless trolleys; 426 RIDE vehicles [paratransit vans]; and 2 passenger ferries.

The average weekday ridership for the entire system in 2004 was 1.2 million. MBTA ridership is expected to increase by 45 percent by 2025.

William Lind, Director of the Center for Cultural Conservatism and commentator for the Free Congress Foundation, a Washington, D.C.-based think tank, describes the two types of commuters that the MBTA and other large transit authorities serve: “transit dependents,” who will take whatever transit options they are given; and, alternatively, commuters with access to cars, who must be enticed to ride

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217 MBTA WEBSITE, supra note 16; PROGRAM FOR MASS TRANSPORTATION, supra note 19, at ES-1.

218 PROGRAM FOR MASS TRANSPORTATION, supra note 19. The hub-and-spoke model is described in Part II.

219 Light rail vehicle (LRV) is typically used to describe modern trolleys/streetcars. See note 315, infra.

220 PROGRAM FOR MASS TRANSPORTATION, supra note 19 at 5A-2. At the time of the report the MBTA had on order 343 CNG buses, including some allotted for the Silver Line. The MBTA plans to have replaced all diesel buses built before 1994 (approximately 561 buses) with CNG vehicles by 2005. Id. at 5A-4. By January 2004 the MBTA had already purchased 175 CNG buses. At this time the neighborhoods of West Roxbury, Roslindale, and Hyde Park would now be served exclusively by CNG buses. Peter DeMarco, Breathe at Last: Out Here, A Diesel-Free T.3 Neighborhoods Get New Bus Fleet, BOSTON GLOBE, Jan. 11, 2004, at City Weekly 1.


222 PROGRAM FOR MASS TRANSPORTATION, supra note 19, at ES-2.
mass transit.\textsuperscript{223} The latter group, often referred to as “choice riders,” prefers and will often use only rail service.\textsuperscript{224} The Boston Globe conducted an independent analysis in 2001, revealing that the MBTA allocates a disproportionate amount of money to commuter rail:

Since 1990, the transit agency has put more than 40 percent of its investment capital into suburban commuter rail service, which makes up just 10 percent of its daily ridership. As a result, the entire system has been stretched thin, leaving riders on trains, subways, and especially buses feeling the pinch, and prompting some critics to label the T’s expenditures discriminatory. In the 1990s alone, the T invested more than $1.6 billion in commuter rail, adding 100 line miles and 21 new stations and parking facilities. The outlay reaped handsome rewards: [c]ommuter rail ridership nearly doubled, drawing people from the region’s overtaxed roadways and reducing air pollution. But as commuter rail investment barreled forward at twice the rate of other transit agencies in the United States, according to the American Public Transportation Association, the T’s bus system saw just 17 percent of the agency’s capital investment, or just $660 million, even though a third of the T’s riders take buses.\textsuperscript{225}

Residents of Roxbury, Dorchester and Mattapan – the most transit-dependent neighborhoods in the city – must rely on the bus as their principal mode of transit.\textsuperscript{226}


\textsuperscript{224} Id.; see also PROGRAM FOR MASS TRANSPORTATION, supra note 19 at II.B, II.C.

\textsuperscript{225} Raphael Lewis, A Fare Question Under Fire for its Heavy Investment in Commuter Rails, The MBTA is Taking Steps to Improve Service to Bus Riders, Earmarking More Money for that System in Coming Years, BOSTON GLOBE, May 20, 2001, at B1 (emphasis added). Brian Braiker published an article in 2002 which states similar facts:

Even though buses carry 37 percent of its customers, the MBTA spends only 13 percent of its capital budget on them, putting the money instead into costly new commuter trains serving politically well-connected suburbs. On a typical weekday, only 62 percent of buses arrive on time.


\textsuperscript{226} Transit-dependent residents in parts of Roxbury, Mattapan, and Dorchester may have a glimmer of hope. The Fairmount Commuter Rail Line runs from South Station in downtown Boston through Dorchester, Roxbury, Mattapan, and Hyde Park to Readville. The 9.2 mile line passes through densely populated portions of the urban core which have no rapid transit access. The three intermediate stations that currently exist are small, underutilized, poorly marked, and potentially unsafe. Rail service is also infrequent. The MBTA has proposed upgrades to this
Masaya Otake undertook a Policy Analysis Exercise “to clarify whether Roxbury receives a reasonable or fair share of transit resources and services relative to other communities in the [MBTA] district.”\(^\text{227}\) Two findings warrant special attention. First, the subsidy per passenger on MBTA commuter rail ($6.89) is considerably higher than that on the bus ($1.90) or subway ($1.68).\(^\text{228}\) Second, even within the bus system, the routes that serve Roxbury receive a lower operating subsidy per passenger ($0.69 to $0.71) than the MBTA district overall or other low-income inner-city communities (MBTA $1.08, South Boston $1.31).\(^\text{229}\)

B. A Cloud Without a Silver Lining: The Orange Line Relocation

1. Deprived Arteries

Dorchester, Mattapan, and Roxbury benefited from high-quality rail transit at earlier times in their history.\(^\text{230}\) At the turn of the century an elevated train was constructed along Washington Street from downtown to Jamaica Plain, and streetcars ran along Blue Hill Avenue as far as Mattapan.\(^\text{231}\) These two arteries became two primary commercial corridors through the southwestern portion of greater Boston, and formed an integral part of the north-south transportation

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\(^\text{227}\) Masaya Otake, John F. Kennedy School of Gov’t at Harvard University, Analysis & Strategies for Transit Justice in Greater Boston [A Policy Analysis Exercise] x (2002) (emphasis in original). Otake’s study, which corroborates the Boston Globe analysis, “suggests that there is a difference of transportation subsidy per capita between Roxbury and other targeted communities, especially between Roxbury transit-dependents and suburban choice-riders.” \textit{Id.}

\(^\text{228}\) \textit{Id. at xi.}

\(^\text{229}\) \textit{Id. at xii (emphasis added).}


2. The Orange Line: Then and Now

The Washington Street Elevated, the predecessor to the Orange Line, opened for service in 1901.239 The Orange Line Elevated extended from downtown Boston to Forest Hills Station in Jamaica Plain. Since Boston’s early days Washington Street was the main transportation route between Boston and Roxbury and other neighboring towns to the southwest.240 The Orange Line Elevated allowed

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233 HEART OF THE CITY: TRANSIT JUSTICE, supra note 231.
234 See infra Part IV.B.2.
235 “Many have . . . suggested that economic development along Blue Hill Avenue is stymied by poor access via public transportation.” HEART OF THE CITY: TRANSIT JUSTICE, supra note 231.
236 See supra Part IV.A.1.
237 HEART OF THE CITY: TRANSIT JUSTICE, supra note 231.
238 Id.
large numbers of working class people to travel between the inner city and into the suburbs for the first time.\textsuperscript{241}

The Orange Line Elevated embodied the most advanced transportation planning of its day.\textsuperscript{242} The elevated system borrowed advanced rapid transportation technology from cities like New York and Chicago, which had already developed third-rail systems.\textsuperscript{243} The engineering problems created by Boston’s irregular topography – consisting of hilly terrains, settled residential districts, and narrow curving streets – made construction of the elevated structure an “impressive undertaking,” even by modern standards.\textsuperscript{244} The Orange Line Elevated was also architecturally significant: the original rail stations were designed by the famous Boston architect Alexander Wadsworth Longfellow.\textsuperscript{245}

At the dawn of the Interstate Era in Boston, mass transit planning and highway planning became inextricably intertwined. The 1948 Master Highway Plan, later revised and expanded by the 1968 Recommended Highway and Transit Plan, called for, inter alia, the construction of the “Southwest Corridor” from downtown through Roxbury, Jamaica Plain, and Roslindale.\textsuperscript{246} The threat of a new highway did not initially cause public alarm because Boston already had an established core rail transit system; thus there was no “highway versus rail” battle.\textsuperscript{247} Public awareness intensified when citizens learned about plans for a circumferential expressway encircling downtown Boston and Cambridge and in 1968 when clearing of the path for the new Southwest Corridor led to the demolition of over 700 homes and 300 busi-

\textsuperscript{241}\textit{Cf.}, for Urban and Reg’l. Policy, Heart of the City Project at Northeastern Univ., Orange Line (formerly the Boston Elevated Railway (the “El”)), at http://ksg.acman.harvard.edu/hotc/DisplayPlace.asp?id=11701 [hereinafter Heart of the City: Orange Line].

\textsuperscript{242} Zaitzevsky, supra note 240, at 12.

\textsuperscript{243} Id.

\textsuperscript{244} Id. at 13.

\textsuperscript{245} Id. at 9.


\textsuperscript{247} BTS Report, supra note 246, at 15. The prohighway interest groups did not oppose transit; they “agreed that transit was a valid type of transportation service, although of lower priority than highways.” Id. Furthermore, most of the proposed transportation improvements “were located along underused rail rights-of-way and would not require extensive displacement or disruption of the sort that often attracts the attention of political leaders.” Id.
nesses.\textsuperscript{248} The Governor yielded to the pressure in February, 1970, by placing a moratorium on highway planning and construction.\textsuperscript{249}

The MBTA took possession of the 120 acres of land that were to become the highway.\textsuperscript{250} A decision was finally made to move the Orange Line from the elevated structure along Washington Street to a $750 million new rapid transit line along the Southwest Corridor.\textsuperscript{251} “This was the first time in U.S. history that construction funds allocated for a major expressway had been redirected for a transit project.”\textsuperscript{252}

By 1978, the MBTA completed a plan for the new Orange Line. Community leaders, consultants, and government officials were all involved in the plan; however, the endeavor was exceedingly complex because everyone had conflicting agendas and ambitious goals.\textsuperscript{253} The new track was to run alongside the Northeast Corridor (the Amtrak right-of-way) from Back Bay Station to Forest Hills. The Orange Line Elevated closed on April 30, 1987, and the new line was “tied in” to the rail system a few days later.\textsuperscript{254}

The aesthetic differences between the Orange Line Elevated and its replacement are immense. The rusty, 80 year-old elevated structure caused blight in the neighborhoods it served and cast shadows over residential and business districts.\textsuperscript{255} The sleek, relocated Orange Line offered 9 new stations, 52 acres of parkland, basketball courts, and amphitheatres alongside the line.\textsuperscript{256} The MBTA predicted that the

\textsuperscript{248} Maze, supra note 246, at 1; BTS Report, supra note 246, at 11. See generally Alan Lupo et al., Rites of Way: The Politics of Transportation in Boston and the U.S. City (Little, Brown 1971) (describing the Southwest Corridor project and the successful community resistance).

\textsuperscript{249} BTS Report supra note 246, at 11; Heart of the City: Orange Line, supra note 241.

\textsuperscript{250} Maze, supra note 244, at 1.

\textsuperscript{251} Id.; Heart of the City: Orange Line, supra note 241.

\textsuperscript{252} Heart of the City: Orange Line, supra note 241.

\textsuperscript{253} Id.

\textsuperscript{254} Belcher, supra note 239, at 286.

\textsuperscript{255} Id. The elevated line “cast gloomy shadows and projected a feeling of blight along Washington Street.” Peter J. Howe, New Orange Line Popular, but Inconvenient for Many, Boston Globe, May 4, 1988, at 29.

\textsuperscript{256} Id.
safer, quicker, new Orange Line would attract new ridership as well as open the door for a revitalized Washington Street.

The Orange Line Relocation had a substantial negative impact on transit service for the low-income, transit-dependent residents of Roxbury. The new line was more than twelve blocks – about half a mile – to the west of some of the old stations on Washington Street, making it distant from the heart of the neighborhoods. In spite of its unsightliness, the Orange Line Elevated allowed thousands of inner-city residents to make a rapid, one-seat ride to downtown Boston. After the replacement some riders had to take two buses to the nearest Orange Line station, which required paying an additional fare. The lack of transfers made riders who had to make linked trips pay the highest transit fares in the nation.

The effect on local small business ranged from minimal to substantial. In Dudley Square, the hardest-hit businesses were small restaurants and grocery stores. The loss of the train at Dudley was noticeable but attenuated because the square is a main commercial center in Roxbury. Egleston Square businesses were impacted to a

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257 Columnist Peter Howe discussed crime with the general manager of the MBTA a year after the relocation. The manager reported that “[t]he number of serious crimes on the Orange Line, in 1982 called the ‘Terror Train’ after a gang of youths seized a train, beating and robbing passengers, is down 26 percent since the move.” Id.

258 The ride was quicker for riders who could take a short walk to a station. After the relocation many inner-city residents had to walk farther or use one or more buses to travel to a rail station. See infra note 262-63.

259 Ridership on the Orange Line between Forest Hills and the Chinatown area increased 54.1 percent during the first year of operation. Howe, supra note 255.

260 In 1987 a study by The City of Boston Office of Neighborhood Services predicted that after the reconstruction and (re)establishment of permanent public transportation to Washington Street, “new housing, revitalized neighborhood business districts, increased local employment opportunities, and improved transportation” could result. Ray Richard, Study: Razing El Will Hurt Economy, BOSTON GLOBE, April 29, 1987, at 24.


262 See Howe, supra note 255.


264 Peter J. Howe, Roxbury Merchants Say There is Life After El but Some Lose Sales, BOSTON GLOBE, July 23, 1987, at 22.

265 Id.
greater extent because customers were much more dependent on the Orange Line Elevated. In spite of the loss of the Elevated and the construction disturbances due to its dismantling, the challenge for many businesses was to “hold on” for a few years for the promised new development.266

The MBTA set a goal to replace the old Orange Line Elevated with an alternative transit system on Washington Street by 1994.267 The primary alternatives included light-rail vehicles, buses, or trackless trolleys.268 Each alternative had advantages and disadvantages.269 In the interim the MBTA ran buses along Washington Street as a temporary replacement. In August 1987, the regional administrator for UMTA informed the MBTA that the federal government would not pay its traditional 80% share if LRVs were chosen.270

3. The Silver Line: An Inferior Replacement

The MBTA chose to replace the Washington Street elevated rail service with the Silver Line, which is Boston’s version of bus rapid transit (BRT).271 Phase I272 of the Silver Line uses CNG buses which

266 Id.
268 Pave, supra note 261.
269 Peter Calcaterra, the MBTA’s assistant project manager for planning and development during the decision-making process, discussed the three alternatives:

Buses on the street can make more frequent stops, and they’re the cheapest to implement; however, they are unable to penetrate the downtown area because of traffic and street patterns. So, a direct link to an Orange Line station would be lost. Passengers would need a transfer. Light-rail vehicles (LRVs) would cost more to implement because of the necessity of laying two miles of track from Dudley to the entrance of a new tunnel under Tremont Street. The LRVs...would make six to eight stops before connecting with Boylston Station on the Green Line. The LRVs certainly give us more carrier capacity, and our ridership would increase with them, according to our surveys. [Indications] are that about 5000 people would ride buses, as opposed to 9000 daily commuters on [LRVs]. It’s a faster ride, and it connects directly with all rapid transit lines downtown. But it’s more expensive, and construction of an LRV line could cause disruption: [an] issue of particular concern to the community around Chinatown. But going underground could mean less disruption in the long run. Trackless trolleys...would be an “in-between” in terms of service and cost-effectiveness. They’re less of a polluter than buses, but our closest repair yard for them is in North Cambridge. Setting up a closer repair yard would be an added cost.

Id. (emphasis added).

271 BRT has become an attractive transit mode for transportation planners:
operate from Dudley Square to Downtown Crossing. The buses stop at rider-friendly “smart” kiosks along Washington Street which resemble miniature train stations.\textsuperscript{273} Ridership on the Silver Line has increased steadily since opening day, due in part to improved convenience over the traditional bus route it replaced.\textsuperscript{274} Silver Line buses operate more frequently than the old bus route\textsuperscript{275} and use specially-designated bus lanes for part of their trip.

The Silver Line does have shortcomings. Notwithstanding the Silver Line’s designation as bus rapid transit, “a bus is a bus.”\textsuperscript{276} First,

\textsuperscript{272} The Silver Line consists of three phases. Phase I, which cost \$40 million, operates CNG buses along Washington Street from Dudley Square in Roxbury to Downtown Crossing. Phase II, also known as the South Boston Transitway, operates dual-mode diesel-electric buses from South Station to Logan Airport. The buses use electric power underground and diesel power on the surface. The tunnel portion of Phase II cost \$601 million. Phase III, which is still in the planning stage, is a 1.3 mile underground tunnel which will connect the Boylston Green Line Station to South Station. The estimated price tag for Phase III is \$780 million. \textit{See generally Jack Healy, Silver Line Opens to Fanfare, Protests MBTA Touts Bus; Groups See “Sham,” BOSTON GLOBE, July 21, 2002, at B2 (price tag for Phase I); Anthony Flint, Silver Line Derailed to Funding Sideline, BOSTON GLOBE, Feb. 6, 2004, at B1 (price tag for Phase II); For the Record, BOSTON GLOBE, Feb. 26, 2005, at A2 (price tag for Phase III).}

\textsuperscript{273} The MBTA has a separate Silver Line website which describes the new rider-friendly stations:

Washington Street Stations are designed with rider comfort, convenience and safety as top priorities. Sheltered, street-level stations offer seating. “smart” kiosks with schedule information, variable message boards, police call boxes, area maps, and bike racks. The well-lit Washington Street stations welcome you with attractive landscaping, map-adorned kiosks. \ldots The airy underground stations of Silver Line Waterfront will offer similar amenities.


\textsuperscript{274} Doug Hanchett, \textit{The Silver Line Rapidly Growing}, BOSTON HERALD, Apr. 22, 2003, at 2 (“It attracts] more than 13,000 riders per day, almost double what the old No. 49 bus was carrying up and down Washington Street before being replaced by the new cutting-edge service last year.”).

\textsuperscript{275} Doug Hanchett, \textit{T’s Silver Line Bus Service Posts Big Ridership Increase}, BOSTON HERALD, Oct. 3, 2002, at 2 (“T officials say the new service is a more flexible hybrid. \ldots with buses coming along at intervals that resemble its subway lines.”).

the BRT lanes only exist on the widest part of Washington Street, where they are needed the least.\textsuperscript{277} Therefore, the buses still get stuck in traffic, just like other vehicles.\textsuperscript{278} Trolleys running in a dedicated right-of-way do not suffer these drawbacks. Second, the Silver Line buses continue to emit some unhealthy particle matter in their exhaust.\textsuperscript{279} A better policy decision would have called for the use of all-electric vehicles. Third, it is not clear that the Silver Line is the primary force behind the economic development along Washington Street.\textsuperscript{280} Fourth, in spite of its convenience, the Silver Line is still inherently inferior than light rail for the above-stated reasons.\textsuperscript{281} The MBTA clearly broke its promise to provide Washington Street with service that is “equal or better” than the old Orange Line Elevated.\textsuperscript{282}

The MBTA’s choice of bus over light rail on Washington Street involved more than the best interests of the transit-dependent residents of Roxbury. The MBTA essentially admitted this when an official stated that even though “BRT is obviously \textit{not} the choice of the community, [it] suits the needs of the entire corridor and the city.”\textsuperscript{283} However, it is not clear whose needs were met by the implementation of BRT. First, the Federal Transit Administration “nud-


\textsuperscript{280} A regular Silver Line rider wrote a letter in response to a letter written by an MBTA official which touted its positive impact on economic development:

I’m laughing at his suggestion that the Silver Line is the reason that development has increased on Washington Street. The people who purchase the residences on Washington Street won’t be taking the Silver Line, since their cars in their underground parking garages are quicker and less crowded.


\textsuperscript{281} Doug Hanchett, \textit{T’s Silver Line Bus Service Posts Big Ridership Increase, Boston Herald}, October 3, 2002, at 2 (“I’m not surprised [that the Silver Line is] doing well . . . Studies show that the more convenient the service, the better the ridership will be. Imagine what ridership would look like if they actually installed light rail?”).

\textsuperscript{282} See id.

\textsuperscript{283} \textit{Urban Transit Solutions}, supra note 277, at 6.
“Set the Captives Free!” the MBTA toward the groundbreaking new BRT concept. Second, the MBTA may have implemented the Silver Line to merge multiple projects into one, most notably the Washington Street replacement service and a rapid transit line connecting downtown to the airport via the rapidly-developing South Boston Waterfront. The MBTA proudly claims that at the completion of Phase III, transit riders will be able to make a “one-seat” ride from Dudley Square to Logan Airport. Even if this one-seat ride becomes a technical possibility, it is unlikely that the poor Roxbury needs airport access.

284 Doug Hanchett, *Hi-yo, Silver, and Away: Criticized, Lauded New Line Begins*, Boston Herald, July 21, 2002, at 3. The Federal Transit Administration is a firm supporter of BRT, which it describes on its BRT webpage:

> BRT combines the quality of rail transit and the flexibility of buses. It can operate on exclusive busways, HOV lanes, expressways, or ordinary streets. A BRT system combines intelligent transportation systems technology, priority for transit, cleaner and quieter vehicles, rapid and convenient fare collection, and integration with land use policy.


285 See Doug Hanchett, *Hi-yo, Silver, and Away: Criticized, Lauded New Line Begins*, Boston Herald, July 21, 2002, at 3 (“The problem with the Silver Line is that its goals are too broad, that the T is trying to address too many transportation shortcomings in one fell swoop. ...What you [have] here [are] two separate projects that merged [which] leaves you with this kind of difficult, cobbled-together system”) (internal quotation omitted). A case study of Boston’s BRT describes the merger of multiple projects into the Silver Line:

> In early 1998, the Silver Line concept emerged when the MBTA combined the Washington Street improved bus service and the South Piers Transitway into a single system and integrated the planning and development for each project. This also includes the integration of other approved projects like the Airport Intermodal Transit Connector (AITC) project, as well as coordination with new developments in the South Boston Seaport District, including the Boston Convention and Exhibition Center (BCEC) project and proposed development on Massport property.


287 The buses which travel along Washington Street are CNG powered. The MBTA uses diesel-electric hybrids along the South Boston Transitway because CNG cannot be used in tunnels. MBTA officials claim that “by 2010[,] only one type of vehicle will be used system-wide—either dual mode, all electric, or an evolved CNG.” William J. Angelo, *Billion-Dollar Boston Busway Taking Shape*, 250 ENR: ENG’G NEWS-REC. 111, 112 (2003).

288 However, the “one-seat” ride would improve commute times for the fraction of Roxbury residents who work at Logan Airport. See Federal Transit Administration, U.S. Dept. of Transportation, Demonstration Projects: The [MBTA] Silver Line (Mar. 31, 2003), at http://
Third, since the MBTA’s current LRV\textsuperscript{289} fleet is old\textsuperscript{290} or unreliable,\textsuperscript{291} BRT becomes a quick, cheaper alternative to rail service.\textsuperscript{292} Interestingly, the MBTA asserts that businesses along the Washington Street did not want overhead wires, which are necessary to power LRVs and trackless trolleys.\textsuperscript{293} This assertion is disputed.\textsuperscript{294} Had the MBTA chosen to make the Silver Line all-electric, however, air pollution concerns would have disappeared and the “one-seat” ride from Dudley Square to Logan Airport would seem more sensible.

The Silver Line is not equivalent to the MBTA’s other rapid transit lines. A regular Silver Line rider balks at the notion that affluent residents will be attracted to the line:

> It’s disgusting to hear that the MBTA is touting its Silver Line service as an enhancement when it feels like a lot of money was spent for poor service. I would like to see these planners spend a couple of hours on the Silver Line early in the morning when people are going to work. I’d like to see them jostle their briefcases around the elderly residents of Chinatown with their food bundles and teenagers with their backpacks. Only then will I believe them when they say that the Silver Line is a premier line.\textsuperscript{295}

\textsuperscript{289} See supra note 219; infra note 315.

\textsuperscript{290} See PROGRAM FOR MASS TRANSPORTATION, supra note 19, at 5A-2 (listing the ages of the MBTA’s revenue vehicles).


\textsuperscript{292} See Anthony Flint, T Touts Rapid Bus Transit as Wave of Future But Some Say Service is Cheap Alternative, BOSTON GLOBE, Oct. 20, 2003, at B1. “After decades of huge investment in subway and commuter rails service, the MBTA is heralding a new era being dubbed the ‘decade of the bus.’” Id. However, the operating costs for BRT are not necessarily cheaper than light rail. See Transportation Research Board, Bus Rapid Transit 1, TRANSIT COOP. RES. PROGRAM, TCRP REP. 90 (2003).

\textsuperscript{293} See Angelo, supra note 287, at 112 (“Because of opposition to a catenary system, the surface system uses buses powered by compressed natural gas”); Robin Washington, ROADS SCHOLAR: T’s Shiny Yo-Yo Won’t Turn New Silver Line into a Train, BOSTON HERALD, May 28, 2001, at 2.

\textsuperscript{294} Washington, supra note 293, at 2.

\textsuperscript{295} Letters to the Editor, Silver Line Isn’t Jewel of MBTA, BOSTON GLOBE, Apr 21, 2003, at A14.
The riders that the MBTA is trying to attract realize that "a bus is still a bus." Robert Terrell of the Washington Street Corridor Coalition believes that the decision to install BRT as a rail replacement is rooted in discrimination:

We're the only area in the state that's lost a rapid-transit line and they're trying to give us a bus. . . . They wouldn't go to Brookline and shut down the Green Line. So why are they doing it here? The answer is, it's a form of discrimination. . . . they wouldn't pull this nonsense anywhere else.

In spite of the Silver Line's improvement over the bus route it replaced, the Silver Line does not meet the needs of the Roxbury community.

4. "Sick" Roxbury

"Asthma rates in Dorchester, Mattapan and Roxbury are as much as 178 times the state average." The alarming rate of asthma in Roxbury has drawn the attention of the environmental justice and scientific communities. The MBTA acknowledges that diesel buses have contributed to the high rate of asthma in Roxbury. The problem lies not only in the number of buses running through Roxbury, but is also due to specific MBTA practices. For example, at one point half of the MBTA's fleet of 970 buses was housed in or near Dudley Square. Bus drivers also routinely allowed buses to idle longer than five minutes, which is the maximum allowable time dictated by Massachusetts state law. In studies completed in 1999 and 2001, Harvard

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296 See Can BRT Overcome Bus' Bad Image?, supra note 223, at 1 ("Among riders with choice, [the] reaction to bus rapid transit is, 'A bus is still a bus.'") (internal citation omitted).
297 Doug Hanchett, Hi-yo, Silver, and Away; Criticized, Lauded New Line Begins, BOSTON HERALD, July 21, 2002, at 3.
298 Id.
300 See, e.g., Penn Loh et al., From Asthma to AirBeat, 110 ENVTL. HEALTH PERSP. 297, SUPPL. 2 (2002) (describing community efforts to trace incidence of asthma to the excessive number of diesel vehicles).
302 Id.
303 The Massachusetts statute states that excessive idling is punishable by a fine:
researchers found evidence of elevated air pollution on weekdays, during morning rush hours, near the bus terminal at Dudley Station, and on streets with heavy diesel bus traffic.304

Actions from state and federal agencies have forced the MBTA to both expedite the replacement of the bus fleet with lower-emissions vehicles and to reduce bus idling times.305 The Massachusetts Department of Environmental Protection and the Executive Office of Transportation and Construction have signed a consent order which directs the MBTA to implement a bus fleet consisting exclusively of CNG buses or diesel buses which use clean fuel and discharge 90 percent less particulate matter.306 In early 2004, the EPA, USDOJ, and the U.S. Attorney’s Office reached a settlement with the MBTA which, inter alia, directs all transit buses to meet the five-minute idling requirement.307 The EPA predicted that this measure would improve air quality in Boston because excessive bus idling produces diesel exhaust which, in addition to being potentially carcinogenic, triggers asthma and other respiratory illnesses.308 The MBTA recently opened the Arborway CNG Bus Maintenance and Storage Facility in Jamaica Plain, which replaces an antiquated diesel bus garage in Roxbury.309 The new facility “represents a major milestone in advancing the Com-

No person shall cause, suffer, allow or permit the unnecessary operation of the engine of a motor vehicle while said vehicle is stopped for a foreseeable period of time in excess of five minutes. . . . Whoever violates any provision of this section shall be punished by a fine of not more than one hundred dollars for the first offense, nor more than five hundred dollars for each succeeding offense.


305 These actions often come at the prodding of local environmental justice agencies like the Conservation Law Foundation, see supra note 197; see also Alternatives for Cmty. & Env’t., http://www.ace-ej.org (last visited Mar. 17, 2006).

306 Dep’t. of Env’t. Prot., Commonwealth of Massachusetts, Amended Administrative Consent Order No. ACO-BO-00-7001 Amendment No. 1 (May 23, 2002).


308 Id.

The Commonwealth’s commitment to utilize cleaner technologies for its bus fleet.”

C. The Arborway Restoration

The Green Line is the MBTA’s oldest transit line. Streetcars on the line operate both on surface streets and through the Central Subway. Upon exiting the Central Subway the Green Line splits into five branches, including the “E” branch which now terminates at Heath Street in Jamaica Plain. Although most Green Line surface rails lie in reservations along street medians, streetcars along the E Branch must interact extensively with automobile traffic beyond Brigham Circle. The complexities that arise from “street running” were at least partially responsible for the MBTA’s decision to suspend Green Line service to the Arborway, the former terminus of the E

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310 Id.
311 See Belcher, supra note 239, at 251.
312 “Street running” describes the operation of streetcars along rails embedded in the pavement which are not isolated by barriers or within a reservation. The streetcars must obey traffic signals and, accordingly, interact extensively with automobiles. Most transportation planners try to limit or avoid “street running” in order to prevent streetcar-automobile accidents. Boston started to eliminate “street running” decades earlier. See Scott Moore, Arborway Memories (Feb. 5, 1996), at http://members.aol.com/netransit2/arborway/arborway.html.
313 The Arborway, characterized by old trees and grassy medians, is a major thoroughfare in Jamaica Plain which connects traffic from Cambridge to Boston. See Ctr. for Urban and Reg’l Policy, Heart of the City Project at Northeastern Univ., Arborway (as a whole), at http://ksgaccman.harvard.edu/hote/DisplayPlace.asp?id=11524. The Arborway skirts the historic Emerald Necklace. See infra note 320.
branch, in late December 1985. This date also marked the end of PCC trolley service on the Green Line.

1. Background

Streetcar service to the Arborway dates back to the 1870s. The former terminus of the E line, the Arborway rail yard, is adjacent to the Orange Line’s Forest Hills Station. During the PCC era streetcars ran from the Arborway along South Street to Center Street, South Huntington Avenue, and then to the Longwood Medical Area, the Mission Hill District, and Northeastern University along Huntington Avenue before entering the Central Subway.

In late December, 1985, all rail service along the E branch was suspended in order to rebuild the corridor between Brigham Circle

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314 Scott Moore recounts the last night of Arborway trolley service, and his suspicion that the “suspension” would be permanent:

On December 28, 1985, at a little after midnight, the last Arborway train left Park Street station for the Arborway carbarn. The last two-car train, an unusual late night consist required by the number of people riding the train, wound its way through the subway out to the cold night air. The mood was like that of a funeral, many people on the cars feeling like they had lost a good, reliable friend to a disease which came about agonizingly swift, and left no way to save the victim. As the train rolled through Jamaica Plain for the last time, the car was quiet, save for the normal noises made by the streetcars in motion.

Upon arriving at the Arborway yard, the scene was devastating. Trolleys were parked in a haphazard manner, contrary to the normal order of a transit facility which would by now be preparing the cars for the next day’s runs. Some carbarn personnel were removing fareboxes from the cars, while others were moving the remaining cars to the back of the yard, and pulling the trolley poles down from the wire. Many of these cars would never run again, and this was very apparent to the passengers alighting that last train.

Signs in the trolleys had announced the impending doom. The buses would roll tomorrow. The word had passed swiftly, cruelly, leaving a community without its transit link once again. This time, the trolley did not seem to be returning anytime in the near future, and the Jamaica Plain community, would be forced to endure bus service once again, but this time it might be for good.

Moore, Arborway Memories, supra note 312.

315 PCC trolleys were the workhorse of most electric street railways in North America from the 1930s through the 1980s. Nearly 5000 were built between the 1930s and 1950s. Transit systems began to replace PCCs with LRVs in the 1980s. “LRV” is used to indicate streetcars built in the 1970s or later. LRVs are heavier and more powerful than PCC trolleys; accordingly overhead wiring and electrical power requirements differ. See generally Light Rail Central: The North American Light Rail Information Site, http://www.lightrail.com (last visited March 17, 2006) (describing light rail equipment and terminology). Boston still operates PCC trolleys along the Mattapan-Ashmont extension of the Red Line.

and South Huntington Avenue, and to rebuild the incline at North-
eastern University – the point at which E trains emerge from the sub-
way.\footnote{317 See Belcher, supra note 239, at 271-272; Moore, Arborway Memor-
ies, supra note 312.} Incline rebuilding was required in part because the new LRV
trains are heavier than the old PCC trolleys.\footnote{318 See id.} Service along the E
branch to Brigham Circle resumed in mid-1986, and operation to
Heath Street resumed in 1989. Most of the old PCC trolleys at the
Arborway yard were sold, and the Route 39 bus now serves the
remainder of the corridor from Heath Street to Forest Hills. Interest-
ingly, the Route 39 bus is the most heavily used bus route in the
added). The Route 39 bus accounts for 5 percent of MBTA ridership. Id.}

The MBTA owns over 18 acres of land at the Arborway. Thus,
transit decisions have a substantial effect on the surrounding green
space. For example, the transportation hub around the Forest Hills
Station separates the Arborway from the Emerald Necklace, a 1000-
acre linear parkland that connects Franklin Park, the Arnold Arbore-
tum, Jamaica Park, Olmsted Park, the Fens and the Riverway.\footnote{320 Thus
the restoration of LRV service to the corridor is intimately connected to
restoring environmental distinctiveness and integrity to the
Arborway.} The Commonwealth of Massachusetts committed to Arborway
trolley restoration to mitigate the Central Artery/Tunnel Project. This
and other commitments, which appear in the Code of Massachusetts
Regulations,\footnote{321 These transit guidelines were promulgated by the Department of Environmental
Protection for the Executive Office of Transportation and Construction, which oversees the MBTA:
(2) Transit System Improvement Projects. EOTC shall plan and construct and render
available for public use, transit system improvement projects including the following
projects in accordance with the schedules set forth in 310 CMR 7.36: . . .
(d) Before December 31, 1997 construction of the following facility shall be completed
and opened to full public use: Green Line Arborway Restoration.
310 Mass. Code Regs. 7.36(2)(d) (1991).} allow the EOTC/MBTA to substitute the required
projects with another if two conditions are satisfied: (1) the required project becomes "infeasible due to associated adverse engineering, environmental or economic impact," and (2) the proposed project "achieves equal or greater emission reductions" of certain pollutants and "provide[s] a greater improvement in air quality [where] the required project was to have been implemented, in both the short and long term."\(^{322}\)

The MBTA wants to substitute Arborway trolley restoration with CNG bus service.\(^{323}\) The MBTA commissioned a report which stated that CNG service would achieve comparable air standards as LRVs, increase transit usage more than LRVs, and cause less disruption to local businesses and public safety.\(^{324}\) "Equal or better service" would be achieved by including "[a]menities such as shelters, benches, kiosks, route maps, and signage,"\(^{325}\) which would make the proposed CNG route strikingly similar to the Silver Line on Washington Street.\(^{326}\) Another report highlighted three additional infrastructural barriers to restoring rail service: (1) the construction of the right-of-way/reservation along the narrow streets of the Arborway corridor;

\(^{322}\) The substitution provision has several strict requirements, including:

(4) Substitute Transit System Improvement Projects.
(a) EOTC may substitute other transit improvement projects in place of those listed in 310 CMR 7.36. To replace a project EOTC must demonstrate to the Department that a specific project listed in 310 CMR 7.36 is infeasible due to associated adverse engineering, environmental or economic impacts. An alternative project may be substituted in the following manner:

1. EOTC must petition the Department to accept a substitution project, said petition to include a demonstration that the alternative project achieves equal or greater emission reductions of nonmethane hydrocarbons (NMHC), carbon monoxide (CO) and nitrogen oxides (NOx) and would provide a greater improvement in air quality for CO and NOx in the area where the required project was to have been implemented, in both the short and long term.

2. Within 60 days of receipt of a complete petition and demonstration for project substitution, the Department shall review the proposed substitution and shall take action either approving or denying the proposed substitution in writing.

3. Within 90 days of receipt of a complete petition and demonstration for project substitution, the Department shall file a copy of the petition, supporting documentation and Department action with U.S. EPA, Region 1.


\(^{324}\) Arborway Alternatives Analysis, supra note 319, at ES-4.

\(^{325}\) Id. at ES-3.

\(^{326}\) See supra Part IV.B.3.
(2) the need to replace overhead wires and power systems;\textsuperscript{327} and (3) the need for more LRVs.\textsuperscript{328} The MBTA’s hesitation has been fueled by a growing number of Jamaica Plain residents who believe that trolley restoration will do more harm than good.\textsuperscript{329}

The Secretary of the Executive Office of Environmental Affairs has rejected the CNG bus substitution plan and has directed the EOTC/MBTA to proceed with its legal obligation to restore trolley service to the Arborway.\textsuperscript{330} The Secretary noted that the EOTC/MBTA presented the CNG plan as an “environmental equivalent,” not as a project “that would further avoid or minimize damage to the environment.”\textsuperscript{331} LRV restoration, she notes, will have a substantial positive impact on air quality.\textsuperscript{332} The transit authority also failed to...

\textsuperscript{327} See supra note 315 and accompanying text.

\textsuperscript{328} See Analysis of Restoration of Light Rail to the Arborway, supra note 320; Mac Daniel, Breda Trolleys Return to Bolster Green Line’s Aging Fleet, Boston Globe, Apr. 13, 2003, at B2.

\textsuperscript{329} See, e.g., Stefany Moore, Jamaica Plain Still Divided on Trolley Service, Boston Globe, May 1, 2003, at B2 (“Jamaica Plain [residents] gathered last night for a raucous face-off between groups that are sharply divided over restoring trolley service to the Arborway”); Shari Rudavsky, Two Trains Running: Clang, Clang, Go Trolley and Anti-Trolley Folks, Boston Globe, May 11, 2003, at 7 (“There’s this assumption that trolley service would be better. While it is true that the T has treated buses as second-class, there are also reasons to think trolley service would be worse”); Mac Daniel, Arborway Trolley Plan Challenged Group Cities Safety, Traffic Considerations, Boston Globe, Apr. 17, 2003, at B4 (“Formation of [a] local group, Better Transit Without Trolleys, and a growing petition drive against the trolley effort comes as MBTA officials plan to detail how the project will require a major configuration of traffic and parking”). The MBTA general manager has stated that “if the MBTA was faced with overwhelming opposition to the project in the very community that it was meant to be servicing, [the MBTA would] have to take a step back.” Id.


\textsuperscript{331} Id. at 4.

\textsuperscript{332} The Secretary states that the restoration of LRV service will lessen traffic, which will reduce air pollution and respiratory ailments:

Eastern Massachusetts remains in serious susceptibility to respiratory illnesses line pneumonia and bronchitis. A recent study by the Centers for Disease Control and Prevention revealed that Massachusetts has the highest rates of asthma for adults in the nation. Asthma rates in Jamaica Plain are among the highest in the state. Cars, trucks and buses, are the largest source of criteria air pollutants, air toxics and greenhouse gases in the state. Restoration of streetcar service will reduce local air quality impacts by replacing the Route 39 bus (which generates 2.100 bus vehicle miles along the corridor each day) with streetcars powered by electricity and will provide an alternative to driving within this congested corridor.
prove infeasibility. The Secretary may have been persuaded by testimony from the Arborway Committee before the Department of Environmental Protection which compared the feasibility of LRV restoration with the feasibility of the Central Artery/Tunnel Project:

Thus, at the outset, for Arborway Green Line service to be infeasible it must be shown to be incapable of being done. *Such incapability cannot be based simply on the fact that restoring the service is economically inconvenient or that it is difficult in an engineering sense.*

Because the Arborway project is a transit commitment undertaken as part of the overall Central Artery project, *that project* is the controlling example of the meaning of infeasibility. From the beginning many difficult and apparently insurmountable obstacles confronted the Central Artery project. How does one build a roadway under an above-ground highway without first dismantling the highway? How does one manage to anchor a massive bridge across the Charles River with underground piers coming within 6 feet of the Orange Line tunnel without disrupting service or damaging the tunnel? [*What*] may have appeared to be infeasible was actually only difficult. What was thought to be impossible was actually feasible.

All questions relating to LRV restoration were raised, evaluated, and answered at the time the transit commitments were made. In spite of its reluctance to proceed, the MBTA acknowledges its duty prescribed by the mandate. Accordingly, “at the direction of the Department of Environmental Protection, [the MBTA] has begun the community and planning process to restore light rail along the corridor.”

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333 The air quality benefits associated with this project in the State Implementation Plan (SIP) are a 6.22 kilograms per day reduction in volatile organic compound (VOC) emissions and a 98.49 kilogram per day reduction in carbon monoxide (CO) emissions.

334 *Id.* at 6-7 (emphasis added).

335 *Id.* at 4-5.

336 The Arborway Committee is a citizen’s group whose goal is to restore LRV service to the Arborway. See http://www.arborway.net/lrv/ (last visited Mar. 17, 2006).


D. Equity Analysis

Transit service to Roxbury, Dorchester, Mattapan, and Jamaica Plain is (1) inequitable when evaluated under the analytical frameworks of Litman and Bullard, and (2) inequitable and unfair according to the EPA’s definition of fairness. Although the MBTA insists that it is not seeking to substitute bus service for rail service in future expansions, the adoption of BRT on Washington Street and the MBTA’s delay in restoring trolley service to the Arborway clearly shows that bus service is being offered is a cheaper substitute for rail service.

Transit service in Boston’s urban core is inequitable when viewed through Litman’s three-pronged framework. First, residents in the urban core do not “get what they pay for and pay for what they get.” Most transit riders prefer subways or trolleys, on fixed tracks with stations. The MBTA’s proclamation that this is the “decade of the bus” appears to mean that the most transit-dependent parts of the city will have to settle for transit that is inherently inferior. BRT is not equivalent to rail, and CNG buses discharge more pollutants than electrified, rail-based transit. Second, the low-income riders in Roxbury, Dorchester and Mattapan bear a disparate burden when compared to higher-income riders on rapid transit lines in other areas. Low-income residents subsidize transit riders outside of the urban core. Thus, these transit policies do not favor disadvantaged groups at all. Rather, they exacerbate inequity. Third, there is a lack of vertical equity with regard to mobility need and ability. Replacing an elevated rail line in a transit-dependent area with buses on a congested artery is inherently inequitable.

Professor Bullard’s analytical framework also leads to a conclusion that transit inequity exists in Boston. First, procedural inequity exists because (1) key decisions were made without the input of a

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338 See supra Part II.A.
340 See Litman, supra note 36, at 51-53; supra Part II.A.
341 Litman, supra note 36, at 50.
342 See Litman, supra note 36, at 51-53; supra Part II.A.
343 See supra notes 74-75 and 227-29 and accompanying text.
344 See Litman, supra note 36, at 51-53; supra Part II.A.
345 See Bullard et al., supra note 31, at 27; JUST TRANSPORTATION: DISMANTLING RACE AND CLASS BARRIERS TO MOBILITY 1-6 (Robert D. Bullard & Glenn S. Johnson eds., New Society Publishers 1997). See also supra Part II.A.
diverse group of public stakeholders, and (2) decision making has lacked uniformity, fairness, and consistency.\textsuperscript{346} The MBTA knew that residents along the Washington Street corridor did not want BRT;\textsuperscript{347} they wanted an "equal or better" replacement.\textsuperscript{348} Similarly, there was little or no community involvement before trolley service to the Arborway was discontinued. Second, geographic and social disparities\textsuperscript{349} are clear: high-income riders in nicer parts of Boston and the surrounding suburbs benefit from better transit.

E. Moving Forward

Four legendary events in transportation history have occurred in Boston. First, Boston is the birthplace of public transportation in America.\textsuperscript{350} Second, the Green Line still operates along the oldest subway tunnel in the nation.\textsuperscript{351} Third, the completion of the Central Artery/Tunnel Project is the largest, most ambitious, and most expensive transportation project undertaken in the modern world.\textsuperscript{352} Finally, Boston was the first city in the nation to shift federal highway construction funds to transit construction in the urban core.\textsuperscript{353}

The immense Central Artery/Tunnel Project dominated the Commonwealth’s transportation agenda for over a decade.\textsuperscript{354} As that project nears completion, the Commonwealth has to determine where the

\textsuperscript{346} \textit{JUST TRANSPORTATION: Dismantling Race and Class Barriers to Mobility 1-6} (Robert D. Bullard & Glenn S. Johnson eds., New Society Publishers 1997). \textit{See also supra Part II.A.}

\textsuperscript{347} The MBTA essentially admitted this when an official stated that "[even though] BRT is obviously not the choice of the community, [it] suits the needs of the entire corridor and the city." \textit{Urban Transit Solutions, supra note} 223, at 7 (emphasis added).


\textsuperscript{349} \textit{See Bullard et al., supra note} 31, at 27; \textit{JUST TRANSPORTATION: Dismantling Race and Class Barriers to Mobility} 1-6 (Robert D. Bullard & Glenn S. Johnson eds., New Society Publishers 1997). \textit{See also supra Part II.A.}

\textsuperscript{350} American Public Transportation Association, Milestones in U.S. Public Transportation History, Table 1, \textit{at} http://www.apta.com/research/stats/history/mileston.cfm (last visited March 17, 2006).

\textsuperscript{351} \textit{MBTA Website, Inside the T, at} http://www.mbta.com/insidethet/index.asp (last visited March 17, 2006).

\textsuperscript{352} \textit{See supra} notes 17-18 and accompanying text.

\textsuperscript{353} \textit{Heart of the City: Orange Line, supra note} 241.

focus of transportation infrastructure should turn. Terrance Regan, a senior transportation planner for the Planners Collaborative in Boston and formerly a senior researcher at the Central Transportation Planning Staff and the Executive Office of Transportation and Construction, describes the balancing of interests that the MBTA must consider:

(1) **Capital expansion versus maintenance**: How much capital funding should be expended on new projects as opposed to upkeep of the existing system;

(2) **Urban versus suburban service**: How much should the authority seek to reinforce traditional patterns of transit use, with Boston’s downtown as the hub to outlying communities? How much should the MBTA invest in new transit systems that connect suburban communities with other suburban communities?

(3) **Environmental and accessibility responsibilities**: How should the MBTA address its legal requirements [to] improve the environmental quality of its vehicles and service? What kinds of financial and service tradeoffs are necessary when considering the environment?355

The first two interests are common to most transit authorities in large metropolitan area. The third interest, however, is distinct because it is a binding legal commitment.356 Unfortunately, the MBTA has avoided or barely satisfied these commitments without prodding from environmental advocacy groups. The Silver Line, for example, is not an “equal or better” replacement for the Orange Line Elevated. Operating CNG buses along the Arborway is *inherently* inferior to the restoration of trolley service: both in quality and environmental impact.

The MBTA is certainly conflicted: should the agency attempt to attract more suburbanites to commuter rail, thereby reducing automobile traffic; or should the agency provide transit-dependant riders in the urban core with service and infrastructure which is better than *de minimis*? The MBTA is legally committed to do *both*.

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355 *Governing Greater Boston*, *supra* note 354, at 120.

356 *See supra* notes 20-21 and accompanying text.
V. TRANSPORTATION EQUITY: A DEEPER LOOK

Thus far, this Article has explored the roots of transit inequity and its detrimental consequences on the urban core. Although the history of transit inequity mirrors the growth of mass transit and highway construction in America, efforts to achieve equity will be complex.

All major transportation authorities face the difficult decisions that Terrance Reagan describes. Multimodal transit agencies, including the MBTA and the Washington Metropolitan Area Transit Authority, have drafted mission statements which explicitly reveal the complexity:

We are committed to being an integral part of the Washington metropolitan area by ensuring the best in safe, reliable, cost-effective and responsive transit services, by promoting regional mobility and by contributing toward the social, economic and environmental well-being of our community.

The balancing of interests that Reagan describes may point to a common goal, or may in fact be irreconcilable. The disparity may actually lie in social and economic forces that eclipse transportation.

A. IS RACE THE REAL ISSUE?

The link between race and transportation policies and practices is inescapable. But does modern-day transit inequity create or exacerbate the racial divide, or is it simply a manifestation of America’s race problem? This Article shows that all three are likely true. Highway construction and restrictive federal funding programs laid the foundation for the disparity. Commuter rail lines exist because, without them, choice riders may abandon mass transit. Since capital costs for rail service far eclipse those for bus lines, the choice riders can often

357 See supra note 354 and accompanying text.
359 See supra notes 65-67 and accompanying text.
360 See supra note 105 and accompanying text.
sway transit expenditures. Choice riders, therefore, can determine “what they get” and “where it goes.” This Article has shown that captive riders often do not “get what they pay for.” Government policies allow low-income riders of the urban core to cross-subsidize transit fares for commuter rail. With one major exception, cross-subsidization has survived Title VI scrutiny because the courts have deferred to the business judgment of transit agencies.

All disparate impacts on low-income minorities are not rooted in racism. But, at the very least, transit authorities clearly make race-conscious decisions. These include: (1) where to place routes; (2) which neighborhoods will be served by a particular route; (3) who gets trains and who gets buses; and (4) which type of vehicle (diesel or CNG buses) will be assigned to a particular route or location. These decisions are not purely economic; choice riders “get what they want,” and captive riders “get what they get.”

“White fear” is real, and transit agencies know it. White discomfort with black riders can be traced back to the Plessy era, where racial separation in transportation promoted “public order, peace, and comfort.” The same notion persists in public transportation today. Transit agencies know that whites and blacks often cannot share a bus

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361 See supra notes 58 and 76 and accompanying text.
362 See Litman, supra note 36, at 51-53; supra Part II.A.
363 See Comm. for a Better N. Phila., 1990 WL 121177, at *3; Sanchez et al., supra note 30, at 14; supra note 227-229 and accompanying text.
366 Professor Randall Kennedy has written about the difference between disparate impact and racial discrimination:

[Some persons] automatically insist, simply on the basis of observable racial disparities, that officials are engaged in making invidious racial discriminations. They seem unaware that a racial disparity is not necessarily indicative of a racial discrimination. A disparity is often evidence of discrimination. But one must keep in mind that a racial disparity may stem from causes other than disparate treatment.


368 See Part II.C.2.
369 Ex parte Plessy, 11 So. 948, 951 (La. 1892), aff'd, Plessy v. Ferguson, 163 U.S. 537 (1896).
or train due to racism, elitism, "class differences," a perceived lack of safety, discomfort, resentment, or "white guilt." Justice Clarence Thomas has argued that Plessy receives little scholarly attention, possibly because of its "complete rejection by our society." Although we have rejected Jim Crow laws, it is not clear that we have completely abandoned Plessy's precepts. For example, many transit routes are racially identifiable as "black" or "white." White passengers will stand on a crowded train rather than sit in an empty seat next to a young black professional.

B. What Can Be Done?

Transit agencies do not have a duty to fix America's race problem, but they should not aggravate the disparity. Public transportation is at a crossroads; if transit authorities cannot equitably achieve their goals, then the agencies should rethink their mission. Nevertheless, transit agencies can make policy changes that seek to achieve equity.

First, transit authorities should assign equipment fairly. As the agencies begin to replace old diesel bus fleets, the urban core should receive a fair proportion of clean fuel buses. Some commentators, such as Professor Litman, would even argue that the urban core should receive a higher proportion of clean-fuel buses in order to compensate for overall inequity and past environmental harm. Asthma rates in Roxbury, Dorchester, and Mattapan may decrease when the MBTA replaces its diesel fleet with CNG buses.

Second, transit authorities can attract more suburban riders without constructing new rail lines. Although some suburbanites will always prefer to drive, some will use mass transit if, on balance, mass

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372 See supra note 4 and accompanying text.

373 See Part II.C.2.

374 See supra notes 71 and accompanying text.

375 See Litman, supra note 36, at 51-53.

376 See supra notes 299-310 and accompanying text.

377 Some argue that new suburban rail projects should be trimmed or abandoned altogether because the capital costs are high and the benefits are minimal. See e.g., Stop the Train! at http://citypages.com/databank/21/1000/article8398.asp (last accessed Apr. 15, 2005) (describing the battle in Minneapolis/St. Paul over a new suburban multimillion-dollar LRV line).
transit becomes cost-effective and convenient.\textsuperscript{378} TEA-21 authorized employer transit subsidies, which can attract wealthier riders out of their cars.\textsuperscript{379} The employer can deduct these costs as business expenses, and the employees need not report the subsidy as taxable income.\textsuperscript{380}

Transportation policy in America must be reevaluated. Since the birth of the Interstate Era, transportation policies have been narrowly focused, which in turn have placed a disparate burden on the urban core. Transportation agencies must realize that the urban core should not bear the burden for improving suburban life.

VI. Conclusion

Although the story of transit inequity often appears to be a collection of anecdotes that reveal the darker side of America's past, this Article has sought to show that the disparities are rooted in the law, beginning with \textit{Plessy} and continuing with Interstate Era legislation which benefited highways and suburbs at the expense of city transit and the urban core. These laws, combined with government-supported discriminatory housing practices, have created an urban core with low-income residents who are transit dependent. This Article has sought to show that transit inequity extends beyond “train is better than bus.” Admittedly transit authorities seek to achieve formidable goals while navigating through a network of regulations and statutes. This Article has shown that the agencies, in exercising their business judgment, tend to placate choice riders at the expense of the captive riders of the inner city. Although the courts must allow transit

\textsuperscript{378} Atlanta provides a good example. In spite of MARTA's negative image (“Moving Africans Rapidly Through Atlanta,” see Bullard et al., \textit{supra} note 51, at 52; Lockard, \textit{supra} note 72, at 180 n.139), white passengers will ride the train to the airport to avoid interstate traffic and high parking fees. The southern part of the MARTA rail line between the airport and downtown passes through several neighborhoods that are overwhelmingly black; however, the cost benefit seemingly trumps the discomfort!

\textsuperscript{379} The Citizens for Modern Transit explain the program benefits on their website:

Under TEA-21, the Transit/Vanpool Benefit Program is a provision of the Internal Revenue Code that lets your company pay for the employee’s cost of commuting to work, other than driving alone. Under Section 132 (f) of the Internal Revenue Code, an employer can provide up to $100 per month, $1,200 a year, to those employees who commute by transit or vanpool and qualified parking expenses up to $175 a month, $2,100 a year.


\textsuperscript{380} \textit{Id.}
authorities reasonable discretion in allocating resources, the courts must insist that the agencies operate within the law and honor their commitments.