

Rousing the Sleeping Giant: Administrative Enforcement of Title VI and New Routes to Equity in Transit Planning

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From Homer Plessy to Rosa Parks, access to public transit has been at the center of the civil rights movement. While de jure segregation is largely a relic of this nation's past, advocates have struggled to adapt civil rights jurisprudence to the more subtle and pervasive transit inequities that exist today. Administrative enforcement of Title VI of the Civil Rights Act of 1964 has the potential to open a new front in the struggle for transit justice. Using the Federal Transit Administration's Title VI guidance as a starting point, this Comment examines the current guidance's innovations and weaknesses, and proposes new measures the Federal Transit Administration and other administrative agencies can use to ensure transit planning decisions are made in a manner that is most equitable to the communities involved.

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INTRODUCTION

Sylvia Darensburg has lived much of her life in East Oakland, California, a predominantly low-income, African American community. As they cannot afford a car, Sylvia and her family rely on Alameda–Contra Costa Transit District (“AC Transit”) buses to get to work, school, medical appointments, grocery shopping, social services, and volunteer activities. Since the 1970s she has witnessed AC Transit’s slow decline, with increasing headways¹ and canceled routes leading to more and more transfers with longer waits in between. As a result, she has often been tardy for work despite her best planning. A trip downtown, only a few miles away, can take as much as an hour, making simple errands physically draining. After work, Sylvia takes classes at a local community college, but due to the discontinuation of evening service on the bus route closest to her home, Sylvia must now walk twelve blocks through an unsafe area to get home.²

1. Headway is a measurement of the distance or time between vehicles in a transit system.

2. Guillermo Mayer & Richard A. Marcantonio, *Bay Area Transit—Separate and Unequal*, RACE, POVERTY & ENV’T, Winter 2005/2006, at 20, available at <http://urbanhabitat.org/files/5>

Nearby, construction is beginning on a \$484 million rail project to build 3.2 miles of track and reduce ride time from the local station to the airport by eight minutes.³ The project's ridership is estimated to be 64 percent white,⁴ while the surrounding neighborhood is predominantly African American.⁵ This is one of several rail expansions planned across the San Francisco Bay Area that will primarily benefit affluent, white riders.⁶

From the days of Homer Plessy's defiance of segregated railroad cars in the 1890s⁷ to Rosa Parks and the Montgomery bus boycotts in the 1960s,⁸ the struggle for equal access to mass transit has had deep ties to the civil rights movement. The overt de jure discrimination Plessy and Parks faced is largely a relic of this nation's past; however, transit-related disparities endure. Today, transit policy tends to favor higher-income transit riders over lower-income transit riders, and suburbs over cities.⁹ In some cases, transit agencies even use lower-income riders to subsidize the trips of higher-income riders.¹⁰ People of color who are disproportionately poor and concentrated in cities bear the brunt of these trends,¹¹ which in turn affect their ability to access jobs,¹² education,¹³ and other social necessities.¹⁴

.Guillermo.Mayer-Richard%20A.Marcantonio.pdf; Complaint at 4, *Darensburg v. Metro. Transp. Comm'n*, 611 F. Supp. 2d. 994 (N.D. Cal. 2009) (No. C 05 01597).

3. *Oakland Airport Connector: Project Purpose and Benefits*, BAY AREA RAPID TRANSIT (BART), <http://bart.gov/about/projects/oac/index.aspx#anchor1> (last visited Mar. 25, 2013); Memorandum from Vijay Mahal & Alec More, HDR, Inc., to Tom Dunscombe, BART, on Service and Fare Change Impacts of the Proposed Oakland Airport Connector Project 7 (July 13, 2010), [hereinafter OAC Equity Analysis], available at <http://bart.gov/docs/oac/Final%20OAC%20Equity%20Analysis%20-%20July%2013%202010.pdf>.

4. OAC Equity Analysis, *supra* note 3, at 4.

5. *Id.* at 5.

6. See, e.g., *East Contra Costa BART Extension (eBART)*, BART, <http://bart.gov/about/projects/ecc/> (last visited Mar. 25, 2013); *Livermore Extension*, BART, <http://bart.gov/about/projects/liv/> (last visited Mar. 25, 2013); *Warm Springs Extension Project Overview*, BART, <http://bart.gov/about/projects/wsx/index.aspx> (last visited Mar. 25, 2013); VTA BART SILICON VALLEY, www.vta.org/bart/ (last visited Mar. 25, 2013); see also THOMAS SANCHEZ ET AL., THE CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY, MOVING TO EQUITY: ADDRESSING INEQUITABLE EFFECTS OF TRANSPORTATION POLICIES ON MINORITIES 14 (2003) [hereinafter MOVING TO EQUITY].

7. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

8. *Civil Rights: Montgomery Bus Boycott*, NATIONAL ARCHIVES, <http://www.archives.gov/atlanta/education/resources-by-state/montgomery-bus-boycott.html> (last visited Mar. 25, 2013).

9. MOVING TO EQUITY, *supra* note 6, at 14–15 (arguing that transit policies favor higher-income transit riders); Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 2004–09 (2000) (arguing that infrastructure investment favors suburbs over cities).

10. MOVING TO EQUITY, *supra* note 6, at 14–15.

11. Of America's one hundred largest cities, forty-eight have a majority minority population, and the number of people of color in major cities is growing. At 71%, whites have the highest percentage of any racial group living in the suburbs. See *id.* at 7. African Americans 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. African Americans and Hispanics account for 54% of all transit users, 62% of all bus riders, and 35% of all rail riders. John Pucher & John L. Renne, *Socioeconomics of Urban Travel: Evidence from the 2001 NHTS*, 57 TRANSP. Q., no. 3, 2003, at 49, 67. The rate of car

While judicial enforcement of antidiscrimination mandates was once the legal mainstay of transit justice advocacy, advocates must develop new strategies to combat the transit-related disparities of today. The increasingly subtle and complex nature of transit-related disparities has required advocates to reconsider what it means to have equity in the transit planning process. While Homer Plessy's prayer for relief asked the court to overturn a law that prohibited a black man from sitting in a whites-only car,¹⁵ Sylvia Darensburg's sought "to permanently enjoin [the local metropolitan planning organization] from supporting the funding of or funding any improvement or expansion in service that detracts from the equitable funding of services that benefit AC Transit riders" and inequitable subsidies that favored rail systems over bus systems.¹⁶ Others have challenged the voting structure¹⁷ and siting practices¹⁸ of transit agencies. Ultimately most modern attempts to pursue transit planning equity through the courts have met with little success. Plaintiffs struggle to conceptualize, define, and measure equity in a way that is acceptable to the courts, and courts are reluctant to substitute their judgment on complex policy issues for that of defendant transit agencies.¹⁹

One possible solution is administrative enforcement under Title VI of the Civil Rights Act of 1964 ("Title VI").²⁰ Referred to as the "sleeping giant" of civil rights law,²¹ Title VI was passed to ensure taxpayer dollars are not "spent in any fashion which encourages, entrenches, subsidizes or results in racial

ownership is also much higher among white owners than Asian Americans, African Americans, or Latinos. MOVING TO EQUITY, *supra* note 6, at 9.

12. Only 3% of whites rely on public transit to get to work, as compared to 12% of African Americans, 9% of Latinos, and 10% of Asian Americans. MOVING TO EQUITY, *supra* note 6, at 9.

13. *Id.* at 22–24.

14. Access to cars affects access to things like health care, healthy food, and social services. *Id.* at 19.

15. Plessy v. Ferguson, 163 U.S. 537, 539–42 (1896).

16. Complaint at 18, Darensburg v. Metro. Transp. Comm'n, 611 F. Supp. 2d. 994 (N.D. Cal. 2009) (No. C 05 01597).

17. See, e.g., Ehm v. Bd. of Trs. of Metro. Rapid Transit Auth., 251 F. App'x. 930, 931–32 (5th Cir. 2007); City of Atlanta v. Metro. Atlanta Rapid Transit Auth., 636 F.2d 1084, 1089–90 (5th Cir. Unit B Feb. 1981); Fulton Cnty. v. Metro. Atlanta Rapid Transit Auth., 276 S.E.2d 583, 584–85 (Ga. 1981).

18. See, e.g., Save Our Valley v. Sound Transit, 335 F.3d 932, 934 (9th Cir. 2003); Coal. of Concerned Citizens Against I-670 v. Damian, 608 F. Supp. 110, 112–14 (S.D. Ohio 1984).

19. Advocates have confronted similar issues pursuing equity in other land use contexts such as the siting of municipal services, environmental hazards, and affordable housing. See, e.g., Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth., 417 F.3d 898 (8th Cir. 2005) (challenging a decision to demolish public housing); Macone v. Town of Wakefield, 277 F.3d 1 (1st Cir. 2002) (challenging a decision to deny a developer's application to build low-income housing); East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb Cnty. Planning & Zoning Comm'n, 706 F. Supp. 880 (M.D. Ga. 1989) (challenging a decision to allow the creation of a private landfill); Bean v. Sw. Waste Mgmt. Corp., 482 F. Supp. 673 (S.D. Tex. 1979) (challenging the siting of a waste facility).

20. 42 U.S.C. § 2000d (2006).

21. Memorandum from Thomas Perez, Assistant Att'y Gen., to Federal Funding Agency Civil Rights Directors, regarding Title VI Coordination and Enforcement 4 (Aug. 19, 2010) (on file with the *California Law Review*).

discrimination.”²² Section 601 of Title VI states that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”²³ Section 602 grants administrative agencies that extend federal financial assistance to any program or activity the authority to “effectuate the provisions of [Title VI] with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.”²⁴ This section allows agencies to define discrimination and impose additional requirements to ensure recipients of federal financial assistance carry out their programs and activities in a nondiscriminatory manner. As most major transit agencies are recipients of federal funding from the Federal Transit Administration (“FTA”), administrative enforcement of Title VI has the potential to reshape transit planning in the United States.

While Title VI has been well litigated, agencies’ regulatory authority remains an extremely underutilized tool in influencing the fight for transit justice. This Comment first examines the shortcomings of judicial enforcement of Title VI, then explores ways administrative enforcement can overcome these weaknesses. Part I reflects on modern Title VI suits, describing the various theories of equity advocates have proposed and the challenges of relying on a judicial remedy to obtain them. Using the FTA’s *Circular on Title VI and Title VI Dependent Guidelines for Federal Transit Administration Recipients* (“Circular”) as a starting point, Part II illustrates how agencies can use their rulemaking authority to overcome the pitfalls that derailed judicial enforcement. Part II also demonstrates how the Circular falls short in its pursuit of transit equity. Part III proposes additional measures the FTA can use to ensure transit planning decisions are made in a manner that is most equitable to the communities involved.

I.

THEORIES OF EQUITY AND THE SHORTCOMINGS OF JUDICIAL PURSUIT OF TRANSIT JUSTICE

The pursuit of equity in the transit planning process has taken many forms. As transit justice advocates focused their early legal efforts on judicial enforcement of nondiscrimination guarantees such as the Equal Protection Clause of the Fourteenth Amendment and Title VI, the jurisprudence under

22. 109 Cong. Rec. 11161 (1963) (message from President Kennedy on Civil Rights and Job Opportunities, June 19, 1963); *see also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 329 n.9 (1978).

23. 42 U.S.C. § 2000d.

24. *Id.* at § 2000d-1.

these authorities has shaped legal efforts to define equity in the transit planning process.²⁵ While judicial enforcement was effective in combating de jure segregation, this Part examines the shortcomings of judicial enforcement in addressing modern de facto discrimination.

Modern theories can be broadly delineated into substantive equity, which combats inequitable distribution of the benefits and burdens resulting from the transit planning process, and procedural equity, which combats inequities in the transit planning process itself. While these theories have failed to gain acceptance in the courts, the suits illustrate the various ways advocates have conceptualized equity. Judicial enforcement of both theories has also been limited by problems of defining equity, the trend towards judicial deference to local governments, and the courts' lack of enforcement capacity.

A. Substantive Equity

Substantive equity is measured by the ultimate distribution of the benefits and burdens of the transit planning process. Most suits based in substantive equity rely on a disparate impact cause of action under Title VI or comparable state statutes.²⁶ Rather than requiring proof of discriminatory intent, disparate impact suits instead focus on the discriminatory effects of facially neutral policies. Courts evaluating a disparate impact claim do so using a three-part burden-shifting framework. The plaintiff must carry the initial burden of presenting a prima facie case of discrimination, usually by demonstrating that the challenged policy causes a statistical disparity in the benefits or burdens felt by a particular population. The burden then shifts to the defendant to prove there is a substantial legitimate justification for the disparity. The plaintiff can rebut this substantial legitimate justification by showing there is a less discriminatory alternative to the challenged action.²⁷

While substantive equity has the power to provide for immediate relief to transit-deprived communities, advocates relying on substantive equity theories have faced steep challenges in the courts. Advocates have struggled to define

25. Transit planners, unconstrained by the limits of antidiscrimination jurisprudence, have developed more diverse, and in many cases, more powerful theories of equity. *See, e.g.*, David C. Hodge, *Fiscal Equity in Urban Mass Transit Systems: A Geographic Analysis*, 78 ANNALS ASS'N AM. GEOGRAPHERS 288, 289 (1988) (using cross-subsidization to evaluate the equitable funding of transit in Seattle, WA); Todd Litman, *Evaluating Transportation Equity*, 8 WORLD TRANSP. POL'Y & PRAC. 50, 50–51 (2002) (describing vertical and horizontal equity).

26. Other statutes include section 11135 of the California Government Code and title 740, section 23/5 of the Illinois Code.

27. *See, e.g.*, N.Y. Urban League, Inc. v. New York, 71 F.3d 1031, 1036 (2d Cir. 1995); Ga. State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985). Disparate impact claims under Title VII (employment discrimination) and Title VIII (housing discrimination) of the Civil Rights Act are evaluated under the same burden-shifting framework. As a result, courts often find Title VII and Title VIII precedent relevant in interpreting Title VI, and vice versa. *See, e.g.*, Larry P. v. Riles, 793 F.2d 969, 982 nn.9–10 (9th Cir. 1984) (using Title VII precedent to interpret Title VI); *see also* Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 934–35 (2d Cir. 1988) (using Title VII jurisprudence to interpret Title VIII).

substantive equity in a manner that satisfies the standard courts have demanded to show a prima facie case. The deference courts show towards transit agencies in evaluating substantial legitimate justifications further limits the effectiveness of these suits. In addition, simply granting the remedy sought has severely tested the court's capacity for ensuring compliance.

1. Theories of Substantive Equity: Allocation of Benefits and Distribution of Burdens

Transit justice advocates have developed two lines of substantive equity cases. The first focuses on the distribution of subsidies across transit lines, typically alleging that transit agencies favored rail lines with predominantly white riderships used to commute between suburbs and central cities over bus lines with predominantly minority riderships used primarily for short, intra-city trips.²⁸ The second examines the siting of transit lines themselves. However, these two lines of cases are plagued by a similar series of weaknesses both in the jurisprudence and in the courts' capacity to ensure compliance.

The most celebrated of the subsidy-based cases is *Labor/Community Strategy Center v. Los Angeles County Metropolitan Transportation Authority*, also known as the *Bus Riders Union* case.²⁹ The plaintiffs challenged a decision by the Los Angeles County Metropolitan Transportation Authority ("LACMTA") to raise fares and eliminate a monthly pass on certain bus lines that served predominantly minority communities to raise \$32 million while concurrently allocating \$59 million to build a rail line that would serve a predominantly white and affluent ridership.³⁰ The plaintiffs showed that in 1992, LACMTA spent an average annualized subsidy of \$1.17 per trip on bus passengers while subsidizing Metrolink rail passengers at \$21.00 per trip,³¹ and cited LACMTA projections stating the subsidies could become even more disparate in the future.³² The plaintiffs also cited disparities in qualitative measures such as transit amenities and security.³³ The suit resulted in a preliminary injunction for the plaintiffs and a consent decree that required LACMTA to make substantial improvements to its bus system.³⁴ However, *Bus*

28. See MOVING TO EQUITY, *supra* note 6, at 7 (noting that forty-eight of America's one hundred largest cities have a majority minority population, and the number of people of color in major cities is growing); *id.* (noting that at 71 percent, whites have the highest percentage of any racial group living in the suburbs); *id.* at 15 (noting that rail riders typically have higher incomes than bus riders).

29. Findings of Fact and Conclusions of Law re: Preliminary Injunction, *Labor/Cmty. Strategy Ctr. v. L.A. Cnty. Metro. Transp. Comm'n*, No. CV 94-5936 (C.D. Cal. Sept. 21, 1994).

30. *Id.* at 3-4.

31. *Id.* at 8-9.

32. *Id.* at 8.

33. *Id.* at 8-9.

34. Consent Decree, *Labor/Cmty. Strategy Ctr. v. L.A. Cnty. Metro. Transp. Comm'n*, No. CV 94-5936 (C.D. Cal. Oct. 29, 1996), available at <http://oldbru.thestrategycenter.org/engli/pdf%20files/Consent%20Decree%20pdfs/Consent%20Decree%20Documents/consent-decree-10-96.pdf>. For an account of the Bus Riders Union's fight written by one of the organizers, see Eric Mann, *Los*

Riders Union was the only successful case of its kind. Challenges to similar imbalances in New York and Chicago were defeated on the grounds that the metric selected to compare subsidies given to each system was not adequate,³⁵ while one challenge in Philadelphia failed because the transit agency had provided a substantial legitimate justification for the disparity.³⁶

The second group of cases has centered on the siting of transit expansions. Some suits have focused on the benefits of transit expansion, such as *Darensburg v. Metropolitan Transportation Commission*, which challenged as discriminatory the expansion of systems serving lower minority riderships instead of those serving higher minority riderships.³⁷ To measure the disparity, plaintiffs relied on vehicle revenue miles (“VRM”), a measure of the total number of miles that each transit vehicle is available for consumer use.³⁸ The plaintiffs noted that of the seven largest operators in the Bay Area, the three higher minority operators reduced their VRM from 1993 to 2007, while the three lower minority operators increased their VRM.³⁹ The court dismissed the claim, holding that VRM does not adequately measure equity and citing concerns that disparities in VRM are “affected by a number of factors, including service choices by operators, topography, geographic coverage and changes to service areas.”⁴⁰

Rather than focusing on disparate benefits, other suits have challenged the burdens resulting from transit siting decisions. In *Save Our Valley v. Sound Transit*, for example, the plaintiffs claimed that a planned light-rail expansion disproportionately displaced minority neighborhoods based on a comparison of the demographics of the various neighborhoods displaced by the project.⁴¹

Angeles Bus Riders Derail the MTA, in HIGHWAY ROBBERY: TRANSPORTATION RACISM & NEW ROUTES TO EQUITY 33, 33–48 (Robert Bullard et al. eds., 2004).

35. See *N.Y. Urban League, Inc. v. New York*, 71 F.3d 1031, 1037–38 (2d Cir. 1995); *Munguia v. Illinois*, No. 10 C 0055, 2010 WL 3172740, at *9–11 (N.D. Ill. Aug. 11, 2010).

36. *Comm. for a Better N. Phila. v. Se. Pa. Transp. Auth.*, 1990 U.S. Dist. LEXIS 10895, at *13–15 (E.D. Pa. Aug. 9, 1990), *aff’d without opinion*, 935 F.2d 1280 (3d Cir. 1991). The defendants in this case conceded that the plaintiffs had stated a prima facie case for the purposes of summary judgment. *Id.* at *9–10.

37. 611 F. Supp. 2d 994, 1048 (N.D. Cal. 2009), *aff’d*, 636 F.3d 511 (9th Cir. 2011).

38. *Darensburg*, 611 F. Supp. 2d at 1048. VRM does not include miles traveled to and from storage facilities or other non-revenue producing trips. *Id.*

39. On the seven largest transit operators, the proportion of minority riders is: 78% of AC Transit riders; 53% of BART riders; 50% of Caltrain riders; 38% of GGT riders; 58% of Muni riders; 70% of SamTrans riders; and 70% of VTA riders. *Id.* at 1007. The three operators with reduced VRM were AC Transit, SamTrans and VTA. *Id.* at 1048. The three operators with increased VRM were BART, Caltrans and Muni. *Id.* GGT, a low-minority operator, also decreased its VRM in this period. *Id.* Plaintiff’s argument focused on AC Transit, which has the highest minority ridership, and experienced the steepest decline in services during the period in question. These operators account for 95% of the Bay Area’s total annual transit trips. *Id.* at 1007.

40. *Id.* at 1048.

41. 335 F.3d 932, 934 (9th Cir. 2003). *Save Our Valley* was dismissed because the court ruled that 42 U.S.C. § 1983 cannot be used to create a private right of action for violation of regulatory rights. *Id.* at 935–36. A similar suit, *Coalition of Concerned Citizens Against I-670 v. Damian*, 608 F. Supp. 110, 112–13, 127–29 (S.D. Ohio 1984), which involved a challenge to a proposed highway on

Other advocates have filed challenges based on the public health effects of siting environmental hazards—like bus depots disproportionately in minority neighborhoods.⁴² These suits have also been largely unsuccessful.

2. Problems in Defining Substantive Equity

The largest stumbling block for plaintiffs has been the struggle to define and measure challenged inequities in a manner that satisfies Title VI. Other types of equal protection jurisprudence have dealt with the distribution of a relatively uniform benefit, such as a certain type of job or units of housing. Transit planning cases often involve benefits as diverse as buses and ferries or decisions with both deleterious and advantageous effects, making comparisons between the effects on various groups difficult.⁴³ Outside of *Bus Riders Union*, courts have been broadly skeptical of nearly every equity metric proposed.⁴⁴

While the effects of transit planning decisions are often complex and numerous, disparate impact jurisprudence requires plaintiffs to reduce a given policy's effects down to a single, all encompassing, quantitative metric so the court can compare the policy's effects on one group to its effects on another. However, there is no consensus within the transit planning community as to a single measure for equity.⁴⁵ Even the plaintiffs' expert in *Darensburg* acknowledged that comparing transit service is more "an art than a science."⁴⁶ This lack of consensus permeates the transit cases. One fundamental disagreement is whether equity should be measured in terms of input or output. The *Darensburg* plaintiffs, for example, defined equity in terms of the services available to particular groups.⁴⁷ In contrast, the *Bus Riders Union* plaintiffs

the grounds that it disproportionately displaced minority residents, was dismissed on the grounds that the defendants had provided a substantial legitimate justification for the route.

42. See, e.g., Complaint, *W. Harlem Envtl. Action, Inc. v. Metro. Transp. Auth.*, No. 2001.0053 & 2001.0062 (Federal Transit Administration Nov. 14, 2000). The complaint was ultimately dismissed. For an account of this case, see Jeremy Linden, Casenote, *At the Bus Depot: Can Administrative Complaints Help Stalled Environmental Justice Plaintiffs?*, 16 N.Y.U. ENVTL. L.J. 170 (2008).

43. These areas of equal protection jurisprudence include Title VII (employment discrimination), Title VIII (housing discrimination), other Title VI cases (language access, education, etc.), and the Equal Protection Clause of the Fourteenth Amendment. See, e.g., *Darensburg*, 611 F. Supp. 2d at 1052 (noting that unlike prior cases where "the employment and educational practices at issue were very discrete, involving a single screening or selection device (high school diploma or intelligence test) applied to one population (e.g., job applicants or students)[,]" the plaintiffs challenged "the application of several complex budgetary practices to a host of transit operators, which are differently situated as to funding and modes of service, and serve multiple, overlapping populations of riders[]" which were also "subject to a complex array of statutory, regulatory and administrative constraints, not to mention numerous, and sometimes competing policy goals").

44. See *N.Y. Urban League, Inc. v. New York*, 71 F.3d 1031, 1037–38 (2d Cir. 1995); *Munguia v. Illinois*, No. 10 C 0055, 2010 WL 3172740, at *9–11 (N.D. Ill. Aug. 11, 2010).

45. See, e.g., Litman, *supra* note 25, at 50–51 (describing various measures of equity used by transit planners).

46. *Darensburg*, 611 F. Supp. 2d at 1048 (internal quotation marks omitted).

47. *Id.* (relying on VRM to evaluate equity).

focused on securing the same amount of resources invested per person, regardless of the final services provided.⁴⁸

Even where there is agreement on what to measure, there is disagreement on how to measure it, and to what level of detail. Of the four cases evaluating subsidy distribution, the plaintiffs relied on seven different metrics,⁴⁹ and in most cases the defendants brought forward additional metrics they felt were more appropriate.⁵⁰ Further complicating matters is the fact that metrics can be framed to favor certain social groups.⁵¹

Courts have held that plaintiffs must find an “appropriate measure” for assessing disparate impact that “adequately capture[s]” the relative impacts of the policy in question.⁵² While this language appears permissive, courts have required equity metrics to account for an exacting level of detail. The *Darensburg* court critiqued the use of vehicle revenue miles by noting that “VRM is affected by a number of factors, including service choices by operators, topography, geographic coverage and changes to service area.”⁵³ In *Munguia v. Illinois*, the court rejected a challenge to the allocation of funding between the Chicago Transit Authority, which serves a predominantly urban ridership via bus and subway services, the Commuter Rail Board, and the Suburban Bus Board because of the plaintiff’s reliance on subsidy per trip (“SPT”) as a measure of equity.⁵⁴ The court noted SPT was subject to independent variables such as a cheap and effective advertising campaign that

48. See, e.g., Findings of Fact and Conclusions of Law re: Preliminary Injunction at 8–9, *Labor/Cnty. Strategy Ctr. v. L.A. Cnty. Metro. Transp. Comm’n*, No. CV 94-5936 (C.D. Cal. Sept. 21, 1994) (relying on subsidy per trip to evaluate equity).

49. See *id.* (proposing subsidy per trip); *Munguia*, 2010 WL 3172740, at *9 (proposing subsidy per passenger trip); *N.Y. Urban League, Inc. v. Metro. Transp. Auth.*, 905 F. Supp. 1266, 1275 (S.D.N.Y. 1995) (proposing comparisons based on total revenue passengers to the total subsidies received by the two systems; the total subsidy per revenue passenger; the total subsidy per revenue vehicle mile (per subway car, train car, or bus); the total subsidy per revenue passenger mile; and how much of the total cost of operation of a transit system is recovered by the fares paid by its passengers (the farebox operating ratio)), *rev’d sub nom.* *N.Y. Urban League, Inc. v. New York*, 71 F.3d 1031 (2d Cir. 1995); *Comm. for a Better N. Phila. v. Se. Pa. Transp. Auth.*, 1990 U.S. Dist. LEXIS 10895, at *4 (E.D. Pa. Aug. 9, 1990) (proposing a comparison between a population’s representation in the agency’s ridership and how much of its operating budget that population funds).

50. See *N.Y. Urban League, Inc.*, 71 F.3d at 1038 (suggesting percentage of mean household income spent on commuting, per capita subsidy in service area and capital subsidies to each system as alternative to farebox recovery ratio); *Munguia*, 2010 WL 3172740, at *10 (suggesting subsidy per mile instead of subsidy per trip); *Darensburg*, 611 F. Supp. 2d at 1048–49 (suggesting vehicle revenue hours instead of vehicle revenue miles). In some cases the choice of metrics affected not only the degree of the disparity, but also the existence of the disparity. See, e.g., *Metro. Transp. Auth.*, 905 F. Supp. at 1275 (noting that total subsidy per revenue passenger mile did not show a disparity whereas farebox recovery ratio and other metrics did).

51. See Litman, *supra* note 25, at 51 (charting seven ways to measure equity and which groups the metric favors).

52. *N.Y. Urban League, Inc.*, 71 F.3d at 1037–38; see also *Munguia*, 2010 WL 3172740, at *9.

53. *Darensburg*, 611 F. Supp. 2d at 1048. A metric that accounted for all of these factors would have to find objective ways to rate the utility of line expansions based on the types of terrain that they covered, gradients, and amount of traffic that they would draw.

54. 2010 WL 3172740, at *11.

could decrease SPT by increasing ridership with little extra cost, or a crime wave that could increase SPT by decreasing ridership without reducing costs.⁵⁵ This difficulty is exacerbated by the fact that the transit cases involved comparisons between as many as five different modes of transit, each with related but distinct purposes and characteristics.⁵⁶ With the exception of *Bus Riders Union*, which was decided before the inception of the appropriate measure standard, courts have rejected every metric plaintiffs have proposed.⁵⁷

There is no end to the variability courts might find if every detail matters. In *Hawkins v. Town of Shaw*, a three-judge panel found that Shaw, an entirely segregated town, had discriminated in its provision of municipal services because nearly 98 percent of all homes that fronted on unpaved streets were occupied by blacks, and 97 percent of the homes not served by sanitary sewers were in black neighborhoods.⁵⁸ The dissenters in the en banc rehearing, however, would have had the plaintiffs account for differences in measurements such as soil quality, width of streets, and income and education levels of the inhabitants to show discrimination.⁵⁹ Such requirements in the face of such blatant disparities would effectively eviscerate disparate impact altogether.

Even where consensus exists on a single measure of equity and a method of measuring it, the question remains how to account for a policy's ancillary benefits and burdens in the disparate impact analysis. For example, subsidizing commuter rails may reduce traffic congestion and pollution in a city.⁶⁰ In this sense, subsidizing commuter rails at a higher rate may be detrimental to local bus-line riders in their capacity as riders, but it may have beneficial effects for them as inhabitants of the city. In addition, different modes of transit have different ancillary benefits. A bus may be slower than a subway line, but it could also be cheaper and make more stops, allowing for greater transit access. A single effect can also have both beneficial and detrimental aspects.⁶¹ For

55. *Id.* at *11. None of the situations imagined by the court had occurred.

56. The *N.Y. Urban League* court expressed skepticism that different forms of transit were comparable at all. 71 F.3d at 1038.

57. See *Munguia*, 2010 WL 3172740 at *9; *N.Y. Urban League, Inc.*, 71 F.3d. at 1038. The *Munguia* court also rejected subsidy per trip, the metric relied upon in *Bus Riders Union*, as an appropriate measure. *Munguia*, 2010 WL 3172740, at *9. The only instance of a court finding that a metric satisfied the appropriate measure standard was *South Camden Citizens In Action v. New Jersey Department of Environmental Protection*, where the metric in question was endorsed by the Environmental Protection Agency. 145 F. Supp. 2d 446, 492–93 (D.N.J. 2001).

58. 437 F.2d 1286, 1288 (5th Cir. 1971). *Hawkins* was decided under the Equal Protection Clause of the Fourteenth Amendment prior to the Supreme Court's ruling that the Equal Protection Clause did not include a right of action for disparate impact discrimination.

59. See *Hawkins v. Town of Shaw*, 461 F.2d 1171, 1181, 1184–86 (5th Cir. 1972) (en banc) (Clark, J., dissenting).

60. See *N.Y. Urban League, Inc.*, 71 F.3d at 1039. While the Metropolitan Transit Authority argued these as substantial legitimate justifications for the disparate impacts, they can also be seen as benefits in determining whether there is a prima facie case.

61. See Vicki Been, *What's Fairness Got to Do With It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1035–37 (1993) (discussing the

example, living in a transit desert can mean low transit access but also low rent, and a new transit line through a predominantly minority neighborhood can be a source of jobs or transit for those not displaced.⁶²

There is no readily available objectively correct way to balance these different effects against one another. The effects of air quality on health, property values, or quality of life do not translate readily into miles of track or subsidies per trip. Further, whether a community prefers a given level of transit access to higher air quality, less traffic congestion, or low rent could depend on the subjective preferences of community residents, and thus could vary from community to community. In these cases there is no easy way for a court to definitively state what is equitable and what is not.

The challenges of measuring equity and accounting for the benefits and burdens of a transit planning decision highlight the challenges of seeking redress through judicial enforcement. Inequities in transit planning are subtle and complex, and efforts to address these inequities through courts have largely been unsuccessful, due to the difficulty of choosing what effects to measure, how to measure them, and how to weigh different effects against one another.

3. *Second-Guessing Agency Judgment*

Where a court finds that a policy establishes a prima facie case of a disparate impact, the judge must then evaluate whether the agency's justification is substantial and legitimate. This requires courts to second-guess an agency's rationale for its policies. However, judges rarely have technical expertise in the fields in which they are adjudicating, and thus are often loath to second-guess the judgment of planners, engineers, and other professionals at transit agencies.

While earlier Title VI cases had required strict necessity to justify decisions having a disparate impact,⁶³ courts in the transit cases have required only a substantial legitimate justification. As the *Darensburg* court reasoned, "an overly strict requirement of establishing transportation necessity . . . is not

sometimes fine line between benefits and burdens in siting of locally undesirable land uses); see also *Greater New Orleans Fair Hous. Action Ctr. v. U.S. Dep't of Hous. & Urban Dev.*, 639 F.3d 1078 (D.C. Cir. 2011) (concluding that, although one aspect of a formula related to the Department of Housing and Urban Development's hurricane relief grant program appeared to have an adverse disparate impact on African Americans, it seemed to be offset by other elements of the formula that favored African Americans). *But see Connecticut v. Teal*, 457 U.S. 440, 455 (1982) (holding that a promotion test was unconstitutional because one portion had a disparate impact on black candidates despite the fact that other affirmative action components of the test resulted in a higher rate of promotion for black candidates than for white candidates).

62. Some scholars have argued that distributive justice does not account for market forces and the choices of the individuals living in "undesirable" areas. See Vicki Been, *Locally Undesirable Land Uses In Minority Neighborhoods: Disproportionate Siting Or Market Dynamics?*, 103 YALE L.J. 1383, 1384-91 (1994); see also Thomas Lambert & Christopher Boerner, *Environmental Inequity: Economic Causes, Economic Solutions*, 14 YALE J. ON REG. 195 (1997).

63. See, e.g., *Larry P. v. Riles*, 793 F.2d 969, 982 (9th Cir. 1984) (requiring educational necessity for an IQ test used to assign students to special education classes).

appropriate for judging the complex policy decisions and tradeoffs . . . in allocating funds that are always too scarce among competing legitimate needs to achieve the myriad goals for the region.”⁶⁴ The court further noted that transit decisions are more “complicated” than job performance tests and the applicability of IQ scores to classroom assignment.⁶⁵ Applying this test, the court’s analysis dwells largely on the challenges of balancing competing policy goals such as maintaining existing systems, accommodating growth, and harmonizing transportation and meeting other legitimate statutorily required objectives.⁶⁶ This rationale is an acknowledgment of the court’s limited expertise and a reluctance to second-guess the expertise of agency decision makers.

Requiring a court to weigh a justification’s legitimacy raises the same issues as does requiring the court to define whether the decision was inequitable in the first place. The court must once again choose what effects are important, how to measure them, and how to weigh them against one another. For example, in *New York Urban League v. New York*, the court also held that even if the higher subsidies for a commuter rail amounted to a prima facie case, the lower court did not consider the extent to which the higher subsidy would “minimize[] congestion and pollution levels associated with greater use of automobiles in the city; encourage[] business to locate in the City; and provide[] additional fare-paying passengers to the City subway and bus system.”⁶⁷ Without a universally accepted measure of equity, courts may be reluctant to tie agencies to one balancing metric and thus restrict their discretion to make difficult policy trade-offs.

4. Judicial Capacity to Enforce Decisions

Even when there is a decision in the plaintiff’s favor, the limited capacity of the courts to supervise an agency’s implementation of a settlement or corrective action plan curtails the effectiveness of judicial enforcement. The enforcement of the *Bus Riders Union* consent decree underscores the challenges courts and plaintiffs face in obtaining compliance, even where the parties have agreed on a course of action. Under the consent decree, LACMTA agreed, among other things, to retain an unlimited-use bus pass, to purchase one thousand more buses over five years, and to reduce overcrowding as measured by several load factors.⁶⁸ However, neither the court’s special master nor the plaintiffs had the ability to ensure that LACMTA abided by its word. Formulating the consent decree took more than a year after the court issued its

64. *Darensburg v. Metro. Transp. Comm’n*, 611 F. Supp. 2d 994, 1054 (N.D. Cal. 2009).

65. *Id.* at 1048.

66. *Id.* at 1054–55.

67. *See* *N.Y. Urban League, Inc. v. New York*, 71 F.3d 1031, 1039 (2d Cir. 1995).

68. Consent Decree, *Labor/Cnty. Strategy Ctr. v. L.A. Cnty. Metro. Transp. Comm’n*, No. CV 94-5936 (C.D. Cal. Oct. 29, 1996), available at <http://oldbru.thestrategycenter.org/engli/pdf%20files/Consent%20Decree%20pdfs/Consent%20Decree%20Documents/consent-decree-10-96.pdf>.

preliminary injunction, and within two years LACMTA had fallen behind on its implementation. LACMTA then sued, challenging the validity of the special master's orders, and tried to reinterpret the consent decree.⁶⁹ The Bus Riders Union eventually obtained most of the terms agreed upon in the consent decree, but only after multiple appeals to the Ninth Circuit and even a petition for certiorari to the Supreme Court.⁷⁰ When the consent decree expired in 2006, LACMTA had met its requirements to retain monthly bus passes and add new buses to its fleet.⁷¹ It had failed, however, to meet the overcrowding requirements.⁷²

The struggle courts and plaintiffs face to implement the terms of settlements is often reflective of deeper-seated problems in the decision-making process. Since substantive equity is by its nature reactive and focused only on the outcome of the process, it does not reach the decision-making process itself. As a result, an obstinate transit agency can simply continue its discriminatory practices and force plaintiffs into time-intensive and expensive suits to stop them. In 2011, five years after the expiration of the *Bus Riders Union* consent decree, the FTA initiated an investigation of LACMTA for additional Title VI violations, responding to a complaint claiming—among other things—that LACMTA's decision to cut 564,000 bus service hours since 2008, while at the same time increasing rail service by 8 percent, had a disparate impact on the basis of race.⁷³ This claim is strikingly similar to the allegations from *Bus Riders Union* fourteen years previous.

The shortcomings of the substantive equity cases highlight the steep challenges advocates face in using judicial enforcement to pursue transit planning equity. By its very nature, this theory requires generalist judges to

69. See *Labor/Cnty. Strategy Ctr. v. L.A. Cnty. Metro. Transp. Auth.*, 263 F.3d 1041 (9th Cir. 2001), *cert. denied*, 535 U.S. 951 (2002); see also Mann, *supra* note 34, at 43–44 (describing the fight over the consent decree).

70. See *Labor/Cnty. Strategy Ctr. v. L.A. Cnty. Metro. Transp. Auth.*, 564 F.3d 1115 (9th Cir. 2009); *Labor/Cnty. Strategy Ctr.*, 263 F.3d 1041.

71. *Labor/Cnty. Strategy Ctr.*, 564 F.3d at 1122.

72. LACMTA claimed that it had met the requirements based on its own calculations, which differed from the methodology agreed upon in the consent decree. *Id.* at 1121–22. According to the methodology from the consent decree, LACMTA's compliance rate was as low as 9 percent. *Id.* The district court denied the Bus Riders Union's request to extend the consent decree, and in 2009, over a vigorous dissent by Judge Berzon, the Ninth Circuit affirmed, holding that LACMTA's actions constituted substantial compliance. See *id.* at 1123; see also *id.* at 1128–32 (Berzon, J., dissenting).

73. See Complaint at 1, *Bus Riders Union v. L.A. Cnty. Metro. Transp. Auth.* (Fed. Transit Admin. Nov. 15, 2010), available at http://publicadvocates.org/sites/default/files/library/bru_title_vi_complaint_vs_lacmta_final_filed_11-15-10.pdf; Letter from Amber Ontiveros, Title VI Investigator, Fed. Transit Admin., to Esparanza Martinez, Bus Riders Union (Mar. 9, 2011), available at www.publicadvocates.org/sites/default/files/library/fta_investigation_of_mta_letter_3-14-2011.pdf (notifying complainants of FTA's plan to conduct a compliance review of LACMTA). FTA subsequently found LACMTA out of compliance with several requirements of its Title VI regulations. U.S. DEP'T OF TRANSP., FED. TRANSIT ADMIN., OFFICE OF CIVIL RIGHTS, TITLE VI COMPLIANCE REVIEW OF THE LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY (METRO) LOS ANGELES, CA 14–15 (2011), available at www.fta.dot.gov/12328_14167.html [hereinafter L.A. METRO TITLE VI COMPLIANCE REVIEW].

critically examine the determinations of agencies full of transit experts just to make a finding. Even where a court makes a decision, implementing its holding over the resistance of a recalcitrant defendant stretches the court's power past its traditional capacities both practically,⁷⁴ and in some cases constitutionally.⁷⁵ Complicating matters further, the Court has effectively cut off all federal judicial private rights of action against recipients of federal funding for disparate impact discrimination, first via the Equal Protection Clause,⁷⁶ then section 601 of Title VI,⁷⁷ and finally the agency regulations prohibiting disparate impact discrimination.⁷⁸ The most recent disparate impact suits have

74. See generally GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991); Robert P. Inman & Daniel L. Rubinfeld, *Judicial Pursuit of Local Fiscal Equity*, 92 HARV. L. REV. 1662, 1712–21 (1979) (evaluating the effects of four judicial approaches towards attaining fiscal equity in local government spending and concluding that the effects would be limited). Some scholars have argued though that the role courts take in institutional change litigation is not radically different from their role in other types of litigation, and others have argued that courts can enhance their capacity to administer and reform institutions by, for example, employing special masters to supplement the court's expertise and capacity. See Malcolm M. Feeley, *Implementing Court Orders in the United States: Judges as Executives*, in JUDICIAL REVIEW AND BUREAUCRATIC IMPACT: INTERNATIONAL AND INTERDISCIPLINARY PERSPECTIVES 221 (Marc Hertogh & Simon Halliday eds., 2004) (examining the use of special masters in prison reform litigation); Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Change Litigation*, 93 HARV. L. REV. 465 (1980); see also Charles M. Haar, *Judges as Agents of Social Change: Can the Courts Break the Affordable Housing Deadlock in Metropolitan Areas?*, 8 HOUSING POL'Y DEBATE 633, 635–37 (1997) (describing ways in which the courts compensated for their institutional limitations to manage the problem of exclusionary zoning in New Jersey).

75. Managing agencies and making policy decisions, such as how to allocate resources and structure agencies, are typically considered executive and legislative functions respectively, and beyond the domain of the courts, both practically and in some cases, constitutionally. See *Allen v. Wright*, 468 U.S. 737, 760 (1984) (rejecting the plaintiff's claim based on lack of standing, because allowing the court to grant relief would effectively allow the courts to act as "continuing monitors of the wisdom and soundness of Executive action," which is a more appropriate role for the Congress or the electorate) (internal quotation marks omitted) (citations omitted); see also Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894 (1983) (arguing that standing requirements in federal courts may preclude challenging policy decisions that have a generalized impact).

76. *Washington v. Davis*, 426 U.S. 229, 246 (1976).

77. *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983). This case produced four different opinions, with seven justices agreeing that intent was required to show discrimination under Title VI. *Id.* at 610–11 (Powell, J., concurring); *id.* at 612 (O'Connor, J., concurring); *id.* at 641–42 (Stevens, J., dissenting). Previously courts had allowed liability under Title VI for facially neutral policies (i.e., disparate impact liability). See, e.g., *Lau v. Nichols*, 414 U.S. 563 (1974) (finding that a school district's failure to provide English second language education to Chinese speaking students violated Title VI).

78. Rather than holding that the regulations did not prohibit disparate impact discrimination, the Supreme Court held that the agency regulations did not provide private citizens with a private right of action. *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). Post-*Sandoval* advocates briefly tried to enforce the agency regulations using 42 U.S.C. § 1983 until the Court held that § 1983 cannot be used to create an implied right of action in *Gonzaga University v. Doe*, 536 U.S. 273 (2002). See also *Save Our Valley v. Sound Transit*, 335 F.3d 932, 939 (9th Cir. 2003) (extending *Sandoval* and *Gonzaga* to conclude "that agency regulations cannot independently create rights enforceable through § 1983").

all proceeded under state statutes.⁷⁹ Despite the successes of the *Bus Riders Union*, most advocates pursuing transit equity through substantive justice theories have met with only frustration.

B. Procedural Equity

Rather than focusing on ultimate resource distribution, procedural equity seeks not so much an objectively fair solution, but rather a meaningful opportunity to influence decisions.⁸⁰ Defining equity in this manner reaches some of the systemic problems that can cause unjust outcomes, but provides no direct remedy for the outcomes themselves. In other words, remedying procedural inequities in a decision-making process provides no guarantee that subsequent decisions will be any more substantively equitable. Suits utilizing theories of procedural equity typically use Title VI and the Equal Protection Clause of the Fourteenth Amendment to target the obstacles to equal participation in the transit planning process, such as unequal treatment and structural disadvantages in the decision-making process itself. There are three basic forms of procedural equity: equal treatment, equal access to the decision-making process, and equal representation in the decision-making process. Equal protection jurisprudence is no better suited for procedural equity cases than for substantive equity. Litigation efforts under procedural equity theories have also suffered from problems of measuring equity and judicial deference to transit agencies.

1. Equal Treatment Within the Decision-Making Process

The most basic form of procedural equity is equal treatment in the decision-making process, defined as a lack of racial animus or discriminatory intent. While both Title VI and the Equal Protection Clause provide a private right of action to plaintiffs seeking to challenge unequal treatment in transit planning decisions, proving a case is nonetheless difficult due to the problem of measuring equity.⁸¹

79. *Darensburg v. Metropolitan Transportation Commission* proceeded under section 11135 of the California Government Code and *Munguia v. Illinois* used title 740, section 23/5 of the Illinois Code.

80. See U.S. COMMISSION ON CIVIL RIGHTS, OFFICE OF THE GENERAL COUNSEL, NOT IN MY BACKYARD: EXECUTIVE ORDER 12898 AND TITLE VI AS TOOLS FOR ACHIEVING ENVIRONMENTAL JUSTICE 105 (2003) (noting that “[m]eaningful participation of affected communities is one of the cornerstones of environmental justice”) [hereinafter NOT IN MY BACKYARD]; Lynn E. Blais, *Environmental Racism Reconsidered*, 75 N.C. L. REV. 75, 80–83 (1996) (arguing that equity should be defined as satisfaction of community preferences).

81. The test for intentional discrimination is the same for both Title VI and the Equal Protection Clause. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978); *id.* at 328 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part); see also *United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992) (“Our cases make clear . . . that the reach of Title VI’s protection extends no further than the Fourteenth Amendment.”) (citations omitted).

The most overt equal treatment claims involve direct evidence of discriminatory intent. An example of direct evidence would be minutes from an agency's meeting recording that the agency denied funding to a bus line because it ran through a Latino neighborhood. Instances involving direct evidence of discrimination are rare though, effectively requiring plaintiffs to prove discriminatory intent under a variety of tests based on circumstantial evidence.

The problem of measuring equity also hobbles many efforts to show intentional discrimination based on circumstantial evidence. The most common test in the land use context is the *Arlington Heights* totality of the circumstances test, which considers an action's impact on protected groups, that action's historical background, the specific sequence of events leading up to the challenged action, and legislative or administrative history.⁸² Under the *Arlington Heights* test though, discriminatory intent often depends on showing a disparate impact.⁸³ Similarly, the pattern-and-practice theory of discriminatory intent requires plaintiffs to show a statistical disparity in the defendant's practices and anecdotal evidence of discrimination.⁸⁴ As a result, the problems of defining and measuring impact that limit substantive equity theories are also present here.

Evaluating the non-quantitative elements again requires courts to balance factors that do not readily compare to one another. The *Darensburg* plaintiffs, for example, argued that the statistical disparities in services for minority transit riders in the Bay Area, the Metropolitan Transportation Commission's ("MTC") historical background of inadequate funding for bus lines, its departure from the typically mandatory norm of preserving systems when it cut bus services while expanding rail services, and its failure to provide minority participants with the information and analysis necessary to meaningfully participate in the decision-making process together evidenced intentional discrimination.⁸⁵ But the court granted MTC's motion for summary judgment, holding that the plaintiff's allegations were inconsistent with other MTC decisions such as allocating extra maintenance funds to bus lines on several occasions and allowing service on the rail line with the lowest minority ridership to be cut multiple times.⁸⁶ The necessity of second-guessing the judgments of planners and experts at the transit agencies in order to find discrimination adds to courts' hesitancy in evaluating equal treatment. Claims

82. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977).

83. *See, e.g., id.* at 266 (noting that the impact of an action may be an "important starting point" in determining intent); *Darensburg v. Metro. Transp. Comm'n*, 636 F.3d 511, 523 (9th Cir. 2011) (noting that "Plaintiffs' failure to establish that MTC's challenged conduct has a discriminatory impact prevents any inference of intentional discrimination").

84. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 337–38 (1977).

85. *See Darensburg v. Metro. Transp. Comm'n*, No. 05-01597, 2008 WL 3915349, at *24–25 (N.D. Cal. Aug. 21, 2008).

86. *See id.* at *25.

of intentional discrimination in the transit context have been met with little success.⁸⁷

2. Access to the Decision-Making Process

Procedural equity can also be defined as the ability to participate meaningfully in a decision-making process.⁸⁸ The most salient aspect of participation is access to the process, and the ability to present one's concerns and perspectives to decision makers. Restricting a particular group's access and ability increases the likelihood that the resulting decision will not address their needs. The examples of meeting time and language access demonstrate the impact that decision-making processes can have on the ability of various groups to have their voices heard.⁸⁹

The ability to attend meetings and bring one's concerns before decision makers is a basic element of access. Accessible public meetings also promote transparent decision making on behalf of the agency. But the public's ability to take advantage of these opportunities can be constrained by the times of the meetings. As people working low-wage jobs are more likely to have work during the day with little flexibility in their schedules,⁹⁰ they are less able to attend meetings scheduled during the workday. For example, the MTC encourages public comment at its meetings.⁹¹ All but two of the 107 meetings

87. The plaintiffs in *Munguia* also brought claims of intentional discrimination, but their claims were dismissed without substantial discussion. *Munguia v. Illinois*, No. 10 C 0055, 2010 WL 3172740, at *12 (N.D. Ill. Aug. 11, 2010).

88. Some scholars have focused on opportunities to explore the issues and an explanation of the outcome. See Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837, 894–900 (1983). Others include agency responsiveness and the balance of power between the various parties. See Sheila Foster, *Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CALIF. L. REV. 775, 834 (1998).

89. Employment discrimination scholars have more extensively explored how the ways employers organize their workplaces and the procedures they use to determine promotions can facilitate discrimination. See, e.g., Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849, 857–65 (2007); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 468–509 (2001).

90. JOAN C. WILLIAMS & PENELOPE HUANG, CENTER FOR WORK LIFE LAW, IMPROVING WORK-LIFE FIT IN HOURLY JOBS: AN UNDERUTILIZED COST-CUTTING STRATEGY IN A GLOBALIZED WORLD 17 (2011), available at www.worklifelaw.org/pubs/ImprovingWork-LifeFit.pdf (noting that only 17.5 percent of workers without a high school degree can vary their schedules compared to 39.1 percent of college graduates; only 33 percent of low-wage workers have access to traditional flextime; 33 percent cannot decide when to take breaks; and that low-wage workers are more likely than more affluent workers to report that using workplace flexibility programs will negatively affect job advancement); WORKPLACE FLEXIBILITY 2010, URBAN INSTITUTE, GEORGETOWN LAW, LOWER-WAGE WORKERS AND FLEXIBLE WORK ARRANGEMENTS (2010), available at <http://workplaceflexibility2010.org/images/uploads/Lower-Wage%20Workers%20and%20FWAs.pdf>.

91. Meeting agendas typically note that “[t]he public is encouraged to comment on agenda items at committee meetings by completing a request-to-speak card (available from staff) and passing it to the committee secretary.” See, e.g., *Meeting Agenda, Policy Advisory Council, July 11, 2012, 1:30*

held by MTC and its committees between January and July of 2012, however, were held during the work day, typically between 9:00 a.m. and 1:00 p.m.⁹² Even the Policy Advisory Council and its Equity and Access Committee regularly met at 1:30 p.m. on Wednesdays,⁹³ and the Equity Working Group meets at 11:15 a.m. on Wednesdays.⁹⁴ The scheduling of these meetings inhibits the ability of low-wage workers, who are disproportionately minority, to access the decision-making process. The Oakland City Council, by contrast, meets on Tuesdays at 5:30 p.m. with public hearings and discussion items set for 6:30 p.m.⁹⁵

The ability to understand the discussion at public meetings is also essential to meaningful participation. Thus, translation at public meetings may be necessary for limited English proficient (“LEP”) populations to access the decision-making process. A 2011 investigation by the FTA, for example, found the Los Angeles Metropolitan Transportation Authority failed to provide translated handout material at public hearings and meetings.⁹⁶ In contrast, other agencies such as MTC provide translation services at all public meetings to individuals who have limited English proficiency.⁹⁷

While access issues are more readily identifiable than intentional discrimination, the current state of traditional civil rights jurisprudence is not well suited to claims centered on access. Some plaintiffs have used lack of access, manifested through a transit system’s inadequate provision of information to minority riders, as circumstantial evidence of intentional discrimination, but these efforts have thus far been unsuccessful.⁹⁸ Access disparities more naturally fall within the realm of disparate impact claims, as the policies limiting access are typically facially neutral. While language access

PM, METRO. TRANSP. COMM’N, <http://apps.mtc.ca.gov/events/agendaView.akt?p=1899> (last visited Mar. 25, 2013).

92. *MTC Meeting Archive*, METRO. TRANSP. COMM’N, www.mtc.ca.gov/meetings/archive/ (last visited Mar. 25, 2013). The two exceptions were two special joint meetings between MTC Commission and the ABAG Executive Board held on May 17 and July 19.

93. *See, e.g., Meeting Agenda*, *supra* note 91.

94. *See, e.g., Meeting Agenda, SCS/RTP Equity Working Group*, METRO. TRANSP. COMM’N, <http://apps.mtc.ca.gov/events/agendaView.akt?p=1909> (last visited Mar. 25, 2013). Similarly, the Southeastern Pennsylvania Transportation Authority holds its Board meetings on Thursdays at 3 p.m. and its Administration and Operations Committee meetings Thursdays at 12 p.m.. *Board Meetings and Members*, SE. PA. TRANSP. AUTH., www.septa.org/about/board/ (last visited Mar. 25, 2013).

95. *Meeting Schedule, City Council*, CITY OF OAKLAND, CAL., www2.oaklandnet.com/Government/o/CityCouncil/s/councilmeetings/index.htm (last visited Mar. 25, 2013).

96. L.A. METRO TITLE VI COMPLIANCE REVIEW, *supra* note 73, at 14.

97. *See, e.g., Meeting Agenda, Commission Meeting, July 25, 2012, 10:00 AM*, METRO. TRANSP. COMM’N, <http://apps.mtc.ca.gov/events/agendaView.akt?p=1884> (last visited Mar. 25, 2013) (noting that MTC requires three days notice for all requests for accommodations, including translation assistance by people with disabilities or limited English proficiency).

98. *See Darensburg v. Metro. Transp. Comm’n*, No. 05-01597, 2008 WL 3915349, at *25 (N.D. Cal. Aug. 21, 2008).

claims have had some success,⁹⁹ plaintiffs still struggle to overcome agencies' substantial legitimate justification. On the whole, access-based cases are rare and even more rarely successful.¹⁰⁰

Access is a necessary element of participation, but is not an independently sufficient guarantee of equity. Even though the ability to provide input allows advocates to better communicate their preferences and needs to decision makers, those decision makers are in no way obligated to heed the concerns raised.¹⁰¹ Cultural differences can also make participation in certain types of processes more difficult for certain groups.¹⁰² Becoming involved in complex transit planning moreover requires substantial resources, organization, and often counsel, which could make accessing opportunities difficult for disadvantaged communities.¹⁰³ Further procedural guarantees are necessary to ensure that public participation is meaningful.

3. Representation in the Decision-Making Process

Another manifestation of procedural equity is equal representation in decision-making bodies that allocate transit resources. Defining equity in this manner would ensure not only a minority group's access to the process, but also its ability to influence the process through its representatives. As this theory situates equity in the realm of voting rights, the primary cause of action here is the Fourteenth Amendment's Equal Protection Clause and its principle of "one person, one vote."¹⁰⁴ The problems of measuring equity and deference to municipal agencies also hamstringing equal representation theories.

99. See e.g., *Sandoval v. Hagan*, 197 F.3d 484 (11th Cir. 1999) (finding that Alabama's policy of administering its driver's license exam in English only had a disparate impact on the basis of national origin), *rev'd on other grounds sub nom. Alexander v. Sandoval*, 532 U.S. 275 (2001); L.A. METRO TITLE VI COMPLIANCE REVIEW, *supra* note 73, at 14–15 (critiquing LACMTA for its lack of "translated hand-out materials at public hearings and meetings, and with the lack of readily available schedule information in languages such as Korean[]" and requiring LACMTA to update its plan for providing language access to LEP persons).

100. As of 1999, there were no recorded cases of Title VI violations with respect to public hearings. John C. Duncan, Jr., *Multicultural Participation in the Public Hearing Process: Some Theoretical, Pragmatical, and Analeptical Considerations*, 24 COLUM. J. ENVTL. L. 169, 246 (1999).

101. See Luke W. Cole, *The Theory and Reality of Community-Based Environmental Decisionmaking: The Failure of California's Tanner Act and Its Implications for Environmental Justice*, 25 ECOLOGY L.Q. 733, 742–49 (1998) (describing two failed uses of a local assessment committee (LAC) as a vehicle to grant the public access to the decision making process—one where the agency took over the LAC and used it to rubber stamp its decisions, and another agency that simply ignored the LAC's input); Kerry Kumabe, *The Public's Right of Participation: Attaining Environmental Justice in Hawai'i Through Deliberative Decisionmaking*, 17 ASIAN AM. L.J. 181, 195–98 (2010) (noting that actual decisions are often made years prior to the formal period for public comment).

102. See e.g., Duncan, *supra* note 100, at 186–207.

103. See Daniel J. Fiorino, *Environmental Risk and Democratic Process: A Critical Review*, 14 COLUM. J. ENVTL. L. 501, 525–29 (1989) (noting that "[e]ffective participation requires organization, resources, and professional representation").

104. See *Reynolds v. Sims*, 377 U.S. 533, 558 (1964) (quoting *Gray v. Sanders*, 372 U.S. 368, 381 (1963)) (internal quotation marks omitted). In theory, plaintiffs could challenge governance

The interests of minorities are often underrepresented on metropolitan planning organizations (“MPOs”), the public entities that set fares and plan the growth of the various systems in a region.¹⁰⁵ A 2006 survey of the fifty largest MPOs found 82 percent used either council of governments (“COG”) or freestanding MPOs structures, under which each affected city or county government in the region sends a representative who has an equal vote in the body’s decisions.¹⁰⁶ These models tend to give suburbs disproportionate representation relative to the central cities. A 2006 survey showed that urban jurisdictions received 29 percent of board votes while making up 55 percent of the population.¹⁰⁷ Another study found that 92 percent of surveyed central cities with more than 200,000 residents were underrepresented on MPO boards.¹⁰⁸

The San Francisco Bay Area’s MTC demonstrates how these disparities play out. Prior to 2013, MTC had nineteen commissioners—thirteen represented the region’s various cities and counties, five represented various government agencies, and one was appointed by the Mayor of San Francisco.¹⁰⁹ Under this arrangement, the two most underrepresented counties are Santa Clara, which has two votes and 1,809,000 residents, and Alameda, which has two votes and 1,530,000 residents. These counties, which include the major urban centers of San Jose and Oakland respectively, also have the highest percentage of minority residents of the nine counties under MTC’s

systems that disfavor protected populations on the basis that the system has a disparate impact. This cause of action, however, is untried.

105. As part of the Intermodal Surface Transportation Efficiency Act of 1991, Congress required each metropolitan area with over 50,000 residents to establish an MPO to carry out its transportation planning. 23 U.S.C. §§ 134–35 (2006). The subsequent transportation appropriations bills have built up the influence of MPOs in the planning process. THOMAS W. SANCHEZ, AN INHERENT BIAS? GEOGRAPHIC AND RACIAL-ETHNIC PATTERNS OF METROPOLITAN PLANNING ORGANIZATION BOARDS 3 (2006). While MPOs directly administer only a small portion of federal funding in most states, their power lies in their authority to designate the projects for which a much larger portion of the funding will be used. See Sheldon Edner & Bruce D. McDowell, *Surface-Transportation Funding in a New Century: Assessing One Slice of the Federal Marble Cake*, 32 PUBLIUS: J. FEDERALISM, Winter 2002, at 7, 15–16 (discussing the balance of power between MPOs and state departments of transportation in the transportation planning process).

106. SANCHEZ, *supra* note 105, at 8.

107. *Id.* at 9. The same study also found that minorities are underrepresented on MPO boards. Of all voting members from the surveyed MPO boards, 88% were white, while about 7% of all board members were black, 3% were Hispanic, and 1% were Asian. In contrast, the overall racial-ethnic composition of the populations these MPOs serve, on average, was 61% white, 15% black, 17% Hispanic, and 6% Asian. *Id.* at 11.

108. Seth B. Benjamin et al., *MPOs and Weighted Voting*, 20 INTERGOVERNMENTAL PERSPECTIVE, Spring 1994, at 31, 31–35.

109. CAL. GOV’T CODE § 66503 (West 2012). The counties of San Mateo, Contra Costa, Santa Clara, and Alameda each have two representatives. The counties of San Francisco, Solano, Marin, Sonoma, and Napa each have one. The represented agencies are the U.S. Department of Housing and Urban Development; the Association of Bay Area Governments; the San Francisco Conservation and Development Commission; the U.S. Department of Transportation; and the State Business, Transportation, and Housing Agency. San Francisco is a combined city and county. See *About MTC, MTC Commissioners*, METRO. TRANSP. COMM’N, www.mtc.ca.gov/about_mtc/commissioners/ (last visited Mar. 25, 2013).

jurisdiction.¹¹⁰ The two most overrepresented counties are Marin and Napa, which have two of the three lowest-minority populations in the region. Marin has one vote and 255,000 residents; Napa has one vote and 138,000 residents.¹¹¹ A resident of Napa has roughly 6.5 times the voting strength as does a resident of Santa Clara.

While there are no comprehensive surveys of transit authority governance, anecdotal evidence suggests many are similarly structured. For example, the Metropolitan Transportation Authority (“MTA”) has four voting members from New York City and four from the surrounding counties¹¹² despite the fact that New York City has over eight million residents and the represented counties have less than five million residents.¹¹³

Because the board members of these agencies represent individual municipalities, they are more likely to pursue local interests over regional interests.¹¹⁴ Studies confirm that public infrastructure investment tends to favor affluent suburbs,¹¹⁵ and that increased representation of suburban interests correlates with decreased transit investment relative to highways.¹¹⁶ Ensuring

110. Santa Clara is 35% white and Alameda is 34% white. *Alameda County, California*, U.S. CENSUS, <http://quickfacts.census.gov/qfd/states/06/06001.html> (last revised Mar. 11, 2013); *Santa Clara County, California*, U.S. CENSUS, <http://quickfacts.census.gov/qfd/states/06/06085.html> (last revised Mar. 11, 2013). San Francisco, the third major urban center in the region, is the median with two votes, 813,000 residents, and 42% of its population being white. *San Francisco County, California*, U.S. CENSUS, <http://quickfacts.census.gov/qfd/states/06/06075.html> (last revised Mar. 11, 2013). The second representative represents the mayor of San Francisco. All data is based on the 2012 and 2011 estimates from the 2010 Census.

111. Marin County is 73% white and Napa County is 56% white. *Marin County, California*, U.S. CENSUS, <http://quickfacts.census.gov/qfd/states/06/06041.html> (last revised Mar. 11, 2013); *Napa County, California*, U.S. CENSUS, <http://quickfacts.census.gov/qfd/states/06/06055.html> (last revised Mar. 11, 2013). Sonoma County is a notable outlier. It has the second-highest concentration of white residents at 66%, but has the sixth-highest ratio of residents to votes at 488,000 residents and one vote. *Sonoma County, California*, U.S. CENSUS, <http://quickfacts.census.gov/qfd/states/06/06097.html> (last revised Mar. 11, 2013). The remaining counties are: Contra Costa (population of 1,066,000; 47% white; two votes), Solano (population of 416,000; 41% white), and San Mateo (population of 727,000; 42% white; two votes). *Contra Costa County, California*, U.S. CENSUS, <http://quickfacts.census.gov/qfd/states/06/06013.html> (last revised Mar. 11, 2013); *Solano County, California*, U.S. CENSUS, <http://quickfacts.census.gov/qfd/states/06/06095.html> (last revised Mar. 11, 2013); *San Mateo County, California*, U.S. CENSUS, <http://quickfacts.census.gov/qfd/states/06/06081.html> (last revised Mar. 11, 2013). All data is based on the 2011 estimates from the 2010 Census.

112. *MTA Board Members*, METROPOLITAN TRANSPORTATION AUTHORITY, www.mta.info/mta/leadership/board.htm (last visited Mar. 25, 2013). Nassau, Suffolk, and Westchester Counties each have one vote. Orange, Rockland, Putnam, and Dutchess Counties share one vote. MTA also has six non-voting members held by various labor organizations, and the Permanent Citizens Advisory Committee.

113. *New York City, New York*, U.S. CENSUS, <http://quickfacts.census.gov/qfd/states/36/3651000.html> (last revised Jan. 10, 2013).

114. See Cashin, *supra* note 9, at 2015–22. This underrepresentation accentuates the inherent advantages suburbs have in the competition for regional resources. See *id.* at 2015–26.

115. *Id.* at 2004–09.

116. Arthur C. Nelson et al., *Metropolitan Planning Organization Voting Structure and Transit Investment Bias: Preliminary Analysis with Social Equity Implications*, TRANSP. RES. REC.: J.

that cities have proportional representation on MPO governing bodies will allow them to more effectively advocate for their fair share of transit resources.

There are several potential solutions to the problem. One is to grant more populous jurisdictions additional votes or other procedural rights to bring their representation more in line with their population. The Southeastern Pennsylvania Transportation Authority (“SEPTA”), for example, uses a COG model where each county sends a representative and state officials appoint several members.¹¹⁷ The two members from Philadelphia, however, who represent two-thirds of SEPTA’s ridership, can veto any decision by the full board.¹¹⁸ Another practice used by MTC is to grant additional votes to underrepresented jurisdictions. MTC grants a vote to the Mayor of San Francisco and in 2013 granted votes to the mayors of Oakland and San Jose.¹¹⁹ Direct election of MPO representatives, rather than appointment by other municipal officers would further increase the accountability of representatives to their constituencies.¹²⁰ While advocates have pursued both solutions under the Equal Protection Clause, their efforts have met with little success.

Many transit agencies fall outside the scope of the “one person one vote principle” because the principle applies only to legislative, general purpose governments. The Supreme Court held in *Sailors v. Board of Education* that non-legislative offices need not be popularly elected and may instead be “chosen by the governor, by the legislature, or by some other appointive means.”¹²¹ Lower courts applying this principle to transit agencies have consistently found transit agencies to be non-legislative. In *City of Atlanta v. Metropolitan Atlanta Rapid Transit Authority (MARTA)*, for example, the Fifth Circuit rejected a claim that the state legislature’s decision to add four members to the MARTA board constituted vote dilution, because MARTA’s function was administrative, not legislative.¹²² The Supreme Court has also exempted

TRANSP. RES. BOARD, No. 1895, 2004, at 1–7. Highway investment typically benefits suburban residents more than urban residents.

117. *Board Meetings and Members*, SE. PA. TRANSP. AUTH., www.septa.org/about/board/ (last visited Mar. 25, 2013).

118. This veto can be overridden by a vote of 75 percent of the full board (i.e., twelve of the fifteen members). 74 PA. CONS. STAT. § 1715(a) (2012).

119. *See About MTC, MTC Commissioners*, METRO. TRANSP. COMM’N, www.mtc.ca.gov/about_mtc/commissioners/ (last visited Mar. 20, 2013); *Press Releases: Regional Transportation Agency to Add Two Board Members*, METRO. TRANSP. COMM’N, www.mtc.ca.gov/news/press_releases/rel570.htm (last visited Mar. 25, 2013). Even with these additional votes, Santa Clara and Alameda will be the most underrepresented and third-most underrepresented jurisdictions in MTC respectively.

120. Of the country’s largest MPOs, only Portland allowed for direct election of board members. SANCHEZ, *supra* note 105, at 4.

121. 387 U.S. 105, 108 (1967) (upholding an appointed school board).

122. 636 F.2d 1084, 1089 (5th Cir. Unit B Feb. 1981); *see also* Ehm v. Bd. of Trs. of Metro. Rapid Transit Auth. of San Antonio, 251 F. App’x. 930, 931 (5th Cir. 2007) (rejecting a similar claim in an unpublished decision); *Education/Instruccion, Inc. v. Moore*, 503 F.2d 1187, 1189 (2d Cir. 1974) (rejecting an Equal Protection challenge to a council of governments on the grounds that its function

government bodies that have a “special purpose.”¹²³ In contrast to general service bodies that perform “general public services,” “special purpose” bodies are those whose decisions have more impact on a definable group of constituents, such as landowners, than on the general population.¹²⁴ While the Court has included provision of transportation in a list of “general public services . . . ordinarily financed by a municipal body,”¹²⁵ lower courts have found transit agencies to be special purpose bodies. In rejecting a challenge to the governance structure of the Southern California Rapid Transit District (“SCR TD”), which based its voting rights on property values, the California Supreme Court held that SCR TD was a “limited-purpose benefit district[], the organizing principle of which is the recoupment of some of the added economic value conferred on commercial property resulting from its proximity to the transit stations.”¹²⁶

The Court has expressed concern about how to measure the equitable impacts of a particular distribution of votes. In *Vieth v. Jubelirer*, which challenged a redistricting plan, the Court rejected attempts to use factors such as contiguity of districts, compactness of districts, observance of the lines of political subdivision, protection of incumbents of all parties, and cohesion of natural racial and ethnic neighborhoods to define equity in representation, ultimately holding that there is no judicially manageable standard.¹²⁷ The Court’s holding meant that equal representation challenges were effectively non-justiciable.

The Court’s decision in *Vieth* reflects a larger trend of federal courts’ increasing hesitancy to second-guess the decisions of state and local governments. Federal courts can and have rearranged borders of cities and special districts to preserve proportional representation, blocking attempts by cities to de-annex black neighborhoods, by white neighborhoods to secede from a county school district to avoid a desegregation order, and by school districts

was simply to advise); *Fulton Cnty. v. Metro. Atlanta Rapid Transit Auth.*, 276 S.E.2d 583 (Ga. 1981) (rejecting similar claims by litigants who had not participated in the federal suit).

123. *Avery v. Midland Cnty.*, 390 U.S. 474, 483-85 (1968).

124. *See id.* at 483-84. Factors in determining whether a government body is special purpose or general purpose include the area over which the body has jurisdiction, the degree of the body’s autonomy, the ability to raise revenue, the degree of oversight by other bodies, the geographic area, the administrative characteristics, and the private characteristics. *See* Joseph Seliga, *Democratic Solutions to Urban Problems*, 25 *HAMLIN L. REV.* 1, 13 (2001).

125. *See Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 728-29 (1973) (noting that the district in question “provides no other general public services such as schools, housing, transportation, utilities, roads, or anything else of the type ordinarily financed by a municipal body”).

126. *Rapid Transit Advocates, Inc. v. S. Cal. Rapid Transit Dist.*, 822 P.2d 875, 884 (Cal. 1992).

127. Four justices held that there was no judicially manageable standard for equal representation cases. 541 U.S. 267, 306 (2004). A fifth found “[t]hat no such standard has emerged in this case should not be taken to prove that none will emerge in the future.” *Id.* at 311 (Kennedy, J., concurring in judgment).

to gerrymander along racial lines.¹²⁸ In theory, a court could order the member counties of an MPO whose governance structure disfavors minorities to provide for a more racially equitable distribution of votes. Of late, courts have become increasingly deferential to local control and reluctant to modify existing municipal governance structures under the Equal Protection Clause.¹²⁹ The prevailing attitude, that “the Constitution and this Court are not roadblocks in the path of innovation, experiment, and development among units of local government[,]” makes it unlikely that a court would order the restructuring of an MPO on equal protection grounds.¹³⁰ This trend further curtails the ability of advocates to pursue equal representation through the courts.

Even equal representation, the most powerful form of procedural justice, does not guarantee fair apportionment of transit resources. The LACMTA has a governance structure that gives the City of Los Angeles, which constitutes just under 40 percent of the county’s population, proportional representation with the surrounding suburbs.¹³¹ In spite of this, LACMTA put up fourteen years of stiff resistance to the *Bus Riders Union* suit and continues to make questionable decisions related to distribution of transit resources.¹³²

The shortcomings of the procedural equity suits demonstrate that the courts are no more suitable for these theories than they are for substantive equity theories. Here, too, courts struggle to define equity and are hesitant to second-guess the decisions of local agencies and governments that have more expertise and resources to evaluate the issue. Further, the jurisprudence does not provide advocates with an effective cause of action to pursue equal treatment, access to the decision-making process, or equal representation. As a result, most efforts to pursue procedural equity through the courts have also largely fallen short.

II.

ADMINISTRATIVE ENFORCEMENT AND THE REDEFINITION OF EQUAL PROTECTION

Administrative enforcement presents an opportunity to open up new avenues in the pursuit of equity. Section 602 of Title VI grants agencies the authority to “effectuate the provisions of [Title VI]” by enacting “rules,

128. See Michelle Wilde Anderson, *Mapped Out of Local Democracy*, 62 STAN. L. REV. 931, 960–63 (2010).

129. *Id.* at 964–79.

130. *Avery v. Midland Cnty.*, 390 U.S. 474, 485 (1968).

131. The voting members of the LACMTA board are Los Angeles County’s five supervisors, the mayor of Los Angeles, three of the mayor’s appointees, and four city council members from cities other than Los Angeles within the county. There are eighty-eight cities in Los Angeles County. The Governor of California also appoints one non-voting member. CAL. PUB. UTIL. CODE § 130051 (West 2012). The City of Los Angeles had a population of 3,849,378 in 2006. In 2010, the County of Los Angeles had a population of 9,818,605. *Los Angeles County*, U.S. CENSUS, <http://quickfacts.census.gov/qfd/states/06/06037.html> (last revised Mar. 11, 2013).

132. See *supra* Part I.A.4.

regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance” and to bring enforcement actions to ensure compliance with those regulations.¹³³ This allows agencies to reshape Title VI in ways not possible through the judiciary, such as reinterpreting the definition of discrimination, instituting new procedural safeguards, and supplementing their own enforcement capacity. While administrative enforcement of Title VI was crucial to combating de jure segregation in public schools,¹³⁴ the U.S. Commission on Civil Rights has described subsequent administrative enforcement as “grossly inadequate.”¹³⁵

Agencies face the same challenges of expertise and capacity that hamper judicial enforcement, but to a lesser degree. In terms of capacity, most agencies have civil rights offices staffed with investigators and attorneys whose sole expertise is Title VI, who can do more than a judge with a special master. Unlike generalist judges, agencies also have substantial subject-matter expertise in the fields they regulate. These advantages allow agencies to take a more aggressive stance in reexamining the choices of their recipients and ensuring that their judgments are enforced. Despite these advantages, agency experts still cannot match their recipients’ more nuanced knowledge of the local contexts and policy balancing surrounding individual decisions. As a result, agencies must still balance the need for centralized control with deference to local decision making.

Agencies typically issue guidance to their recipients detailing how the agency interprets Title VI and how it defines compliance. The FTA’s *Circular on Title VI and Title VI Dependent Guidelines for Federal Transit Administration* is the most innovative example of what is possible under section 602 in terms of rewriting the substantive law, establishing new procedural requirements, and strengthening agency enforcement capacity. It is also a cautionary tale, however, of the pitfalls facing agencies in their Title VI rulemaking.¹³⁶

133. 42 U.S.C. § 2000d-1 (2006).

134. ROSENBERG, *supra* note 74, at 47–54.

135. U.S. COMM’N ON CIVIL RIGHTS, FEDERAL TITLE VI ENFORCEMENT TO ENSURE NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS 14–17 (1996) (summarizing a series of reports from 1970-1992 chronicling agencies’ “grossly inadequate performance” in enforcing Title VI); I U.S. COMM’N ON CIVIL RIGHTS, TEN-YEAR CHECK-UP: HAVE FEDERAL AGENCIES RESPONDED TO CIVIL RIGHTS RECOMMENDATIONS?: A BLUEPRINT FOR CIVIL RIGHTS ENFORCEMENT 4–5 (2002) (finding that of the eleven agencies surveyed, only the Department of Education and the Equal Employment Opportunity Commission were enforcing civil rights at a high level).

136. U.S. DEP’T OF TRANSP., FED. TRANSIT ADMIN., FTA C 4702.1B, CIRCULAR ON TITLE VI REQUIREMENTS AND GUIDELINES FOR FEDERAL TRANSIT ADMINISTRATION RECIPIENTS (2012) [hereinafter 2012 CIRCULAR FTA C 4702.1B].

A. Redefining Substantive Equity

In combination with the deference given to agency statutory interpretations,¹³⁷ section 602's grant of rulemaking authority gives agencies a broad mandate to rewrite the law of Title VI. In doing so, agencies can make the decisions with which courts have been reluctant to grapple, rewrite much of the precedent that has increasingly limited judicial enforcement of Title VI, and create new causes of action that define equity in ways not contemplated by the courts.

1. Formulating New Tests for Discrimination

Because it grants agencies the power to prohibit actions independent of any other statute, section 602 provides agencies with the necessary authority to counteract the judiciary's erosion of equal protection jurisprudence.¹³⁸ For example, while the Court held in *Guardians Assn. v. Civil Service Commission* that section 601 of Title VI did not include a disparate impact cause of action,¹³⁹ the Court also held that section 602 "delegated to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts."¹⁴⁰ Since then, virtually every agency that has promulgated Title VI regulations has used its discretion to interpret Title VI as prohibiting disparate impact discrimination.¹⁴¹ Further, agencies can use their section 602 authority to reshape the tests for disparate impact and disparate treatment by defining terms such as "substantial legitimate

137. See *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984) (holding that an agency's interpretation of a statute should be upheld where it is a permissible construction of the statute and not contrary to the unambiguously expressed intent of Congress).

138. Beginning with its holding in *Washington v. Davis*, 426 U.S. 229, 246 (1976), that there is no cause of action for disparate impact under the Equal Protection Clause, the Court has been steadily narrowing the scope of disparate impact jurisprudence. It is most marked in employment discrimination. See Linda Lye, Comment, *Title VII's Tangled Tale: The Erosion and Confusion of Disparate Impact and the Business Necessity Defense*, 19 BERKELEY J. EMP. & LAB. L. 315 (1998). Several justices have even questioned whether disparate impact causes of action are consistent with the Equal Protection Clause itself. See *Ricci v. DeStefano*, 557 U.S. 557, 594–96 (2009) (Scalia, J., concurring).

139. *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983). This case produced four different opinions with seven justices agreeing that intent was required to show discrimination under Title VI. *Id.* at 610–11 (opinion of Powell, J.); *id.* at 612 (opinion of O'Connor, J.); *id.* at 641–42 (opinion of Stevens, J.).

140. *Alexander v. Choate*, 469 U.S. 287, 293–94 (1985).

141. See, e.g., 49 C.F.R. § 21.5(b)(2) (2011) (Department of Transportation (DOT) regulations prohibiting the use of "criteria or methods of administration which have the effect of subjecting persons to discrimination because of their race, color, or national origin[)"). Having "the effect" of discriminating is understood to refer to disparate impact, in contrast to disparate treatment theories that require a showing of discriminatory intent. *N.Y. Urban League, Inc. v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995) (interpreting DOT's regulations to prohibit disparate impact).

justification” as well as setting “adequate measure” or standards for equal representation on MPO boards.

The FTA experimented with this authority in its Circular published in 2007. The 2007 Circular redefined the test for disparate impact discrimination, requiring recipients to evaluate whether the proposed change had a disproportionately high and adverse effect on minority riders, assess alternatives, and mitigate the adverse effects.¹⁴² While still examining the impact of the action and alternatives, this test moved away from examining the agency’s justification for its action. The 2007 Circular also expanded the classes protected under Title VI by requiring recipients to include the effects of their actions on low-income populations in their equity analyses.¹⁴³ The 2012 Circular, which supersedes the 2007 Circular, however, returned to the traditional disparate impact test.¹⁴⁴

2. *Service Standards*

Not only can agencies reverse the erosion of equal protection jurisprudence, they can also interpret nondiscrimination in new ways. The 2012 Circular requires providers of fixed-route public transportation to “adopt system-wide service policies to ensure service design and operations practices do not result in discrimination on the basis of race, color, or national origin.”¹⁴⁵ On the theory that a lack of minimum standards could result in discrimination against protected classes, these standards include minimum requirements for vehicle load and headway; on-time performance; distribution of amenities like benches, elevators, and timetables; service availability; and security.¹⁴⁶ For example, a policy might be to distribute service so that 90 percent of all residents in the service area are within one-fourth of a mile of bus or rail service. Similar to the concept of fundamental rights under the Equal Protection Clause, this interpretation of Title VI’s nondiscrimination mandate shifts the focus from equality to sufficiency, and provides substantive guarantees not simply to classes protected by Title VI (i.e., race, color, and national origin), but to all riders, including vulnerable populations like the poor and the elderly who are not formally protected by Title VI.¹⁴⁷

142. U.S. DEP’T OF TRANSP., FED. TRANSIT ADMIN., FTA C 4702.1A, CIRCULAR ON TITLE VI AND TITLE VI-DEPENDENT GUIDELINES FOR FEDERAL TRANSIT ADMINISTRATION RECIPIENTS at V(4)(a) (2007) [hereinafter 2007 CIRCULAR FTA C 4702.1A]. This test was derived from the environmental justice assessment of Executive Order 12,898.

143. *Id.*

144. 2012 CIRCULAR FTA C 4702.1B, *supra* note 136, at I(5)(f).

145. *Id.* at IV(4).

146. *Id.* Vehicle load measures the ratio of passengers per vehicle or passengers to seats at peak time. Vehicle headway is the time interval between two vehicles traveling in the same direction on the same route.

147. *See also infra* Part II.B.2 for a discussion of FTA’s requirement that recipients provide meaningful access to populations with limited English proficiency.

B. Procedural Innovations

Section 602 also provides agencies with the authority to institute rules that safeguard the ability of protected populations to have their concerns considered in the decision making process. The most notable innovations of the 2012 Circular are its requirements that recipients of federal transit funds conduct equity analyses on actions that might have disparate impacts, and maintain public participation plans. While these procedures provide a degree of relief to communities protected by Title VI, the discretion allowed to recipients in implementing them threatens to undermine their effectiveness.

1. Equity Analyses

The Circular's most significant innovation is the equity analysis, which ensures that recipients of federal funds formally consider the equitable impact of each action to which the requirement applies. The Circular requires that recipients serving large urbanized areas must:

[D]evelop written procedures . . . to evaluate, prior to implementation, any and all service changes that exceed the transit provider's major service change threshold, as well as all fare changes, to determine whether those changes will have a discriminatory impact based on race, color, or national origin.¹⁴⁸

While it does not account for the problems of measuring equity, the equity analysis accounts for a number of the other weaknesses of judicial enforcement. The utility of the equity analysis is limited, however, by the breadth of discretion given to recipients in administering it.

Formal consideration of equity in the planning process is itself a significant improvement. Requiring recipients to collect demographic data—such as riders' race, English proficiency, frequency of transit usage, and opinion on quality of service¹⁴⁹—and conduct an equity analysis, provides protected populations with a form of access in that recipients must inform themselves about the needs and circumstances of these groups. These requirements also promote transparency in the decision-making process and provide information to affected communities that can enable affected communities to organize more effectively in support of or opposition to the action, or the decision makers responsible for it.¹⁵⁰

148. 2012 CIRCULAR FTA C 4702.1B, *supra* note 136, at IV(7). The Circular applies the equity analysis requirement to recipients that operate fifty or more fixed route vehicles in peak service, are located in a geographic area with a population of 200,000 people or more, or as determined by the FTA. *Id.* In 2011, this encompassed the 213 largest metropolitan areas in the country, totaling about 77% of the U.S. population. *City and Town Totals: Vintage 2011*, U.S. CENSUS, www.census.gov/popest/data/cities/totals/2011/index.html (last revised June 27, 2012).

149. 2012 CIRCULAR FTA C 4702.1B, *supra* note 136, at IV(5).

150. Even if recipients do not make the analyses public, the public can obtain them through the Freedom of Information Act, 5 U.S.C. § 552 (2006), when they are submitted to the FTA or state equivalents.

The equity analysis requirement effectively reverses the burden of proof in the inquiry as to whether a particular service or fare change is discriminatory. Instead of forcing advocates to argue that a particular action is discriminatory, as in the judicial context, the equity analysis requires recipients to show proposed actions are *not* discriminatory. Thus, the hurdles that faced plaintiffs in judicial challenges are now shifted to recipients. Being able to raise objections to the sufficiency of a recipient's equity analysis gives communities substantial leverage in the planning process. In addition, requiring recipients to conduct equity analyses compels them to acknowledge metrics they consider sufficient to measure equity. In this sense, past analyses can be used as precedent in future actions to establish "appropriate measures" of equity.

Requiring that this consideration take place before approving a decision offers prospective relief to protected populations. A judicial challenge, by contrast, could not be filed until the recipient had reached a final decision,¹⁵¹ and a political challenge would have to wait until the next election, which could be years away. Having an earlier remedy also makes it easier for recipients to modify a project's design to mitigate disparate impacts. This is particularly important in projects involving large construction contracts and capital investments that may be difficult to alter even a short time after their approval. For example, one estimate made a few months into the implementation of a \$480 million rail extension project challenged on civil rights grounds placed the cost of stopping the project at \$125 million.¹⁵² Further, analyzing the equitable impacts of a project upfront insures recipients against the possibility of a challenge to the project after it is underway. Such a challenge can hamper the ability of recipients to plan and finance their projects.

While the equity analysis has much potential for improving the transit planning process, the tension between centralized control and localized discretion threatens to undermine its effectiveness. The tension is most evident in the 2007 Circular's guidance on how and when to conduct an equity analysis. The 2009 case, *Urban Habitat Program v. Bay Area Rapid Transit (BART)*, demonstrates how allowing recipients too much deference in designing

151. The doctrines of ripeness and exhaustion would likely bar a judicial Title VI claim until after the recipient has made a final decision to approve a contested action. *Reiter v. Cooper*, 507 U.S. 258, 269 (1993) ("Where relief is available from an administrative agency, the plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts; and until that recourse is exhausted, suit is premature and must be dismissed.") (citation omitted); *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967), *abrogated on other grounds* by *Califano v. Sanders*, 430 U.S. 99 (1977).

152. See, e.g., Phillip Matier & Andrew Ross, *BART's Oakland Airport Connector Too Costly to Stop*, S.F. CHRON. (May 11, 2011), www.sfgate.com/bayarea/matier-ross/article/BART-s-Oakland-Airport-Connector-too-costly-to-2372367.php (noting that it would cost the agency \$125–245 million to stop construction on the Oakland Airport Connector (OAC)). In the next election for the District 4 position on the BART Board of Directors, Robert Raburn notably defeated Carol Ward Allen, a major advocate of the OAC who represented the district in which the OAC was situated. *Id.* The OAC was initially approved in July 2010. *BART Continues to Move Forward with Oakland Airport Connector Project*, BART (July 22, 2010), <http://bart.gov/about/projects/oac/news.aspx#anchor1>.

their disparate impact analyses creates the potential for abuse.¹⁵³ The case, which challenged the Oakland Airport Connector (“OAC”), a 3.2-mile extension of the Bay Area Rapid Transit (“BART”) that will link BART directly with Oakland International Airport,¹⁵⁴ was decided under the 2007 Circular. The OAC’s opponents assailed the project on the grounds that the OAC would run through a low-income, heavily African American neighborhood in East Oakland without producing any meaningful benefits to the surrounding community,¹⁵⁵ and that the \$484.1 million price tag made the OAC far more expensive than equally effective alternatives, diverting funds from other transit projects in the area that would have been more beneficial to minority residents.¹⁵⁶ Advocates of the project defended the OAC for its capacity to reduce travel times to the airport, generate jobs, and reduce traffic congestion.¹⁵⁷

The discretion the 2007 Circular granted recipients to structure an equity analysis allowed recipients to pass off meaningless statistics in the place of a true analysis. The 2007 Circular made detailed recommendations about how to conduct an equity analysis, but ultimately allowed recipients to substitute a “locally developed evaluation procedure” for the recommended methodology.¹⁵⁸ As its “locally developed evaluation procedure,” BART chose to compare only the estimated travel times for minority riders and non-minority riders and found no disparate impact because the OAC moved minority riders at the same pace as non-minority riders.¹⁵⁹ Although this metric says next to nothing about the actual distribution of benefits and burdens, the FTA deemed this report an adequate equity analysis.¹⁶⁰ The 2012 Circular strikes a balance

153. See Complaint, *Urban Habitat Program v. Bay Area Rapid Transit Dist.* (Fed. Transit Admin. Sept. 1, 2009), available at http://publicadvocates.org/sites/default/files/library/fta_titlevi_complaint_09109final.pdf.

154. *Oakland Airport Connector*, BART, www.bart.gov/about/projects/oac/ (last visited Mar. 25, 2013).

155. *BART/Oakland Airport Connector*, PUB. ADVOCATES, www.publicadvocates.org/bartoakland-airport-connector-oac (last visited Mar. 25, 2013). Studies of the bus line that the OAC would replace showed that the vast majority of the riders did not live in the surrounding neighborhood. BART-OAKLAND AIRPORT CONNECTOR PATRONAGE REFINEMENT, April 24, 2007. While the neighborhood is heavily African American, nearly two-thirds of the projected ridership of the OAC would be white. OAC Equity Analysis, *supra* note 3, at 4. The OAC will run directly from the BART station to the airport without any interim stops.

156. See, e.g., TRANSFORM, OAKLAND AIRPORT CONNECTOR OPTIONS ANALYSIS (2010), available at www.transformca.org/files/reports/OAC-Options-Analysis-August-30-2010-FINAL.pdf.

157. *Oakland Airport Connector*, *supra* note 154.

158. 2007 CIRCULAR FTA C 4702.1A, *supra* note 142, at V(7).

159. OAC Equity Analysis, *supra* note 3, at 12–13.

160. Email from Amber Ontiveros, Equal Opportunity Specialist, Federal Transit Administration to Dorothy Dugger, General Manager, BART (Jul. 21, 2010). FTA reviewed these equity analyses directly as part of a corrective action plan stemming from a finding of BART’s noncompliance with Title VI. For additional discussion of this enforcement action, see *infra* Part III.C. FTA also approved a similar analysis of BART system-wide flat-percentage fare increases in 2008 and 2009. These analyses found that the increases did not have a disparate impact on protected classes because the percentage increase increased the average fare of minority riders by approximately the

more favorable to centralized control, in that it mandates the use of the judicial disparate impact test.¹⁶¹ It leaves room for localized innovation, however, by requiring recipients to “engage the public in the decision-making process to develop the disproportionate burden policy.”¹⁶²

The discretion granted regarding when a recipient must conduct an analysis can also allow recipients to effectively exempt themselves from the equity analysis requirement at will. The 2012 Circular requires equity analyses only for fare changes and “major service changes,”¹⁶³ and allows recipients to set their own major service change policies. In doing so, a recipient must only “engage the public in the decision making process”¹⁶⁴ and cannot set the threshold “so high so as to never require an analysis.”¹⁶⁵

The OAC case also demonstrates the danger of allowing recipients too much discretion in setting the service change threshold.¹⁶⁶ BART defined a “major service change” as an “increase[] or decrease[] of more than 25 percent in the length (in revenue miles) of an existing transit line.”¹⁶⁷ Data on BART service levels from the National Transit Database indicate that a service change of this magnitude has never occurred during the entire period for which data is available.¹⁶⁸ In contrast, some of the largest cuts in recent years were in Cleveland and Detroit, which made massive cuts to their public transit systems in recent years due to enormous budget deficits. Cleveland’s largest single-year

same percentage as non-minority riders. In other words, BART found that a flat-percentage fare increase did not have a disparate impact because it was a flat fare increase. BART made no effort to evaluate the likelihood that higher fares might make the cost of transit unaffordable to low-income or minority riders. SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT, TITLE VI ASSESSMENT OF BART FARE INCREASES EFFECTIVE JANUARY 1, 2008 AND JULY 1, 2009 (2010). The evaluated actions also included an increase of the minimum fare.

161. 2012 CIRCULAR FTA C 4702.1B, *supra* note 136, at IV(7)(a)(1)(f)(vi) (services), (7)(b)(3)(d) (fares).

162. *Id.* at IV(7)(a)(2)(d).

163. *Id.* at IV(7)(a)(1)(a)(vi) (services), (7)(b)(1) (fares).

164. *Id.* at IV(7)(a)(1)(d).

165. *Id.* at IV(7)(a)(1)(a).

166. The 2007 Circular recommends only that the equity analysis apply to “significant system-wide service and fare changes and proposed improvements.” 2007 CIRCULAR FTA C 4702.1A, *supra* note 142, at V(4). Similar to the equity analysis, it lays out detailed suggestions as to what should constitute a major service change, but gives recipients the discretion to set a “Locally Developed Evaluation Procedure.” *Id.* at V(4)(b).

167. SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT, MAJOR SERVICE CHANGE THRESHOLD PUBLIC PARTICIPATION SUMMARY REPORT 2 (2010), *available at* www.bart.gov/docs/community_meetings/Service_Threshold_Summary_English.pdf [hereinafter MTSC REPORT]. Other actions that would trigger the major service change threshold included a new line; an increase or decrease of more than 25 percent in the annual number of transit revenue miles operated or service hours scheduled on a line; annual net increases or decreases to line length, service levels, or service hours which exceed 20 percent in aggregate when combined over all the lines on the BART system; and net increases or decreases to line length, annual service levels, and annual service hours on a transit line which exceed 25 percent cumulatively within a three-year period. *Id.*

168. *Historical Data Files: Service Data and Operating Expenses Time-Series by System*, NATIONAL TRANSIT DATABASE, www.ntdprogram.gov/ntdprogram/data.htm (last visited Mar. 25, 2013). Data available is from 1996 to 2010. *Id.*

reduction was 11 percent in 2010, however, and Detroit's was 22 percent in 1993.¹⁶⁹ Neither of these reductions would have triggered an equity analysis under a 25 percent threshold. Despite the enormity and rarity of a 25 percent threshold, transit agencies in other major cities such as New York,¹⁷⁰ Houston,¹⁷¹ and Atlanta¹⁷² have also adopted this 25 percent standard.¹⁷³ Allowing recipients to set their thresholds anywhere near this level creates a loophole big enough to drive a train through.

2. Public Participation

In addition to specifying whether and when recipients consider equity in the planning process, agency rulemaking can expand the ability of the public generally and protected groups in particular to access the planning process. The 2012 Circular states that recipients must “seek out and consider the needs and input of the general public, including interested parties and those traditionally underserved by existing transportation systems, such as minority and LEP persons.”¹⁷⁴ The Circular further requires that recipients provide “early and continuous opportunities for public review and comment at key decision points.”¹⁷⁵ While it has the potential to substantially increase a protected population's ability to access the transit planning process, the discretion given to agencies once again limits the requirement's effectiveness.

Requiring recipients to “seek out” community viewpoints shifts the burden of assessing the needs and wants of protected populations from the populations themselves to the recipient. This is a form of access for protected populations. It is not sufficient that a recipient simply makes a forum available to protected populations or refrains from placing obstacles in protected

169. *Id.*

170. U.S. DEP'T OF TRANSP., FED. TRANSIT ADMIN., OFFICE OF CIVIL RIGHTS, TITLE VI COMPLIANCE REVIEW OF THE NEW YORK METROPOLITAN TRANSPORTATION AUTHORITY BUS COMPANY (MTA BUS) NEW YORK, NEW YORK 31 (2010), available at http://www.fta.dot.gov/documents/MTA_Bus_Title_VI_FinalReport.docx.

171. U.S. DEP'T OF TRANSP., FED. TRANSIT ADMIN., OFFICE OF CIVIL RIGHTS, TITLE VI COMPLIANCE REVIEW OF THE METROPOLITAN TRANSIT AUTHORITY OF HARRIS COUNTY (METRO) HOUSTON, TEXAS, 42 (2009), available at http://www.fta.dot.gov/documents/Houston_Compliance_Report_Final.PDF.

172. U.S. DEP'T OF TRANSP., FED. TRANSIT ADMIN., OFFICE OF CIVIL RIGHTS, TITLE VI COMPLIANCE REVIEW OF THE GEORGIA REGIONAL TRANSPORTATION AUTHORITY (GRTA) ATLANTA, GA 45 (2011), available at <http://www.fta.dot.gov/documents/GRTATitleVIFinalReport2011.docx>.

173. This practice is likely rooted in language from the 2007 Circular stating that a major service change threshold is often “defined as a numerical standard, such as a change that affects 25 percent of service hours of a route.” CIRCULAR FTA C 4702.1A, *supra* note 142, at V(4).

174. 2012 CIRCULAR FTA C 4702.1B, *supra* note 136, at III(8). This requirement reinforces a similar requirement from the Department of Transportation. 23 C.F.R. 450.316(a)(1)(vii) (2012). DOT regulations also require MPOs to “develop and use a documented participation plan that defines a process for providing citizens . . . with reasonable opportunities to be involved in the metropolitan transportation planning process.” 23 C.F.R. 450.316(a) (2012).

175. 2012 CIRCULAR FTA C 4702.1B, *supra* note 136, at III(8).

individuals' path. The recipient must affirmatively account for existing obstacles that prevent protected populations from participating in the planning process. The effectiveness of this mandate, though, depends on what an agency considers a sufficient effort to "seek out" viewpoints.

The 2012 Circular suggests several "effective practices" for public participation, including coordinating with individuals, institutions, and organizations in the target communities; providing various forms of outreach and meeting formats; and using times and places that are convenient and accessible to the target communities.¹⁷⁶ Ultimately though, the Circular affords recipients "wide latitude" in determining how to seek out the viewpoints of protected populations.¹⁷⁷ Wide latitude for implementation and a lack of minimum standards make the Circular's guarantees ephemeral to protected populations.

Some recipients have used this leeway to develop innovative procedures for engaging protected classes in the transit decision-making process. For example, the Delaware Valley Regional Planning Commission ("DVRPC") requires its planners to identify census tracts that have high concentrations of disadvantaged populations including impoverished communities, minorities, the elderly, the disabled, and carless households.¹⁷⁸ It then requires planners to engage in targeted outreach to identify the communities' needs and tailor the project to accommodate them.¹⁷⁹ Planners include these findings in the project reports the planners submit to DVRPC and incorporate them into the project design.

While the DVRPC displays a model effort, the lack of explicit minimum standards means that meager public participation plans could be deemed adequate. The public participation process BART uses in setting its major service change threshold demonstrates that a series of effective public participation actions do not necessarily equate to a successful public participation model. BART held a series of public participation sessions involving eighteen meetings across the Bay Area, at venues including senior centers and community centers in low income and minority neighborhoods.¹⁸⁰ BART offered simultaneous translation services at many of its meetings, which allowed LEP individuals to participate fully, and the agency scheduled sessions both during the day and in the evening to accommodate working schedules.¹⁸¹

176. *Id.* The FTA provides additional suggestions for implementing public participation plans, but these suggestions are not binding. See FED. HIGHWAY ADMIN., PUBLIC INVOLVEMENT TECHNIQUES FOR TRANSPORTATION DECISION-MAKING (1996), available at http://www.fhwa.dot.gov/planning/public_involvement/publications/techniques/fhwapd96031.pdf.

177. 2012 CIRCULAR FTA C 4702.1B, *supra* note 136, at III(8).

178. See *Planner's Methodology*, DEL. VALLEY REG'L PLAN. COMM'N, www.dvrpc.org/GetInvolved/TitleVI/pdf/Planners_Methodology.pdf (last visited Mar. 25, 2013).

179. See *id.*

180. MTSC Report, *supra* note 167, at 3–6.

181. The author attended several of these meetings.

Constituents could also submit their opinions via an online survey.¹⁸² BART's brief presentation on the topic, however, did not provide a thorough explanation of why the major service change threshold was important or the effect a 25 percent threshold would have on BART's duty to conduct equity analyses.¹⁸³ Notably, BART did not directly engage advocacy groups during the public participation process, including those that had filed the original Title VI complaint, until after BART had completed its report and was preparing to submit its finished product to the FTA.¹⁸⁴ The result was a threshold that effectively exempted BART from the underlying requirement.

The 2012 Circular takes a more effective approach to language access by requiring recipients to "take reasonable steps to ensure meaningful access to benefits, services, information, and other important portions of their programs and activities for individuals who are limited-English proficient."¹⁸⁵ The Circular sets out four general factors, providing context-specific examples of considerations to be included within each factor,¹⁸⁶ for the recipient to use in formulating a language assistance plan.¹⁸⁷ Giving recipients four factors on which to develop a plan—rather than a list of dos and don'ts—allows recipients to innovate and develop localized solutions to language access issues. Requiring recipients to justify their actions in light of the four factors, however, provides a measure of substantive accountability.

The U.S. Department of Transportation ("DOT") has the regulatory authority to address the problem of representation in MPOs, but has only modestly exercised this power. DOT Title VI regulations simply require that a recipient not "[d]eny a person the opportunity to participate as a member of a

182. MTSC Report, *supra* note 167, at 3–6. The 195 in-person surveys showed that 25% of respondents thought that a 25% threshold was too high, 38% thought it was fair, 6% thought it was too low, 5% thought the presentation was unclear, and 25% had no opinion. *Id.* at 9. The results of the 177 web surveys were markedly different, with 31% opining that the threshold was fair, 42% that it was too high, and 4% that it was too low. *Id.* at 11. Sixteen percent found the online presentation unclear and 7% had no opinion. *Id.* BART relied substantially on the in-person results in their decision to approve the threshold. *Id.*

183. The author attended several of these meetings.

184. MTSC Report, *supra* note 167, at 3–6.

185. 2012 CIRCULAR FTA C 4702.1B, *supra* note 136, at III(9); *see also* Exec. Order No. 13,166, 65 Fed. Reg. 50,121 (Aug. 11, 2000); Department of Transportation Policy Guidance Concerning Recipients' Responsibilities to Limited English Proficient (LEP) Persons, 70 Fed. Reg. 74,087 (Dec. 14, 2005).

186. 2012 CIRCULAR FTA C 4702.1B, *supra* note 136, at III(9)(a). The factors are: (1) the number or proportion of LEP persons eligible to be served or likely to be encountered by the program or recipient; (2) the frequency with which LEP persons come into contact with the program; (3) the nature and importance of the program, activity, or service provided by the program to people's lives; and (4) the resources available to the recipient for LEP outreach, as well as the costs associated with that outreach. The factors are derived from the Department of Transportation Policy Guidance Concerning Recipients' Responsibilities to Limited English Proficient (LEP) Persons, 70 Fed. Reg. 74,087 (Dec. 14, 2005), and are standard across the federal government. *See, e.g.,* Department of Justice Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons with Limited English Proficiency, Notice, 65 Fed. Reg. 50,119 (Aug. 16, 2000).

187. 2012 CIRCULAR FTA C 4702.1B, *supra* note 136, at III(9)(b).

planning, advisory, or similar body which is an integral part of the program” on the grounds of race, color, or national origin,¹⁸⁸ and grants MPOs the authority to “increase the representation . . . on their policy boards and other committees as a means for encouraging greater involvement in the metropolitan transportation planning process.”¹⁸⁹ The Circular includes reporting requirements designed to highlight the problem of underrepresentation of minorities on MPO boards.¹⁹⁰ Conceivably, either agency could use its authority to require measures such as proportional representation on MPO bodies, but neither DOT nor FTA has made any further attempt to regulate the recipient agencies’ governance structures or representation in their decision-making process.

The procedural innovations of the 2012 Circular ensure that there is some consideration of equity and the concerns of protected populations in the transit planning process. While the deference the Circular gives to recipients allows them room to develop nuanced solutions appropriate for their jurisdictions, the lack of minimum standards allows recipients to effectively exempt themselves from much of the Circular’s requirements. Until the FTA corrects this balance much of the Circular’s promise will go unfulfilled.

C. Enforcement

Without an effective enforcement mechanism, even the most comprehensive regulatory regime cannot ensure Title VI compliance. In enforcement actions, agencies investigate whether a recipient has engaged in a discriminatory action or otherwise violated agency regulations such that Title VI prohibits the agency from continuing to fund the recipient’s programs or activities. Agencies can use their section 602 authority to make the complaint process more accessible to advocates than judicial enforcement, as well as to expand their own enforcement capacity. The statutory constraints on remedies, however, substantially hamper administrative enforcement of Title VI.

1. Procedures

Statutorily, the only procedural requirements imposed on agency enforcement actions are that they make an “express finding on the record, after opportunity for hearing, of a failure to comply[,]” a finding “that compliance cannot be secured by voluntary means[,]” and a report to Congress before

188. 49 C.F.R. § 21.5(b)(1)(vii) (2011).

189. 23 C.F.R. § 450.310(d) (2012).

190. 2012 CIRCULAR FTA C 4702.1B, *supra* note 136, at III(10) (“[T]ransit-related, non-elected planning boards, advisory councils or committees, or similar committees, the membership of which is selected by the recipient, must provide a table depicting the racial breakdown of the membership of those committees, and a description of efforts made to encourage the participation of minorities on such committees.”).

terminating a local entity's funds.¹⁹¹ Beyond that, federal agencies are free to shape their enforcement procedures as they see fit. Every agency with Title VI enforcement authority has established an inquisitorial model of enforcement, in which complainants submit a complaint to the agency, and the agency investigates and adjudicates the complaint.¹⁹² Recipients can appeal final agency judgments to courts under the Administrative Procedure Act.¹⁹³ This procedural structure has both advantages and disadvantages for complainants in accessing agency enforcement.

Administrative enforcement can improve access to justice by shifting enforcement costs from plaintiffs to agencies. Proving a violation of Title VI can be a costly and time-consuming process, requiring legal counsel, experts, and information gathering.¹⁹⁴ Shifting the investigatory burden to agencies can allow complainants who would not ordinarily be able to shoulder these costs to access the enforcement process. In addition, allowing the agency to spearhead the investigation can bridge the gap in expertise between complainants, who often have little existing transit planning knowledge, and defendants, who are often professional planners.¹⁹⁵

On the other hand, allocation of control of investigations to agencies comes the loss of recourse where the agency's investigations are unsatisfactory. Even ensuring that the agency actually investigates a complaint can be challenging. FTA reserves, and often exercises, the right to close complaints

191. 42 U.S.C. § 2000d-1(1)–(2) (2006). In administrative law parlance, this is known as an informal adjudication.

192. See, e.g., 2012 CIRCULAR FTA C 4702.1B, *supra* note 136, at IX; 49 C.F.R. § 21.1 (2011) (Department of Transportation regulations); 28 C.F.R. § 42.101 (2010) (Department of Justice regulations); 40 C.F.R. § 7.120 (2010) (Environmental Protection Agency regulations); 34 C.F.R. § 100.7 (2011) (Department of Education regulations). This contrasts with the adversarial model of adjudication used in the courts where the plaintiff must investigate and prosecute the case and the adjudicator is passive.

193. 2012 CIRCULAR FTA C 4702.1B, *supra* note 136, at VII(4). A court will uphold the decision if it is supported by substantial evidence. *Universal Camera Corp. v. Nat'l Labor Relations Bd.*, 340 U.S. 474, 477 (1951) (noting the standard of review for agency findings of fact under the Administrative Procedure Act).

194. There were sixteen attorneys of record for the plaintiffs in the *Darensburg* district court decision. *Darensburg v. Metro. Transp. Comm'n*, 611 F. Supp. 2d 994 (N.D. Cal. 2009). At least three experts submitted testimony: a traffic engineer, a professor of statistics, and a professor of urban planning. Expert Report and Declaration of Thomas Rubin, *Darensburg v. Metro. Transp. Comm'n*, No. 05-1597, 2008 WL 7716759 (N.D. Cal. Apr. 1, 2008); Expert Report of Richard Berk, *Darensburg v. Metro. Transp. Comm'n*, No. 05-1597, 2008 WL 7716766 (N.D. Cal. Jan. 9, 2008); Expert Report of Professor Thomas W. Sanchez, *Darensburg v. Metro. Transp. Comm'n*, No. 05-1597, 2008 WL 7716768 (N.D. Cal. Jan. 11, 2008). The complaint for the preliminary injunction in *Bus Riders Union* involved eight lawyers and the support of a professor of urban planning. Complaint, *Labor/Cmty. Strategy Ctr. v. L.A. Cnty. Metro. Transp. Auth.*, CV 94-5936 (C.D. Cal. Aug. 31, 1994); Reporter's Transcript of Proceedings, *Labor/Cmty. Strategy Ctr. v. L.A. Cnty. Metro. Transp. Auth.*, CV 94-5936, 7 (C.D. Cal. Sept 12, 1994) (noting the testimony of Professor Brian Taylor).

195. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974) (noting the advantages of repeat players in an adversarial judicial system).

and conduct a compliance review instead of complaint investigations.¹⁹⁶ From that point on, the investigation is solely between FTA and the recipient, and any further involvement by the complainant is at the discretion of FTA. The FTA took over four years, for example, to reach a conclusion in a complaint filed by West Harlem Environmental Action against New York's MTA.¹⁹⁷ In fact, the FTA did not even begin investigating the complaint for three years while the case was batted back and forth between a mediator and the regional DOT office.¹⁹⁸ While several agencies have faced lawsuits over their failure to process Title VI complaints in a timely fashion, the substantial prosecutorial discretion given to agencies in enforcement actions makes the prospect of judicial review of agency enforcement decisions unlikely.¹⁹⁹

Several problems unique to agency enforcement contribute to these shortcomings. As the mission of agencies like FTA is to disburse funds, seeking to terminate those funds creates cognitive dissonance between the Office of Civil Rights and the rest of the agency. Similar to the problem of agency capture, many agencies depend on maintaining good relationships with their recipients in order to advance a common goal, such as providing transit services. This can make an agency reluctant to jeopardize that relationship or harm that common goal by withdrawing funding. Further, the stigma of labeling a partner a "discriminator" can make agencies hesitant to enforce Title VI as aggressively as they might otherwise choose. Another problem is that the sheer number of an agency's recipients can tax the capacity of the enforcing agencies.²⁰⁰ In 2008, the FTA had four equal opportunity specialists assigned to monitor Title VI compliance for 831 recipients.²⁰¹

196. See 2012 CIRCULAR FTA C 4702.1B, *supra* note 136, at IX(6) (laying out the specific instances when closing a claim is appropriate).

197. Linden, *supra* note 42, at 205–06.

198. *Id.* at 205 n.205. The Environmental Protection Agency and the Department of the Interior have also drawn substantial criticism for their handling of Title VI complaints. See NOT IN MY BACKYARD, *supra* note 80, at 55–63 (Environmental Protection Agency), 69–71 (Department of the Interior); see also Tony LoPresti, *Realizing the Promise of Environmental Civil Rights: The Renewed Effort to Enforce Title VI of the Civil Rights Act of 1964*, 65 ADMIN. L. REV. (forthcoming Dec. 2013) (discussing the EPA's handling of the settlement in the Angelita C. complaint).

199. Heckler v. Chaney, 470 U.S. 821, 828–35 (1985) (finding that the plaintiff could not challenge an agency's decision not to take an enforcement action under 5 U.S.C. § 701(a)(2) because the agency's discretion over enforcement decisions is broad and comparable to prosecutorial discretion). *But see* Rosemere Neighborhood Ass'n v. U.S. Evtl. Protection Agency, 581 F.3d 1169 (9th Cir. 2009) (allowing a case to proceed where the EPA violated its own regulations regarding timeliness of investigations); Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973) (en banc) (allowing a suit to proceed where the agency "consciously and expressly adopted a general policy which is in effect an abdication of its statutory duty").

200. The director of the EPA's Office of Civil Rights attributed some of the backlog in part to the lack of staff resources. NOT IN MY BACKYARD, *supra* note 80, at 55. The Department of Interior, which in 2003 had only five program staff, has made similar reports of being overburdened. *Id.* at 71.

201. U.S. DEP'T OF TRANSP., FED. TRANSIT ADMIN., EXECUTIVE ORDER 12250: "LEADERSHIP AND COORDINATION OF NONDISCRIMINATION LAWS," FY 2008 REPORT at Tab F, 1–2.

One method the 2012 Circular uses to increase its enforcement capacity is to enlist the monitoring and enforcement capacity of MPOs and state DOTs. The Circular requires that primary recipients “monitor their subrecipients for compliance with the regulations,” stating that “if a subrecipient is not in compliance with Title VI requirements, then the primary recipient is also not in compliance.”²⁰² Due to the tiered nature of transit planning, grants often flow from MPOs and state DOTs to local transit agencies, making these regional entities responsible for ensuring their constituent agencies’ compliance.

Implementing this tiered monitoring structure reduces the burden on the FTA by limiting the number of entities it must directly monitor. For example, MTC manages the allocation of transportation funding for twenty-six transportation agencies in the Bay Area, including thirteen transit operators.²⁰³ While requiring MPOs to supervise subrecipients does increase the burden on local transit agencies, it is nonetheless appropriate, since MPOs’ more detailed knowledge of the their individual subrecipients’ situations equips them to bear this burden.

2. Remedies

One of the most limiting factors of agency enforcement is the lack of an adequate remedy. Title VI specifies three options for agencies seeking to enforce its prohibition on discrimination: voluntary compliance, fund termination, and “any other means authorized by law.”²⁰⁴ Agencies typically interpret “other means” to involve referring a case to the Department of Justice (“DOJ”) for litigation.²⁰⁵ Since this option is rarely utilized and carries with it most of the same constraints as litigation by private parties, this Section will focus on the first two administrative options. Between these choices, Title VI prioritizes voluntary compliance over fund termination.²⁰⁶ The various statutory constraints on Title VI enforcement severely limit the effectiveness of both these remedies.

202. 2012 CIRCULAR FTA C 4702.1B, *supra* note 136, at III(12).

203. Much of MTC’s authority comes from its power to allocate funds under the Bay Area’s Regional Transit Expansion Program, Regional Transportation Improvement Plan, and other planning initiatives. *See* *Darensburg v. Metro*, Transp. Comm’n, 611 F. Supp. 2d 994, 1012–35 (describing MTC’s various duties and relationships with transit operators and transportation agencies; *see also About MTC, Bay Area Partnership Board*, METRO. TRANSP. COMM’N, www.mtc.ca.gov/about_mtc/partner_list.htm (last visited Mar. 25, 2013) (listing the various transportation agencies in the Bay Area).

204. 42 U.S.C. § 2000d-1 (2006). As virtually every federal agency, including the FTA, has the same remedies available to it, this Section will discuss administrative enforcement of Title VI more generally.

205. *See, e.g.*, 2102 CIRCULAR FTA C 4702.1B, *supra* note 136, at VII(1); 49 C.F.R. § 21.13(a) (2011) (DOT regulation). The Federal Coordination and Compliance Section within the Civil Rights Division of the DOJ is tasked with litigating Title VI enforcement cases. Prior to 2010, the Federal Coordination and Compliance Section was known as the Coordination and Review Section.

206. 42 U.S.C. § 2000d-1 (requiring that the agency “determine[] that compliance cannot be secured by voluntary means” before taking a formal enforcement action).

Attitudes toward the idea of fund termination have been mixed throughout Title VI's history.²⁰⁷ Since the end of school segregation, fund termination or withholding has been a vanishingly rare occurrence. In the nearly sixty-year history of Title VI, neither the Department of Housing and Urban Development nor the Environmental Protection Agency ("EPA") has ever withheld or revoked funding for a Title VI violation.²⁰⁸

The requirement that an agency head file "a full written report of the circumstances and the grounds" for the termination "with the committees of the House and Senate having legislative jurisdiction over the program or activity involved" prior to terminating a recipient's funding makes this option more theoretical than practical.²⁰⁹ Any agency head who submits such a report risks intense pressure from Congress not to withdraw funds, and could even be subject to congressional retaliation. In 1998, shortly after the EPA released documents indicating it might make a preliminary finding against a recipient, Congress prohibited the EPA from using any funding to investigate and resolve Title VI complaints until the agency had issued final guidance on Title VI compliance.²¹⁰ This effectively brought Title VI enforcement at the EPA to a standstill for three years while the agency drafted the required regulations.²¹¹ Congress has shown its willingness to rein in agencies making decisions with which it disagrees, even withdrawing an agency's funds entirely after a controversial rulemaking.²¹² While there are other potential avenues for

207. *Compare* 110 CONG. REC. 6544 (daily ed. Mar. 30, 1964) (Senator Humphrey stating "[t]ermination of assistance . . . is not the objective of the title This fact deserves the greatest possible emphasis: Cutoff of Federal funds is seen as a last resort, when all voluntary means have failed"), *with* Memorandum from President Jimmy Carter on Enforcement of Title VI of the Civil Rights Act to Heads of Executive Departments and Agencies (July 20, 1977), *available at* www.presidency.ucsb.edu/ws/index.php?pid=7836#axzz1qTm3jTnv (stating that "administrative proceedings leading to fund terminations are the preferred method of enforcing Title VI, and this sanction must be utilized in appropriate cases").

208. NOT IN MY BACKYARD, *supra* note 80, at 74 (Department of Housing and Urban Development); *see also* LoPresti, *supra* note 198 (EPA).

209. 42 U.S.C. § 2000d-1.

210. The requirement was passed as a rider to Department of Veterans Affairs and Housing and Urban Development Appropriations Act. Pub. L. No. 105-276, tit. III, § 214(a), 112 Stat. 2461, 2496 (1998). The requirement followed the *Shintech* complaint (Complaint File No. 4R-97-R6), filed against a power plant in Louisiana and was sponsored by Congressman Joe Knollenberg (R-Michigan), whose district included the Select Steel facility, which was subject to an ongoing Title VI investigation. U.S. ENVTL. PROT. AGENCY, OFFICE OF CIVIL RIGHTS, COMPLAINT FILE NO. 5R-98-R5, TITLE VI ADMINISTRATIVE COMPLAINT RE: LOUISIANA DEPARTMENT OF ENVIRONMENTAL QUALITY/ PERMIT FOR PROPOSED SHINTECH FACILITY (1998).

211. NOT IN MY BACKYARD, *supra* note 80, at 55-56 (citing testimony by Gail Ginsberg, chairperson, EPA Title VI Task Force). The prospect of congressional retaliation is heightened in the current partisan climate of Congress. After the National Labor Relations Board ruled against Boeing in a labor dispute, Congress attempted to reduce the scope of the Board's powers and block its ability to continue its investigation. *See* Steven Greenhouse, *In Boeing Case, House Passes Bill Restricting Labor Board*, N.Y. TIMES (Sept. 15, 2011), *available at* www.nytimes.com/2011/09/16/business/ho-use-approves-bill-restricting-nlr.html.

212. In 1980, Congress briefly shut down the Federal Trade Commission in a controversy over regulation of advertising to children. *See* J. Howard Beales, III, *Advertising to Kids and the FTC: A*

agencies to impose financial sanctions on noncompliant recipients, they remain largely unexplored.²¹³

The Oakland Airport Connector case also demonstrates the limits of fund termination as a remedy even when fund termination takes place. Advocates filed a Title VI complaint with the FTA alleging that BART had not conducted an equity analysis on the OAC as required by the 2007 Circular,²¹⁴ and the FTA found BART had in fact failed to complete the equity analysis.²¹⁵ As a result of BART's noncompliance, the FTA withdrew \$70 million in federal funding from the project.²¹⁶ BART simply restructured its funding package, however, and proceeded with the project by drawing more state and local funding from other agencies and increasing borrowing.²¹⁷ These actions drew funding away from other transit agencies in the area and increased the project's cost.²¹⁸ As one BART director noted, these costs "will be borne by our passengers."²¹⁹

Regulatory Retrospective that Advises the Present, 12 GEO. MASON L. REV. 873, 879–80 (2004); A. O. Sulzberger, Jr., *After Brief Shutdown, F.T.C. Gets More Funds*, N.Y. TIMES, May 2, 1980, at D1.

213. Agencies maintain the authority to enact financial sanctions under regulations independent of Title VI and its congressional reporting requirements if a recipient "materially fails to comply with any term of an award." *See, e.g.*, 49 C.F.R. § 18.43 (2011) (describing enforcement for the DOT). The language used in DOT's regulations is for the most part standard across the federal agencies. An agency like the DOT could interpret a failure to comply with Title VI as a material failure to comply, and available sanctions include including freezing payments, as well as wholly or partly suspending or terminating the grant. *See, e.g., id.*

214. Complaint, *Urban Habitat Program v. Bay Area Rapid Transit Dist.* (Fed. Transit Admin. Sept. 1, 2009), available at http://publicadvocates.org/sites/default/files/library/fta_titlevi_complaint_09109final.pdf.

215. Letter from Peter Rogoff, Administrator of the Federal Transit Administration, to Steve Heminger, Executive Director of the Metropolitan Transportation Commission, and Dorothy Dugger, General Manager of the San Francisco Bay Area Rapid Transit District (Feb. 12, 2010), available at http://publicadvocates.org/sites/default/files/library/feb_12_bart_mtc_letter.pdf.

216. *Id.* The circumstances surrounding this instance of fund termination were atypical because the funding in question was part of a federal stimulus package that had to be spent by a certain date or it would lapse back to the Treasury. After being found out of compliance, BART did not have sufficient time to return to compliance prior to the funding deadline. *Id.* As a result, MTC reallocated the funds to other subrecipients rather than lose them entirely. METRO. TRANSP. COMM'N, AMERICAN RECOVERY AND REINVESTMENT ACT FEDERAL TRANSIT ADMINISTRATION FORMULA PROGRAM TIER 2, FEBRUARY 25, 2009, available at http://publicadvocates.org/sites/default/files/library/m_tcs_arra_contingency_list.pdf (showing contingency list of agencies receiving the reallocated OAC funds). This enabled FTA to terminate BART's funding without filing a report with Congress.

217. *BART Board Approves New Oakland Airport Connector Funding Plan*, BART (July 22, 2010), www.bart.gov/news/articles/2010/news20100722.aspx.

218. BART Board Meeting, Approval of the Full Funding Plan Award of the Oakland Airport Connector at 5–6 (July 22, 2010), BART, <http://www.bart.gov/docs/oac/OAC%20Presentation%207.22.10%20Board%20Mtg.pdf> (noting that \$20 million in new STIP funds would be used to make up for the shortfall caused by the withdrawal of FTA funds); Memorandum from Bimla Reinhardt, Executive Director California Transportation Commission to Chairs and Commissioners "Technical Adjustment to the 2010 State Transportation Improvement Program (STIP)" (June 1, 2010) (rerouting \$10 million from highway reconstruction to the OAC); State of California, Department of Transportation, Project Programming Request (June 24, 2010) (reprogramming \$20 million in highway funding to the OAC).

219. Catherine Traywick, *Despite Promises, the \$484 Million Oakland Airport Connector Yields Few Local Jobs*, OAKLAND NORTH (Nov. 30, 2011), <http://oaklandnorth.net/2011/11/30/oak>

Further, unless a proposed action would itself have resulted in a net harm, fund termination does not necessarily improve equity. Projects that would have been funded simply do not get built; rather than providing a disproportionately small benefit to protected populations, they provide none at all.

Even if fund termination is something of a nuclear option, the very threat of termination gives agencies leverage in pursuing voluntary compliance. Ideally, an agency would work collaboratively with its recipients to produce a locally tailored solution that addresses the particular recipient's needs and fulfills Title VI's nondiscrimination mandate. Each recipient's cooperation would be assured by the looming threat of fund termination should the negotiations break down. But the substantial barriers to fund termination reduce its value as leverage over recipients and compromise the FTA's bargaining position. Without fund termination as leverage, federal agencies have little more than the moral force of their mandate to compel recalcitrant recipients.

The FTA's efforts to reshape the jurisprudence on Title VI, encourage consideration of equity in and increase access to the planning process, and enhance the capacity of its own enforcement processes demonstrate the potential that agency rulemaking has to improve Title VI enforcement. Among other benefits, the FTA Circular mitigates the lack of capacity and expertise that hampered courts, levels the playing field between advocates and transit agencies, and provides proactive redress when challenging potentially discriminatory projects. However, the Circular does not address the problem of measuring equity, and the difficulty of balancing local discretion against centralized control and the statutory limitations of agency enforcement threaten to undermine the Circular's effectiveness.

III.

REFORMING ADMINISTRATIVE ENFORCEMENT: NEW ROUTES TO EQUITY

While the FTA Circular is a deeply flawed document, it is a valuable starting point for using administrative enforcement to address equity concerns in the transit planning process. The remaining challenges are to provide an appropriate means for measuring equity and to improve its accountability measures without unduly restraining the ability of recipients to innovate in their implementation of Title VI. Modifications to the equity analysis requirement can address both of these issues.

For the purposes of Title VI, the three primary actors in the transit planning process are recipients, communities, and the FTA. Empowering communities to play a larger role in defining equity can introduce another player into the regulatory process with the localized knowledge to match recipients. Allowing communities to play a larger role in enforcement can also

land-officials-and-residents-debate-promises-of-job-creation-from-barts-airport-connector-project/
(quoting BART Board of Directors member Robert Raburn).

supplement agency enforcement resources. This would allow the FTA to take a more limited role in monitoring the effectiveness of the process. These reforms can provide the necessary accountability to recipients without unduly constraining recipients' discretion.

A. Empowering Communities to Assess Substantive Equity

Community-based accountability empowers those affected by a proposed project or action to check the excesses of recipients by granting communities increased procedural rights. In the transit planning process, recipients must often balance concerns over equity against other goals such as cost efficiency or service maximization. Enhancing the avenues for public participation available to protected classes will improve the ability of advocates most concerned with equity to make their interests known and the likelihood that recipients consider those interests thoroughly.

This form of accountability is well suited for defining terms that can depend heavily on localized knowledge or preferences, such as what is substantively fair in a given situation. Relying on public participation would allow protected populations to identify for the recipient their concerns about proposed actions, such as questioning why the agency's analysis only examined travel time and not headway.²²⁰ In this sense, protected populations are the experts on their own lives and are in the best position to judge how a particular set of effects would impact them, and how they value the various benefits and burdens accruing from a particular action. As perception of various effects can be subjective and the search for an objective equity metrics elusive, the preferences of affected populations and the weight that they put on the various effects of an action can serve as more accurate measures of equity than any outsider, such as the FTA or a judge, can compile.²²¹

Reliance on public participation as a form of accountability has several drawbacks. Replacing substantive guarantees with procedural rights shifts responsibility onto the protected population to develop an understanding of the situation and advocate for their preferences. Taking advantage of these opportunities may require protected populations to organize and to consult with independent experts and even legal counsel to participate intelligently in the process. The time and expense of participation could be prohibitive, particularly for low-income individuals, and give groups with preexisting

220. Despite the recipients' expertise, there are limits on the ability of experts to predict a particular action's effects on individuals, particularly on racial minorities. Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN. ENVTL. L.J. 3, 32–36 (1998) (noting various critiques of experts in evaluating the effects of environmental hazards on minority populations); see also Ann Bray, Comment, *Scientific Decision Making: A Barrier to Citizen Participation in Environmental Agency Decision Making*, 17 WM. MITCHELL L. REV. 1111, 1116 (1991) (“[C]ultural and political rationality are not readily assimilated into a scientific decision-making process which relies upon empirical and theoretical data as the basis for agency action.”).

221. See Blais, *supra* note 80, at 80–83; Been, *supra* note 61, at 1035–36.

resource advantages a leg up in the process.²²² Further, recipients may take advantage of the imbalance in expertise and its control of the process through strategies such as using public participation sessions as platforms from which to advocate the recipient's preferred position. Procedural rights also only guarantee that recipients are aware of protected populations' perspectives with the recipient retaining the power to do the ultimate balancing. For recipients, this process could be more time consuming and costly than dealing with a predetermined universally applied metric for equity.

The 2012 Circular takes steps towards instituting community-based accountability measures in the equity analysis process by requiring that recipients take public participation into account when setting their major service change thresholds²²³ and constructing their disparate impact policies.²²⁴ But the FTA offers little binding guidance to ensure that the public will have meaningful opportunities to give input, and that the input will be thoroughly considered. Without adequate procedural safeguards and minimum standards, giving increased leeway to recipients would allow them to take advantage of unaware communities and reduce the ability of agencies to hold recipients accountable. The FTA can strengthen the ability of communities to hold recipients accountable in the equity analysis process by incorporating additional procedural mechanisms that increase communities' right to participate. The National Environmental Policy Act ("NEPA"), which requires that agencies produce an environmental impact statement ("EIS") for actions that could harm the environment, uses several features that could be applicable to the FTA equity analysis.²²⁵

In drafting an EIS conduct, NEPA requires that agencies conduct "an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action[]" and invite any "interested persons" to participate, providing a model for this type of information gathering.²²⁶ The FTA can require agencies to adopt similar scoping procedures in their public participation plans and create a formal and predictable process through which the public can inform the agency about its values for proposed agency actions, for example how it values air quality

222. The EPA addressed this problem in the context of Superfund sites by providing Technical Assistance Grants and other assistance to communities seeking to participate in decision-making processes related to cleanup of hazardous waste sites. *See* 40 C.F.R. §§ 30, 35 (2012).

223. 2012 CIRCULAR FTA C 4702.1B, *supra* note 136, at IV(7)(a)(1)(d).

224. *Id.* at IV(7)(a)(2)(d).

225. A NEPA EIS must discuss (i) the proposed action's environmental impact; (ii) any adverse environmental effects that cannot be avoided should the proposal be implemented; (iii) alternatives to the proposed action; (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and (v) any irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented. 42 U.S.C. § 4332(c) (2006).

226. 40 C.F.R. § 1501.7 (2011).

versus transit subsidies.²²⁷ After the agency completes this process, the recipient can determine whether the action as currently constituted is equitable or whether adjustments are necessary.

NEPA's notice and comment process provides communities with additional opportunities to respond to the EIS before it is finalized. Agencies must give notice of their intent to take a proposed action and circulate a draft EIS describing its effects. Interested parties then have the opportunity to submit comments on an agency's draft EIS and the agency must respond to the concerns raised.²²⁸ Incorporating a notice and comment process into the equity analysis would grant communities a formal opportunity to bring their concerns to recipients compiling analyses and to challenge recipients' conclusions. Recipients, though, would maintain substantial control over the equity analysis process, as recipients would be the ones ultimately designing and conducting the analysis.²²⁹

Statutes differ on the level of action an agency must take in response to comments. Rather than preventing environmental harm entirely, NEPA requires only that the agency "consider every significant aspect of the environmental impact of a proposed action[]"²³⁰ and "inform the public that it has indeed considered environmental concerns in its decisionmaking process."²³¹ Thus under NEPA a community may point out that the action has an unmitigated impact, but the agency may choose to ignore the impact with impunity. On the other hand, the California Environmental Quality Act ("CEQA") only allows

227. PUB. ADVOCATES ET AL., CIVIL RIGHTS AND ENVIRONMENTAL JUSTICE IN PUBLIC TRANSPORTATION: PROPOSED FTA ACTIONS TO BUILD ON ITS STRONG RECORD OF ENFORCEMENT 3–7, available at www.publicadvocates.org/sites/default/files/library/white_paper_on_fta_title_vi_circular_with_cover_letter_12-20-10.pdf.

228. Circuits are split on a lead agency's obligation to provide notice to interested parties under NEPA. See DANIEL R. MANDELKER, NEPA LAW AND LITIGATION § 7:14.1 (2d ed. 2012) (outlining the controversy). The Ninth Circuit in *Citizens for Better Forestry v. U.S. Department of Agriculture* held that the Department of Agriculture had an obligation to provide notice and opportunity to comment on a finding of no significant impact. 341 F.3d 961, 970–71 (9th Cir. 2003). Other statutes, such as the California Environmental Quality Act, are more explicit in establishing the public's right to notice and comment. See, e.g., CAL. PUB. RES. CODE § 21092 (West 2012) (noting the agency's obligation to give notice); CAL. PUB. RES. CODE § 21091(d) (West 2012) (delineating an agency's duty to respond to comments).

229. Other public participation models could also be applicable. For more in-depth discussion of public participation models, see Gauna, *supra* note 220, at 31–57 (discussing the application of various models of public participation to the environmental siting context); Kumabe, *supra* note 101, at 194–210.

230. *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (quoting *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 553 (1978)) (internal quotation marks omitted).

231. *Id.* (citing *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139, 143 (1981)); see also *Vt. Yankee Nuclear Power Corp.*, 435 U.S. at 558 (noting that "NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural. It is to insure a fully informed and well-considered decision, not necessarily a decision the judges of the Court of Appeals or of this Court would have reached had they been members of the decisionmaking unit of the agency") (citation omitted).

actions that have unmitigated adverse environmental impacts to proceed where the agency adopts a statement of overriding considerations finding that the “benefits, of a proposal project outweigh the unavoidable adverse environmental effects.”²³² A standard more similar to CEQA is appropriate in the Title VI context as the purpose of Title VI is to prohibit discrimination, not simply to ensure that recipients consider the impacts of their actions on protected populations.

The environmental justice analyses required under Executive Order 12,898 apply this model to evaluations of substantive equity issues. The EPA, for example, conducts an environmental justice analysis, which is similar to a Title VI disparate impact analysis, as one of the elements of its NEPA EIS.²³³ There are also several examples of agencies performing these analyses to assess the equitable impacts of transportation projects as part of their EIS.²³⁴ Such an analysis should be easily adaptable to transit projects.

B. Agency Policing of Procedural Guarantees

Agency-based accountability measures involve the FTA directing recipients on how they should conduct their affairs. The FTA can complement its community-based accountability measures by focusing its own enforcement on ensuring that recipients use the procedural safeguards at the right times and in a proper manner. Doing so will allow the FTA to take a more relaxed approach in evaluating the substantive decision reached.

Agency-based accountability measures are more concrete than community-based measures, which may vary from community to community and may not be knowable until later in the planning process. This gives recipients the benefit of predictability, allowing them to plan further in advance. Relying on agencies to set and enforce accountability measures is also less burdensome for both recipients and communities, allowing planning processes to proceed more efficiently.

Setting generally applicable rules and standards can be a challenge even for agencies with expertise and resources. The complexity of the transit

232. CAL. CODE REGS. tit. 14, § 15093 (2011).

233. The environmental justice analysis is performed pursuant to Executive Order 12,898 and seeks to identify actions that have a “disproportionately high and adverse impact on minority and low income populations.” Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994); EPA WORK GROUP, FINAL GUIDANCE FOR INCORPORATING ENVIRONMENTAL JUSTICE CONCERNS IN EPA’S NEPA COMPLIANCE ANALYSES 3.2 (1998), available at www.epa.gov/environmentaljustice/resources/policy/ej_guidance_nepa_epa0498.pdf.

234. See *Communities Against Runway Expansion v. Fed. Aviation Admin.*, 355 F.3d 678, 688–89 (D.C. Cir. 2004) (analyzing the FAA’s inclusion of an environmental justice analysis in its EIS and the agency’s finding that significant noise impacts from the project would not fall disproportionately on minorities); *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 541 (8th. Cir. 2003) (finding that the Surface Transportation Board’s environmental justice analysis on the impacts of constructing a new rail line on minority populations was adequate despite its use of 1990 census data).

planning process can result in innumerable variations beyond the capacity of even FTA experts to comprehend and predict. Conversely, centrally mandated regulations limit the flexibility of recipients to take into consideration factors not present in the agency's calculations and develop more nuanced and locally appropriate measures. Poorly designed standards could result in inefficient procedures or allocations of resources where the agency-developed measures do not match the situations of individual recipients and communities.

Centrally determined rules and standards are more appropriate where local variation is less likely to affect the outcome. Local variation could be less important because the standard is very general. For example, the FTA might determine that jurisdictions must receive voting rights proportional to their population. Local variation can also be less important because the standard is very specific. The FTA could, for example, require that translators have a particular type of certification. Centralized determinations could also be useful if the agency believes that the potential for inefficiency could be outweighed by the value of certainty or the decreased likelihood of recipient misconduct.

Setting major service change thresholds is an area appropriate for centralized agency-based accountability measures. This is a question that simply requires projects to be grouped into broad categories in preparation for a more context specific analysis, making localized considerations less relevant. NEPA follows this model in requiring that all federal agencies draft an environmental impact statement on "proposals for legislation and other major Federal actions significantly affecting the quality of the human environment."²³⁵ NEPA also has built-in exemptions that allow it to further tailor its scope as appropriate.²³⁶ Litigation has further shaped the boundaries of when the EIS requirement applies.²³⁷ Like NEPA, the FTA could guard against overinclusive thresholds by writing in exceptions and allowing recipients to petition for exemptions on a case-by-case basis.

Setting minimum standards for public participation is a means through which agency-based measures can supplement community-based measures. One option used by the EPA would be issuing a definition of meaningful involvement. In its *Toolkit for Assessing Potential Allegations of Environmental Injustice*, the EPA stated meaningful involvement in a planning process means:

- (1) potentially affected community residents have an appropriate opportunity to participate in decisions about a proposed activity that will affect their environment and/or health;
- (2) the public's contribution can influence the regulatory agency's decision;
- (3) the

235. 42 U.S.C. § 4332(C) (2006).

236. An EIS is not required where the project in question falls within a categorical exclusion, 40 C.F.R. § 1508.4, or the agency makes a finding of no significant impact, 40 C.F.R. § 1508.9 (2011).

237. See, e.g., *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983) (holding that an agency need not conduct an EIS unless there is "a reasonably close causal relationship between a change in the physical environment and the effect at issue").

concerns of all participants involved will be considered in the decision-making process; and (4) the decisionmakers seek out and facilitate the involvement of those potentially affected.²³⁸

In doing so, the EPA endorsed certain elements that which are the core of meaningful public participation, but without binding recipients to specific actions. This gives recipients the discretion to tailor their processes to their unique contexts and the needs of their communities while ensuring that certain elements are present. While the propriety of a given public participation plan for a given community can be fact specific, it is much simpler than opining on the equitable distribution of benefits and burdens resulting from complex transit plans. Courts frequently make decisions about the adequacy of a given process in a particular circumstance under the Due Process Clause of the Fourteenth Amendment,²³⁹ as well as statutes such as the Administrative Procedure Act.²⁴⁰ The FTA's Office for Civil Rights can develop similar expertise.

While community-based accountability measures should serve as the primary means for assessing the equity of a particular project, the FTA should retain the ability to evaluate the ultimate conclusion of the equity analysis. Conceptualizing the division of benefits and burdens as a bargain between the protected communities, nonprotected communities and the recipients, the FTA's role shifts from evaluating whether a particular arrangement is objectively fair to policing the boundaries of the range of permissible bargains. For example, the FTA might conclude that a certain differential in subsidy for rail lines over bus lines is so high and the resulting benefits in congestion reduction and air quality so low that no reasonable community could agree to it as equitable. As befitting this looser role, the FTA's standard of review should not be "preponderance of the evidence" but a looser "substantial basis in evidence" standard. This simply examines whether "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."²⁴¹ Pairing this increased agency deference with increased community-based accountability measures is appropriate because more extensive procedural guarantees for protected populations should increase the likelihood that the resulting balance represents those groups' interests. The FTA could also review the adequacy of a recipient's response to comments.

The substantial evidence standard is also a more accurate reflection of the capacity of a reviewing body to evaluate the decisions of a fact finder more familiar with the facts at hand. As this standard is less precise and more generalized, requiring less familiarity with the individualized context of the

238. ENVIRONMENTAL PROTECTION AGENCY, TOOLKIT FOR ASSESSING POTENTIAL ALLEGATIONS OF ENVIRONMENTAL INJUSTICE 9 (2004).

239. U.S. CONST. amend XIV.

240. 5 U.S.C. §§ 701-06 (2006).

241. *Universal Camera Corp. v. Nat'l Labor Relations Bd.*, 340 U.S. 474, 477 (1951) (quoting *Consol. Edison Co. v. Nat'l Labor Relations Bd.*, 305 U.S. 197, 229 (1938)) (internal quotation marks omitted).

decision, agencies should more easily be able to make a determination without localized knowledge unique to the recipients. This parallels courts' using the substantial evidence standard to review complex agency decisions' findings of fact.²⁴²

C. Alternative Enforcement Mechanisms

Increased emphasis on procedural guarantees for communities can also open up new options for communities to enforce their rights outside of the administrative complaint process. Doing so would allow advocates to access remedies not available under administrative enforcement, supplement agency enforcement capacity, and increase the overall effectiveness of Title VI enforcement.

Procedural guarantees increase the remedies available through the courts. The FTA can require that these state DOTs adopt regulations laying out the procedures for recipients to submit equity analyses. Once the state does so, equity analyses drafted pursuant to these regulations may be subject to state administrative procedure act suits.²⁴³ This is similar to the model used under the Clean Water Act to police non-point source pollution, which requires states to periodically review their waterways and submit to the EPA a list of waterways that do not meet total maximum daily load standards.²⁴⁴ Parties affected by these regulations can and do file suit under various state administrative procedure acts challenging listings as improper.²⁴⁵ Opening recipients up to liability in state court for their equity analyses' insufficiency would substantially increase Title VI enforcement by allowing state courts to supplement the FTA's capacity. This would also provide protected populations with an alternative recourse should agencies mishandle complaints or investigations. Noncompliance with equity analysis procedures could also be circumstantial evidence of discrimination under an equal treatment theory.²⁴⁶

242. Under the Administrative Procedure Act, the substantial evidence standard applies to facts found on a formal record. *Id.* at 489; 4 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 11:22 (3d ed. 2013). Courts reviewing an EIS under NEPA use the similar "hard look" doctrine. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976); *see also* CAL. PUB. RES. CODE § 21168 (applying the substantial evidence standard to CEQA).

243. Findings of fact under state administrative procedure acts are typically subject to substantial evidence review. *See, e.g.*, CAL. CIV. PROC. CODE § 1094.5(c) (West 2012) (delineating the standard of review for writs of administrative mandamus).

244. 33 U.S.C. § 1313(c)–(d) (2006). These actions are often open to challenge under state law. *See, e.g.*, CAL. WATER CODE § 13330 (West 2012) (allowing any "aggrieved party" to appeal to the courts any decision or order of the State Board under CAL. WATER CODE section 13320 by writ of mandate).

245. *See, e.g.*, CAL. CIV. PROC. CODE § 1094.5 (West 2012) (describing the procedures for writs of administrative mandamus).

246. Under the *Arlington Heights* test, three of the four factors focused on whether there were deviations from the traditional zoning procedure. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). This course of action would still be limited, however, by the plaintiffs' ability to show disparity. *Id.* at 266.

Another byproduct of increased procedural protections would be greater leverage for protected populations over recipients outside of the formal administrative and judicial processes. When agencies raise fares, alter service levels, or propose capital construction projects, time is often of the essence since delays equate to lost revenue or increased expenses. Uncertainties such as delays can also affect a recipient's ability to finance projects. Even if the review process would lead the FTA to defer to the agency, just complying with the process takes time and money, and by exercising their procedural rights protected populations could substantially increase the time the process would take.²⁴⁷ This gives protected populations bargaining chips in that they can agree to waive procedural rights in exchange for concessions from recipients.

Community benefits agreements (“CBAs”) exemplify how communities can leverage procedural rights into substantive gains. A CBA is a legally enforceable contract signed by community groups and a developer; community groups agree to support the project through the various approvals needed, such as NEPA review or zoning changes, in exchange for a range of benefits provided by the developer.²⁴⁸ Although they are seen more often in private developments that require government approval, there are examples of CBAs being used for public works projects. One prominent example involves the expansion of the Los Angeles International Airport (“LAX”). In exchange for their support, a coalition of Los Angeles community groups obtained job training, first-source hiring, and living-wage requirements; commitments to devote substantial resources toward mitigating the environmental impacts of the airport; more than \$8.5 million annually for the soundproofing of local schools, city buildings, places of worship, and homes; and additional funding for studies on air quality and community health.²⁴⁹ Other CBAs have included the construction of parks, affordable housing, or other facilities.²⁵⁰ CBAs are

247. Courts have specifically found that delay is not an overriding factor that can exempt agencies from their NEPA duties. *See Karlen v. Harris*, 590 F.2d 39, 44 (2d Cir. 1978), *rev'd on other grounds sub nom.*, *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980) (holding that the agency's EIS was sufficient because it had considered the environmental consequences).

248. JULIAN GROSS ET AL., COMMUNITY BENEFITS AGREEMENTS: MAKING DEVELOPMENT PROJECTS ACCOUNTABLE 9–10 (2005), available at <http://www.goodjobsfirst.org/sites/default/files/docs/pdf/cba2005final.pdf>.

249. For examples, see Cooperation Agreement Los Angeles International Airport (LAX) Master Plan Program (2004), available at <http://www.forworkingfamilies.org/sites/pwf/files/documents/LAXCooperationAgreementFinal12-08-04.pdf>; Community Benefits Agreement, available at <http://www.forworkingfamilies.org/sites/pwf/files/documents/LAXCommunityBenefitsAgreement.pdf> (last visited June 3, 2013). For a more detailed account of the CBA, see Patricia E. Salkin & Amy Lavine, *Understanding Community Benefits Agreements: Equitable Development, Social Justice and Other Considerations for Developers, Municipalities and Community Organizations*, 26 UCLA J. ENVTL. L. & POL'Y 291, 304–06 (2008).

250. GROSS ET AL., *supra* note 248, at 10; *see also* Salkin & Lavine, *supra* note 249, at 300–17 (describing the terms of several notable community benefits agreements).

enforced by the signatories and often contain carefully drafted provisions regarding monitoring and enforcement.²⁵¹

CBAs can be adapted to the Title VI transit planning context, as various groups could agree to support the recipient through the equity analysis process in exchange for certain benefits. For example, if a recipient wanted to increase a commuter rail's subsidy per trip, affected minority communities might ask that the recipient demonstrate how the increased subsidy improves air quality in the minority neighborhoods or provide additional subsidies for bus lines.²⁵² This would secure protected populations a seat at the table in determining how they will benefit from the project, rather than simply commenting on proposed arrangements devised by recipients.

Title VI enforcement via CBA is not a perfect solution. CBAs require substantial time-intensive groundwork such as building coalitions, determining community priorities, and negotiating with recipients.²⁵³ There are also expenses involved, such as hiring legal counsel and experts.²⁵⁴ Amassing funds and committing time could be a daunting task for affected communities. Determining whether the groups involved actually represent the community could present another challenge.²⁵⁵ Furthermore, deciding to negotiate outside the formal Title VI procedural protections could limit the FTA's ability to protect against abuses in the negotiating process or to ensure that the resulting CBA is a fair bargain.²⁵⁶

As exemplified by the Bus Riders Union's struggles to ensure that LACMTA abided by their consent decree, enforcement of CBAs can present a challenge.²⁵⁷ Communities have developed ways to streamline enforcement, however. For example, the LAX CBA included a clause allowing the coalition to seek binding arbitration if the airport breached the agreement.²⁵⁸ Whereas disputes over enforcement of the Bus Riders Union's consent decree were appealed to the Supreme Court, arbitration could provide a more streamlined

251. GROSS ET AL., *supra* note 248, at 70–72.

252. While not a CBA itself, the *Bus Riders Union* consent decree provides another example of things communities can ask for in a CBA. See Consent Decree, Labor/Cnty. Strategy Ctr. v. L.A. Cnty. Metro. Transp. Auth., No. CV 94-5936 (C.D. Cal. Oct. 31, 1996), available at <http://oldbru.thestrategycenter.org/engli/pdf%20files/Consent%20Decree%20pdfs/Consent%20Decree%20Documents/consent-decree-10-96.pdf> (addressing issues such as service improvements, fares, the establishment of a Joint Working Group, and the appointment of a Special Master).

253. Salkin & Levine, *supra* note 249, at 320–21.

254. GROSS ET AL., *supra* note 248, at 23.

255. Vicki Been, *Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?*, 77 U. CHI. L. REV. 5, 21–24 (2010).

256. *Id.* at 24–25.

257. See *supra* Part I.A.4 for further discussion of the enforcement of the *Bus Riders Union* consent decree. See also Been, *supra* note 255, at 29–31 (noting problems with loosely worded CBAs giving developers the ability to escape their obligations).

258. COOPERATION AGREEMENT, LOS ANGELES INTERNATIONAL AIRPORT MASTER PLAN PROGRAM 7 (2004), available at www.envirorights.org/assets/2005-01_LAX_Cooperation_Agreement.pdf. Although the arbitration clause in this agreement provided only limited remedies, the terms of the clause can be negotiated by the parties.

enforcement mechanism. Despite these significant concerns, CBAs can be an effective tool under the right circumstances and provide communities with another option in their fight to effectuate their Title VI rights, particularly given the limitations of the existing formal Title VI enforcement options.

Adopting a collaborative approach to accountability would allow the FTA to utilize the strengths of both communities and agencies. Providing communities with greater procedural rights will allow them to bring their knowledge of localized conditions to bear on the question of whether the substance of a decision is fair while leaving agencies to focus on safeguarding the process. Expanding enforcement options and reviving some semblance of a private right of action will also allow FTA to focus its enforcement resources where they are most needed.

CONCLUSION

From Homer Plessy and Rosa Parks to Sylvia Darensburg, the struggle for transit justice has been long and hard fought. As the effectiveness of judicial remedies has faded, administrative agencies such as the FTA have the opportunity to rouse the sleeping giant of civil rights law, reshape the transit planning process, and open new avenues for advocates seeking equity in the transit planning process. Agencies bring increased expertise and resources to bear on subtle, pervasive inequities facing minority communities, as well as the ability to sidestep a judiciary that has become increasingly skeptical of nondiscrimination jurisprudence.

The FTA Circular is the first attempt by an agency to reconceptualize transit planning equity and administrative enforcement of Title VI. While the Circular in its present form lacks the minimum standards and oversight sufficient to ensure that it is actually enforced, many of its innovations—including the equity analysis, affirmative public participation duties, and monitoring duties—have the potential to revolutionize transit planning. These innovations can increase the transparency with which transit decisions are made, the formal consideration of equity in the planning process, and recipients' accountability for their actions. By revising the Circular to incorporate the public participation elements common in areas of environmental law, the FTA can better balance the need for granting discretion to recipients and minimum substantive standards for protected populations.

For the communities protected by Title VI, the price of these new tools is increased vigilance. Trading substantive guarantees for procedural guarantees is only effective if advocates actively exercise their newfound procedural rights and engage with transit agencies to work toward solutions that benefit the community as a whole. But legal advocacy has always been but a single facet

of the larger struggle for transit justice.²⁵⁹ Even the transit cases were pieces of larger campaigns for their proponents.²⁶⁰ Their success in other forums suggests that transit justice advocates would be up to the task of using these new avenues to continue the struggle for access to schools, jobs, and opportunities for themselves and the communities around them.

259. For accounts of other campaigns for transit justice in Atlanta, Baltimore and elsewhere, see HIGHWAY ROBBERY: TRANSPORTATION RACISM & NEW ROUTES TO EQUITY (Robert D. Bullard et al. eds., 2004).

260. The most prominent example is the Bus Riders Union, with over 3,000 dues-paying members. *About*, BUS RIDERS UNION, www.thestrategycenter.org/project/bus-riders-union/about (last visited Mar. 25, 2013). The Bus Riders Union used its lawsuit as an organizing tool, acting as the lead plaintiff, utilizing its members to collect evidence, and using the publicity to draw more attention to its cause. See David R. Rice, *The Bus Rider's Union: The Success of the Law and Organizing Model in the Context of an Environmental Justice Struggle*, 26 ENVIRONS: ENVTL. L. & POL'Y J. 187, 192–97 (2003) (describing the Bus Riders Union campaign as a model of law and organizing). Similarly, the plaintiffs in *Darensburg* used litigation in the context of a multi-pronged approach to reforming mass transit in the Bay Area that includes litigation, direct action organizing, legislative advocacy, and administrative complaints. See *Our Work: Transportation Justice*, PUB. ADVOCATES, <http://publicadvocates.org/transportation-justice> (last visited Mar. 25, 2013) (describing the work of the organization that represented the plaintiffs in *Darensburg*). The Straphangers Campaign, one of the plaintiffs in *N.Y. Urban League*, is a transit advocacy group whose primary mode is community organizing. See GENE RUSSIANOFF, NYPIRG STRAPHANGERS CAMPAIGN, THE RIDERS AND THE REBIRTH OF CITY TRANSIT: 25 YEARS OF ADVOCACY BY THE NYPIRG STRAPHANGERS CAMPAIGN (2004), available at www.straphangers.org/25th/essay.pdf (describing the principles of organizing behind the Straphangers Campaign).

