

ACHIEVING ACCESS EQUITY: UNDOING DE FACTO DISCRIMINATION IN PUBLIC TRANSIT

*Giancarlo Piccinini**

I. INTRODUCTION

This comment outlines a creative approach to addressing the problem of access inequity. Access inequity describes de facto discrimination in public access to travel and arises out of transit-related access disparities to otherwise available social, economic, and educational opportunities. Access inequity thusly construed focuses on a person's access to opportunity both at a time and over time, impacting people not only individually, but also generationally. Such access disparities manifest in transit most often on public roadways, where private automobile transit is preferred over public transit. Because roadway transit dominates transit infrastructure, reliance on private transit as a policy choice inequitably excludes most non-driving commuters and unsustainably increases traffic density. The need to travel by car to travel in most areas leads to the ubiquity of the problem, and without adequate transit alternatives, access inequity continues.

This comment begins by providing background on the problem and setting the stage as to why New Jersey's public transit is ripe for reconsideration, focusing first on the powers unique to local governments in New Jersey, and second on the historical development of transit infrastructure in New Jersey. Section III addresses the problem's theoretical and historical antecedents to illustrate how access inequity offends the constitutionally protected freedom of movement and right to travel and stems from the effects of de jure discrimination in housing. Section IV examines the problem of access inequity on the roadways, and Section V proposes a long-term solution to the problem presented. The comment then concludes by noting the moral imperative behind vindicating the fundamental freedom of movement and right to travel to ensure equitable access to both

travel as well as opportunity for all.

II. BACKGROUND

This Section begins by evaluating the merits behind New Jersey's unique version of the home rule. It then examines New Jersey's history as it relates to transit development to highlight the historical significance of the City of Newark as New Jersey's northern transportation hub. This Section then concludes with a reflection on why now is ripe to rethink New Jersey's public transit.

A. *Local Legislative Autonomy Under New Jersey's Home Rule*

The New Jersey State Constitution provides for the broad construal of the powers delegated to both municipal and county governments.¹ This unique version of the home rule “is reflected in the very structure of New Jersey” and has justified the limited

*J.D. Candidate, Seton Hall University School of Law, 2022. I am deeply grateful to my faculty advisor, Professor Paula Franzese, for her insight and unmatched enthusiasm, as well as my 1L writing instructor, Professor Charles Sullivan, for his candor and sincere support. I also cannot overstate my thanks to each of those who had a hand in bringing this comment to form. Your efforts are forever appreciated.

¹ See N.J. CONST., art. IV, § VII, para. 11. (1947). Liberal construction of constitutional and statutory provisions concerning municipal corporations and counties.

The provisions of this Constitution and of any law concerning municipal corporations formed for local government, or concerning counties, shall be liberally construed in their favor.

The powers of counties and such municipal corporations shall include not only those granted in express terms but also those of necessary or fair implication, or incident to the powers expressly conferred, or essential thereto, and not inconsistent with or prohibited by this Constitution or by law;

cf. N.J. STAT. § 40:48-2 providing that

[a]ny municipality may make, amend, repeal, and enforce such other ordinances, regulations, rules and by-laws not contrary to the laws of this state or of the United States, as it may deem necessary and proper for the good government, order and protection of persons and property, and for the preservation of the public health, safety and welfare of the municipality and its inhabitants, and as may be necessary to carry into effect the powers and duties conferred and imposed by this subtitle, or by any law.

legislative autonomy of some 565 municipalities.² Some commentators have derided the home rule as destructive and selfish.³ Others have argued that “[h]ome rule is basic in our government.”⁴ Elaborating on the latter view, Chief Justice Weintraub of the New Jersey Supreme Court wrote that New Jersey’s home rule represents the state government’s duty to meet the local needs of its people; indeed, “[i]t embodies the principle that the police power of the State may be invested in local government to enable local government to discharge its role as an arm or agency of the State and to meet other needs of the community.”⁵ Justice Brandeis also remarked a notably similar defense of state autonomy rooted in principles of federalism, suggesting that the police power gives states the opportunity to not only self-govern, but also innovate in ways from which the rest of the country can learn, if states can muster the “courage[]” to do so.⁶ Along these lines, New Jersey’s version of the home rule endows the state’s localities with a unique opportunity to

² Caroline Fassett, *What is Home Rule in New Jersey? Why Your Neighborhood Park May Still be Open*, NJ.COM (Apr. 24, 2020), <https://www.NJ.com/Coronavirus/2020/04/what-is-home-rule-in-new-jersey-why-your-neighborhood-park-may-still-be-open.html>.

³ David J. Barron, Article: *Reclaiming Home Rule*, 116 HARV. L. REV. 2255 (2003) (noting how the home rule can result “in socially destructive development because it allows localities to pursue their own selfish ends.”).

⁴ *Inganamort v. Borough of Fort Lee*, 62 N.J. 521, 528 (1973) (citing *Bergen Cnty. v. Port of New York Auth.*, 32 N.J. 303, 312-14 (1960) (*Inganamort* concerned three consolidated appeals, all involving the same issue brought by multiple plaintiff homeowners, who contended that defendant municipalities did not have the power to adopt rent control ordinances. The Court first held that the state's police power could be invested in local government by legislative action. An inevitable result of such a "home rule" would be diversity within the state because each municipality would act differently to meet local needs. The Court further found that N.J. CONST. art. IV, § 7, para. 11 permitted delegation of the matters of local concern and was satisfied that N.J. STAT. ANN. § 40:48-2 conferred upon defendants the power to adopt rent control ordinances. The Court also held that there was no other statute dealing with rent control or landlord-tenant relationships that would have preempted defendants' power under N.J. STAT. ANN. § 40:48-2. The Court thusly held that where there was a sufficient local need, plaintiffs' rights of property could be restrained by defendants under the police power that was vested in local government by the state.

⁵ *Id.*

⁶ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (observing that “a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country”).

lead by creative example in ways that simultaneously reflect the federalism principles inherent in the states' police power.

The police power reserved to the states derives from the Tenth Amendment of the federal Constitution.⁷ This power, according to Justice Holmes, "must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety."⁸ But, as mentioned above, the New Jersey State Constitution grants a derivative form of police power to all municipal and county governments in New Jersey.⁹ That is, the state constitutional grant invests "local bodies called into existence for purposes of local administration" with a "way to safeguard the public health and public safety" of local constituents.¹⁰ But the state constitutional grant adds an important qualifier that merits recognition. The state constitutional grant additionally specifies that those powers so delegated include "not only those granted in express terms but also those of necessary or fair implication, or incident to the powers expressly conferred, or essential thereto, and not inconsistent with or prohibited by this Constitution or by law."¹¹ Thus, the state grant of local police power doubly includes those expressly conferred as well as those necessary thereto, or those "means which are appropriate, which are plainly adapted to that end."¹² This power gives New Jersey's localities considerable legislative autonomy and latitude.

But the New Jersey State Constitution leaves unaddressed the boundaries and penumbras of home rule in New Jersey. There are a number of state statutes that expressly outline the powers belonging to counties and municipalities.¹³ But there is

⁷ U.S. CONST. amend X ("The power delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

⁸ *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) (Harlan, J.).

⁹ See N.J. CONST., art. IV, § VII, para. 11; see also *Judicial Home Rule; Editorials*, N.J. L. J. (Feb. 23, 2007), <https://www.law.com/njlawjournal/almID/900005474715/>.

¹⁰ *Jacobson*, 197 U.S. at 26–27.

¹¹ N.J. CONST., art. IV, § VII, para. 11.

¹² *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819) (Marshall, C.J.).

¹³ See, e.g., N.J. STAT. §§ 40:8-4 (Condemnation; power of); 40:8-13 (Traffic laws; enforcement); 40:9-2.1. (Acquisition, improvement, operation, and equipment

2022]

COMMENT

225

also state legislative authority that provides municipalities the statutory ability to pass ordinances necessary and proper

for the good government, order and protection of persons and property, and for the preservation of public health, safety and welfare of the municipality and its inhabitants, and as may be necessary to carry into effect the powers and duties conferred and imposed by this subtitle or by any law.¹⁴

Plainly, then, New Jersey's home rule gives "a wide variety of authority to municipalities to govern by the enactment of ordinances."¹⁵ Predictably, however, conflicts arise between local and state actors regarding the question of whether local law is preempted by state law.¹⁶ Yet, since the state grant empowers "courts [to] construe local government powers liberally[.]" determining "what are local matters and what are state matters" has been a question left largely to the state courts.¹⁷ The courts examine intrastate preemption, in other words, by analyzing the relationship between the state, the locality, and the subject matter of the inquiry.¹⁸ Unavoidably, the "home rule is a complex

of public transportation passenger or freight rail line) (stating the "governing body of any county or municipality may acquire, by purchase or lease, maintain, improve, equip and operate any existing public transportation passenger or freight rail line, including its appurtenant lands and ancillary structures and facilities.").

¹⁴ N.J. STAT. § 40:48-2 (Other necessary and proper ordinances).

¹⁵ *Judicial Home Rule*, *supra* note 9.

¹⁶ See Paul Diller, Article: *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1114 (2007) (noting that "[c]ity ordinances, like state laws, are subject to federal preemption, but the primary threat to local innovation is the charge of intrastate preemption: that a city's authority in a particular area has been supplanted by state law."); see also *Jacobson*, 197 U.S. at 27 ("A local enactment or regulation, even if based on the acknowledged police power of a state, must always yield in case of conflict with the exercise by the general government of any power it possesses under the Constitution, or with any right which that instrument gives or secures.").

¹⁷ *Judicial Home Rule*, *supra* note 9.

¹⁸ See *Overlook Terrace Mgmt. Corp. v. Rent Control Bd.*, 71 N.J. 451, 461-62 (1976) (asking (1) whether the ordinance conflicts with state law, (2) whether state law was intended to be exclusive, (3) whether there is a need for uniformity, (4) whether the state scheme is pervasive, and (5) whether the ordinance is an obstacle to the accomplishment of state statutes.).

topic.”¹⁹ On the one hand, “it enables . . . communities to engage in self-government.”²⁰ But on the other, it equally also allows for creative policy approaches for state, county, and municipal collaboration, an approach that has already yielded extraordinary results in New Jersey.²¹

New Jersey is the most densely populated state in the nation.²² The inevitable nexus between population and housing development requires municipal planners to account for the state’s limited space and high population density when designing capital improvements that will affect New Jersey’s shared transportation infrastructure. The development of large-scale housing projects in high-density areas inescapably affects overlapping interests. Affected stakeholders can and should account for that impact on neighboring areas as a policy matter, to the degree necessary to plan against travel access surges, “[c]ongestion, limited escape routes, dense infrastructure, and poverty.”²³

Inter-municipal, -county, and -state collaboration is possible in part through the creative use of New Jersey’s home rule. But creative use of home rule calls for counties and municipalities to find the courage needed to work together with transit authorities to achieve the shared goal of advancing New Jersey’s transit infrastructure with access equity in mind. New Jersey’s transit infrastructure owes itself to well over a century’s worth of population growth and development. The next Section provides a view as to how our transit infrastructure developed to this point.

¹⁹ Richard Briffault, *Home Rule for the Twenty-First Century*, 36 *URB. LAW.* 253 (2004).

²⁰ *Id.* at 259.

²¹ See, e.g., *New Deal Gives Newark \$120M to Resolve Lead Water Crisis Faster*, *NJ.COM* (Aug. 25, 2019), <https://www.nj.com/essex/2019/08/newarks-fix-to-lead-water-crisis-wont-take-so-long-thanks-to-120m-county-bond.html> (describing an inter-municipal, -county, -state approach to solving water crisis in City of Newark).

²² *Population Density in the U.S. by Federal States Including the District of Columbia in 2020*, *STATISTA* (Jan. 21, 2021), <https://www.statista.com/statistics/183588/population-density-in-the-federal-states-of-the-us>.

²³ William Donner & Havidán Rodríguez, *Disaster Risk and Vulnerability: The Role and Impact of Population and Society*, *POPULATION REFERENCE BUREAU* (Jan. 8, 2011), <https://www.prb.org/disaster-risk>.

B. *A Brief History of New Jersey's Transit Infrastructure*

New Jersey's unique population distribution is due in part to the organic development of travel routes charted out over the course of hundreds of years.²⁴ Most of New Jersey's rights-of-way have developed along "property boundaries to limit the impacts to adjacent property owners."²⁵ But prior to the eighteenth century, "[f]ew roads of more than local significance existed."²⁶ Road systems in colonial-era New Jersey were established by either local or county governments or commissioners.²⁷ Few roadways were widely used, and even where roadways were widely used, routes often ran only along municipal borders to reach common destinations.²⁸ Local efforts maintained these roads between 1621 and 1815, including the Old York Road, the most prominent route connecting Philadelphia to New York City, which ran from Lambertville to the City of Newark.²⁹

The charter of the New Jersey Turnpike Company in 1795 constituted a watershed moment in the development of transit infrastructure in New Jersey.³⁰ Yet, in 1816, Governor Mahlon Dickerson maintained that road building should not be the responsibility of the state.³¹ Road construction and finance remained "under the aegis of the local and county road overseers (not unlike during the colonial era)."³² Consequently, of the major turnpike developments that rapidly improved road travel

²⁴ See New Jersey Dep't of Transp. et al., *New Jersey Historic Roadway Study*, 17 (2011), <https://www.state.nj.us/transportation/about/publicat/historicroadwaystudy.pdf> [hereinafter NEW JERSEY HISTORIC ROADWAY STUDY] (noting that although New Jersey's colonizers initially used navigable bodies of water for transportation and trade, some paths used by the settlers may have been "adapted (in whole or in part) from existing Native American trails or paths."); see also *id.* at 19 (explaining that after the English unification of East and West Jersey in 1702, roads became the responsibility of individual counties, which created county "road boards" that had the authority to lay out and maintain new roads).

²⁵ *Id.* at 24.

²⁶ *Id.* at 21.

²⁷ *Id.* at 24.

²⁸ *Id.*

²⁹ *Id.* at 28.

³⁰ NEW JERSEY HISTORIC ROADWAY STUDY, *supra* note 24, at 34.

³¹ "Message of the Governor," *Votes and Proceedings of the Fourteenth General Assembly of the State of New Jersey* 90 (Newark: John Tuttle & Company) (1816).

³² NEW JERSEY HISTORIC ROADWAY STUDY, *supra* note 24, at 34.

in the late eighteenth century, only one New Jersey roadway ever received state investment: the Newark Turnpike, connecting the City of Newark to the Jersey City ferry and New York City.³³ This is because the Philadelphia to New York corridor remained a “powerful influence on all of New Jersey’s transportation.”³⁴ At the same time, it cemented the importance of the City of Newark as Essex County’s multi-modal transportation hub, “emanating” from which “a network of improved, short, radial routes” emerged organically over time.³⁵

Much of the post-American Revolution economic growth in and around the City of Newark was due not to roadway construction but rather to “the completion of the New Jersey Railroad, the Morris Canal, and the Morris and Essex Railroad.”³⁶ Because of these developments, manufacturing in Essex County in particular generally situated along “the rail and canal arteries” rather than along roadways, which is early historical evidence of the inextricable link connecting New Jersey’s multi-modal transit infrastructure, its population density, and its economic growth.³⁷ Because both commuter railroads to Manhattan and streetcar lines from surrounding municipalities passed through the City of Newark, by the turn of the nineteenth century, those routes consistently carried commuters from the City of Newark to its outlying towns, and vice-versa.³⁸

These early transit developments merit recognition by municipalities, counties, and state transit authorities when planning projects that impact overlapping stakeholders.³⁹ Despite its multi-modal history, because “New Jersey eagerly adopted the automobile as a mode of transportation” in the early twentieth century, as early as 1913, the state “had a higher number of vehicles per mile of road than most states in the region, including New York, Massachusetts, Maryland, and

³³ NEW JERSEY HISTORIC ROADWAY STUDY, *supra* note 24, at 45.

³⁴ NEW JERSEY HISTORIC ROADWAY STUDY, *supra* note 24, at 37.

³⁵ NEW JERSEY HISTORIC ROADWAY STUDY, *supra* note 24, at 83.

³⁶ *History of Essex County, NJ*, CNTY OF ESSEX, N.J., <https://essexcountynj.org/history/> (last visited Oct. 2, 2021).

³⁷ *Id.*

³⁸ *Id.*

³⁹ NEW JERSEY HISTORIC ROADWAY STUDY, *supra* note 24, at ix.

Connecticut.”⁴⁰ Since then, New Jersey’s traffic density has continued to place “increasing demands on existing roads.”⁴¹ It is no surprise, then, that roadway congestion continues to be a cause for concern at a time when private automobile transit dominates shared transit infrastructure.⁴² The next Section examines where we stand today in light of this history.

C. *Where We Are and Where We Are Going*

The regional, multi-modal transportation networks that extend throughout Essex County reinforce the need to recognize the power of New Jersey’s home rule as a means of giving municipalities a chance to collaborate with counties and state transit authorities on capital projects that impact inter-municipal interests. To meaningfully advance New Jersey’s transit access, rethinking our existing transit technology and infrastructure is warranted to design a more equitable and sustainable future of travel. Most of New Jersey’s intrastate transit infrastructure prohibits pedestrians and non-motorized travelers from accessing widely used highways.⁴³ Yet, for persons of lesser means who cannot afford their own car, public transit is their only travel option. For those who happened to miss the bus or happen to live along an especially busy and crowded line, such a system is hardly adequate for all practical purposes. Relegated to the road routes serviced by public transit, users of public transit are inequitably withheld from accessing the scope of opportunities afforded to persons who can more easily escape the restrictions imposed by limited public transit access.⁴⁴

⁴⁰ NEW JERSEY HISTORIC ROADWAY STUDY, *supra* note 24, at 82.

⁴¹ NEW JERSEY HISTORIC ROADWAY STUDY, *supra* note 24, at 82.

⁴² See Sarah Feldman, *It’s Not Just You, Traffic is Getting Worse*, STATISTA (Sep. 19, 2019), <https://www.statista.com/chart/19410/traffic-congestion-cities>.

⁴³ See *Restricted Access, Interstate Highways*, N.J. DEP’T OF TRANSP., https://www.state.nj.us/transportation/refdata/traffic_orders/access/interstate.shtm (last visited Dec. 5, 2021).

⁴⁴ See, e.g., Symposium, *A Taxing War on Poverty: Opportunity Zones and the Promise of Investment and Economic Development: An Opportunity Zone Falls in a Forest*, 48 *FORDHAM URB. L. J.* 1183, 1189 (pointing out that “[p]ublic transit infrastructure is a key policy intervention to ensure economic vitality, access to opportunity, and quality of life”).

Bus transit is the most used form of public transportation in New Jersey.⁴⁵ Of course, bus travel gives commuters without a vehicle the ability to use the roadways and highways otherwise foreclosed to them.⁴⁶ A roadway-centric approach fails to sustainably address the access issue in areas already plagued by roadway congestion, despite earnest efforts to improve access to, and the availability of, public transit.⁴⁷ In addition, the lack of access to meaningful modes of travel limits a person's full freedom of movement and stands in stark contrast to the constitutionally guaranteed right to travel. What is more, access inequity is not just a poor people problem. Rather, it affects countless commuters across the state, such as the commuters who needlessly lose hours of their lives and incur externalized social costs every day due to roadway congestion and traffic density.⁴⁸ The needs of tomorrow demand reconsideration of our transit and doing so requires us to muster the courage to boldly rethink the physical and legal infrastructure that sustains public transit. With a focus on the problems of access inequity in Essex County, New Jersey, this comment contemplates a sustainable solution to undo de facto discrimination in opportunity access in a way that is workable in Essex County and the City of Newark, as well as other similarly situated areas.

This comment proposes a long-term solution: the expansion of public light rail service that integrates existing lines with both surface-level and subterranean-level expansion, over and under existing inter-municipal roadways. A move toward expanded, publicly accessible light rail atop and below existing roadways

⁴⁵ *Transit*, N. JERSEY TRANSP. PLAN. AUTH., <https://www.njtpa.org/Planning/Regional-Programs/Transit.aspx> (last visited Dec. 3, 2021) (explaining how of the 454,780 customers NJ Transit serves of a typical weekday (pre-COVID-19), 277,860 customers, or 61% of passengers, use bus service).

⁴⁶ See N.J. Transit, *NJT2030: A 10-Year Strategic Plan*, 11 (2020), https://njtplans.com/downloads/strategic-plan/NJT_2030-A_10-YearStrategicPlan.pdf [hereinafter *NJT2030: A 10-YEAR STRATEGIC PLAN*].

⁴⁷ *Id.* at 81.

⁴⁸ See Feldman, *supra* note 42 (finding that, in 2019, the annual average hours of delay per commuter during peak hours in just seven major U.S. cities totaled 651 hours and noting that “[p]eople on the roadways pay for this congestion through their time, but the economy pays for these delays through costly inefficiencies. The annual cost of traffic delays per commuter has nearly doubled, rising to \$1,010. That is nearly double what it was in the early 1980s.”).

2022]

COMMENT

231

minimizes condemnation and construction costs while creating long-term, retributive property value to the areas serviced. The expansion of a permanent light rail system that goes over and under inter-municipal rights-of-way can also reduce commuter dependence on bus transit.⁴⁹ Indeed, bus transit is far less efficient and less sustainable, when compared to light rail.⁵⁰ Expanded light rail access to low-income communities can also connect communities historically isolated through de jure discrimination in housing policy.

Achieving access equity, therefore, touches on several theoretical and historical antecedents that underpin the need to rethink public transit technology and infrastructure. Section III addresses those topics. Section IV addresses the problem of access inequity as it relates to traffic density and roadway congestion, while Section V addresses the solution, or a move away from roadway-centric transit and a move toward implementing a more permanent, high-volume transit alternative. The comment concludes by proposing a means of evaluating the efficacy of the proposed solution and addressing the moral imperative of undoing de facto discrimination in public transit.

III. THEORETICAL AND HISTORICAL ANTECEDENTS

This Section maps out the theoretical and historical antecedents of access inequity. Beginning with a brief discussion along constitutional lines, Subsection A highlights the reasons why the freedom of movement as a fundamental constitutional guarantee merits a place in a discussion of public transit. Subsection B then examines the historical circumstances under which access inequity emerged.

⁴⁹ See, e.g., N.J. Transp. Plan. Auth., *Mobility Element, Newark Master Plan*, 5 (2012), <https://www.njtpa.org/NJTPA/media/Documents/Planning/Subregional-Programs/Studies/Newark%20Master%20Plan%20Mobility%20Element/Newark-Master-Plan-Mobility-Element.pdf?ext=.pdf> [hereinafter *Newark Master Plan*].

⁵⁰ See *Sources of Greenhouse Gas Emissions*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions> (last visited Feb. 4, 2022) (showing that light rail can reduce that space occupied on roadways by idle vehicles and can use less environmentally impact fuel sources, such as electricity).

A. *The Fundamental Freedom of Movement and Right to Travel*

The United States Supreme Court has recognized that the “freedom of movement is basic in our scheme of values.”⁵¹ This sacred value surfaced as early as the Magna Carta.⁵² Indeed, it is one which the Framers carried over and applied with equal force in the United States.⁵³ Since then, the freedom of movement has been consistently recognized as both a right and a constitutionally protected privilege of United States citizenship.⁵⁴ According to the first judicial construction of the fundamentality of constitutional privileges under the federal Constitution in 1825, “privileges and immunities of citizens in the several states . . . are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union[.]”⁵⁵ Among these is “[t]he right of a citizen of one state to pass through . . . any other state, for purposes of trade, agriculture, professional pursuits, or otherwise;”⁵⁶ such that “citizens of the United States . . . have the right to pass and repass through every part of [the nation] without interruption, as freely as in our own States.”⁵⁷ Thus, the “right to move with freedom . . . belongs to the citizen. He must have this power to move freely to perform his duties as a citizen.”⁵⁸

Although the right to move freely had been recognized as

⁵¹ *Kent v. Dulles*, 357 U.S. 116, 126 (1958) (Douglas, J.).

⁵² *Id.* at 125.

⁵³ See ZECHARIAH CHAFEE, *THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787*, at 187–88 (1956) (explaining how there was a “strong and steadfast desire of the Englishmen who came to America and of the many generations born in the colonies for freedom of movement across frontiers. . . . [O]ne of the potent causes of Independence was the determination of Americans to be masters of their own freedom of movement.”).

⁵⁴ See, e.g., *Slaughter-House Cases*, 83 U.S. 36, 79–80 (1872) (Miller, J.) (describing as a “privilege of a citizen of the United States,” among other things, “the right to use navigable waters of the United States” and those “conferred by the [Fourteenth Amendment]” which allow “a citizen of the United States . . . of his own volition” to enter and reside in any state of his choosing.).

⁵⁵ *Corfield v. Coryell*, 6 F. Cas. 546, 551 (1823) (Washington, J.).

⁵⁶ *Id.* at 552.

⁵⁷ *Crandall v. Nevada*, 73 U.S. 35, 49 (1868) (Miller, J.).

⁵⁸ *Slaughter-House Cases*, 83 U.S. at 57.

fundamental even before the Fourteenth Amendment was ratified, it retains the same thrust of protection afforded to those fundamental liberty interests guaranteed by the Due Process and Equal Protection Clauses of the Fourteenth Amendment.⁵⁹ The Court has also established that the movement of people from state to state constitutes interstate commerce such that laws proscribing otherwise are violative of the Federal Constitution's Commerce Clause.⁶⁰ But the Court has more consistently struck down state laws that burden or inhibit a citizen's ability to move freely whether due to entrance taxes,⁶¹ state prohibitions,⁶² or occupational registration requirements on Fourteenth Amendment grounds.⁶³ Indeed, because the Fourteenth Amendment itself furnishes a "guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society[.]"⁶⁴ the Court has so recognized the freedom of movement on several occasions.⁶⁵

Thus, as a fundamental right of United States citizenship, no state may constitutionally abridge a person's right to move freely.⁶⁶ As Justice Melville Weston Fuller put it, "[u]ndoubtedly

⁵⁹ See, e.g., *Williams v. Fears*, 179 U.S. 270, 274 (1900) (Fuller, C.J.) ("[T]he right, ordinarily, of free transit . . . is a right secured by the Fourteenth Amendment and by other provisions of the Constitution.").

⁶⁰ See *Edwards v. Cal.*, 314 U.S. 160, 172 (1941) (Byrnes, J.) ("It is settled beyond question that the transportation of persons is 'commerce,' within the meaning of that provision."); see also *Gibbons v. Ogden*, 22 U.S. 1, 27 (1824) (Marshall, C.J.); *Hoke v. U.S.*, 227 U.S. 308, 320–21 (1913) (McKenna, J.); *Covington & Cincinnati Bridge Co. v. Ky.*, 154 U.S. 204, 218–19 (1894) (Brown, J.). It is immaterial whether or not the transportation is commercial in character. See, e.g., *Caminetti v. U.S.*, 242 U.S. 470, 491–92 (1917) (Day, J.).

⁶¹ *Crandall*, 73 U.S. at 49.

⁶² *Edwards*, 314 U.S. at 173.

⁶³ *Williams*, 179 U.S. at 274–75.

⁶⁴ *U.S. v. Cruikshank*, 92 U.S. 542, 554 (1875) (Waite, C.J.).

⁶⁵ See, e.g., *Paul v. Va.*, 75 U.S. 168, 180 (1869) (Field, J.) ("It was undoubtedly the object of the [Privileges and Immunities] clause in question to place the citizens of each State upon the same footing with citizens of other States . . . it gives them the right of free ingress into other States, and egress from them."); *Ward v. Md.*, 79 U.S. 418, 430 (1871) (Clifford, J.) ("the [Privileges and Immunities] clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business."); *U.S. v. Wheeler*, 254 U.S. 281, 297 (1920) (White, C.J.).

⁶⁶ U.S. CONST. amend. XIV, § 1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.").

the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty.”⁶⁷ This right is so entrenched in our constitutional structure that it is one of the very few “assertable against private interference as well as government action” which is “a virtually unconditional personal right, guaranteed by the Constitution to us all.”⁶⁸ For “the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.”⁶⁹ In this way, if a state or local law—or even a policy of a private entity—imposes upon or creates limitations that impair a person’s right to travel and freedom of movement, those laws stand subject to challenge under the Privileges and Immunities Clause,⁷⁰ the Commerce Clause,⁷¹ and the Fourteenth Amendment’s Due Process and Equal Protection Clauses.⁷² But it need not be that cut and dry. Although discriminatory housing policy did not directly impair a person’s right to travel and freedom of movement, for example, its latent effect of isolating entire communities has left a legacy that continues perniciously in the form of access inequity. A view of that history follows.

B. *Social Segregation and the Latent Effects of Community Isolation*

Social segregation is the decades-long product of de jure discrimination in housing policies, such as the National Housing Act of 1934, which created a Federal Housing Administration (FHA) “armed with discriminatory rules that quite overtly excluded Blacks from lending opportunities generously made available to whites.”⁷³ It even “redlined maps to prescribe where

⁶⁷ *Williams*, 179 U.S. at 274.

⁶⁸ *Shapiro v. Thompson*, 394 U.S. 618, 643 (1969) (Stewart, J., concurring).

⁶⁹ *Id.* at 629.

⁷⁰ *See Corfield v. Coryell*, 6 F. Cas. 546, 551 (1823) (Washington, J.).

⁷¹ *See cases cited supra* note 60.

⁷² *See, e.g., Williams*, 179 U.S. at 274; *Cruikshank*, 92 U.S. at 554.

⁷³ Paula A. Franzese & Stephanie J. Beach, *Promises Still to Keep: The Fair Housing Act Fifty Years Later*, 40 *CARDOZO L. REV.* 1207, 1210 (2019).

Blacks could live.”⁷⁴ And, what is more, “[t]hose areas within the redlines, often quite literally ‘on the other side of the tracks,’ were the run-down, isolated, and impoverished zones.”⁷⁵ These areas developed over time into “government created ghettos.”⁷⁶ As a result, social separation by race was all but guaranteed in residential development under the FHA.⁷⁷ But the roots of de jure segregation in housing in particular, and social segregation in general, run even deeper and are even more reprehensible than what was justified under the FHA.

Many early progressive-era policies aimed to halt what Professor Michael McGerr has described as a “dangerous social conflict” between races, centered around municipal planning policies to institute a “shield of segregation” to separate people by race.⁷⁸ This time was marked by intensifying and seemingly constant violence, terrorism, and even insurrection in some areas.⁷⁹ As a result, at the turn of the nineteenth century, state and local government leaders leaned into the “dramatic intensification and codification of segregation” as a means of resolving social issues.⁸⁰ Once implemented, segregation in the

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ MICHAEL MCGERR, *A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA, 1870 TO 1920* 183 (2003).

⁷⁹ *See generally* CHARLES LANE, *THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION* (1st ed. 2008); WILLIAM IVY HAIR, *CARNIVAL OF FURY: ROBERT CHARLES AND THE NEW ORLEANS RACE RIOT OF 1900* (1976); JOEL WILLIAMSON, *THE CRUCIBLE OF RACE: BLACK-WHITE RELATIONS IN THE AMERICAN SOUTH SINCE EMANCIPATION* 201–19 (1984); *see also* Brent Staples, Editorial, *When Democracy Died in Wilmington, N.C.*, N.Y. TIMES, Jan. 8, 2006, at C13 (describing the insurrection “engineered by white supremacists who unseated a government that had been elected by an alliance that included black citizens and white progressives.”).

⁸⁰ MCGERR, *supra* note 78, at 188 noting that

what had been de facto in the late nineteenth century became de jure by the twentieth; new segregation laws made the racial boundaries clearer, more rigid. Through differing mixtures of law and custom, every Southern town, city, county, and state tried to achieve two goals: first, to send an unmistakable message of racial inequality that would intimidate blacks and reassure whites; second, to deprive blacks of so much economic and political opportunity that they could never threaten white power.

early twentieth century “enforced public separations.”⁸¹ Despite Justice Brown’s disgraceful incantation of the so-called separate-but-equal doctrine in 1896,⁸² segregation was “never the separation of equals; one party always ended up with less—less power, less wealth, less opportunity, less schooling, less health care, less respect.”⁸³ But as Professor McGerr points out, “segregation was not something that happened only in the South—boundary lines were established everywhere in the early twentieth-century United States.”⁸⁴ Although the “Northern version of segregation was generally milder than Southern Jim Crow,” the “trend toward residential segregation was at least as strong in the North as in the South.”⁸⁵

The intended result, social segregation, has since left lasting effects on communities, especially urban communities, in communities of color, in particular. The latent effects of this history have resulted in the isolation of entire neighborhoods from others.⁸⁶ These government-sanctioned ghettos became known euphemistically as inner cities.⁸⁷ Community isolation of this sort has in turn fostered food desertification,⁸⁸ a lack of equitable access to educational, economic, and organizational opportunities;⁸⁹ and compounding generational poverty and economic disadvantage that is directly attributable to the

⁸¹ MCGERR, *supra* note 78, at 182.

⁸² See *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896) (Brown, J.).

⁸³ MCGERR, *supra* note 78, at 183.

⁸⁴ MCGERR, *supra* note 78, at 183.

⁸⁵ MCGERR, *supra* note 78, at 190–91.

⁸⁶ See Bruce H. Rankin & James M. Quane, *Neighborhood Poverty and the Social Isolation of Inner-City African American Families*, 79 SOC. FORCES 139, 140 (2000) (describing social isolation as “the lack of contact or of sustained interaction with individuals and institutions that represent mainstream society.”).

⁸⁷ Franzese & Beach, *supra* note 73.

⁸⁸ Andrew Deener, *The Origins of the Food Desert: Urban Inequality as Infrastructural Exclusion*, 95 SOC. FORCES 1285 (2017) (discussing how infrastructural exclusion as a form of urban inequality has resulted in “[m]illions of people liv[ing] in geographic pockets without access to supermarkets, a problem disproportionately impacting low-income communities and communities of color.”).

⁸⁹ Rankin & Quane, *supra* note 86, at 146, 155 (evaluating social isolation based on social-network composition and organizational composition and finding that “[d]isadvantaged both by the individual experience of poverty and by residence in poor neighborhoods, ghetto residents are thought to be isolated from valuable social contacts that promote social mobility in American society.”).

implementation of these policies.⁹⁰ These effects are “reinforced by the multi-generational replication of depressed incomes, the consistently vast differences in wealth and income between Blacks and whites, and the persistence of economic exclusionary development and zoning.”⁹¹

The shameful history of race-based social segregation has left a legacy of isolation in many urban communities. As a 1968 Advisory Commission Report observed regarding the effects of exclusionary housing policies and government-sanctioned social engineering, as a result of the “[d]iscrimination and segregation [that has] long permeated much of American life . . . [o]ur nation is moving toward two societies, one black, one white—separate and unequal.”⁹² Since the Advisory Commission reported its observations to President Lyndon B. Johnson, the “continuing polarization of the American community” persists in many, if not all, corners of the country.⁹³

The Commission then understood that this reality presents the need “for a national resolution[,]” which remains salient in substance today.⁹⁴ The resolution that the Commission speaks of must come in the form of decisive action applicable in all parts of the country, “a commitment to national action—compassionate, massive and sustained.”⁹⁵ Furthermore, “it will require new attitudes, new understanding, and, above all, new will.”⁹⁶ This is true not only in a general sense, but also with regard to the need to undo this legacy for the countless generations of Americans yet unborn. For the American people, “[t]here can be no higher priority for national action and no higher claim on the nation’s conscience” than leaving for our posterity a more perfect, more equitable union.⁹⁷

⁹⁰ RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 24 (2017) (“The federal government’s housing rules pushed these cities into a more rigid segregation than otherwise would have existed.”).

⁹¹ Franzese & Beach, *supra* note 73, at 1211.

⁹² NAT’L ADVISORY COMM’N ON CIVIL DISORDERS, *REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS* 1 (1968).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 2.

Although overt de jure discrimination is virtually absent in America, de facto discrimination in housing persists.⁹⁸ De facto discrimination also persists through transit-related access disparities.⁹⁹ Transit-related disparities reflect how “transit policy tends to favor higher-income transit riders over lower-income transit riders, and suburbs over cities[,]” leading to access disparities, and access inequity, in low-income communities excluded by infrastructural policies that preference private roadway transit.¹⁰⁰ The dominance of private automobile transit has developed into a system of infrastructural exclusion that exacerbates the lasting effects of social segregation. To tailor a solution that can meaningfully achieve access equity, one that accounts both for the legacy of social segregation as well as the constitutional issues presented by transit-related, opportunity access disparities, a full picture of the problem is warranted.

IV. THE PROBLEM

If the problem of access inequity is merely a social isolation or infrastructural exclusion problem, then the problem of roadway congestion and traffic density that results ex post from de facto discrimination in public transit is inconsequential to the solution. But if the focus stays solely on these latter issues without bearing also on the former, the solution will ignore the nexus binding the two. To meaningfully articulate a problem statement that encompasses the concerns this comment seeks to resolve, a faithful examination requires a return to the root of the issues. If access inequity is rooted in the transit infrastructure

⁹⁸ See, e.g., Paula Franzese, *An Inflection Point for Affordable Housing: The Promise of Inclusionary Mixed-Use Redevelopment*, 52 UIC J. MARSHALL L. REV. 581, 583-85 (2019) (discussing the effect of de facto zoning practices and economic barriers that disproportionately foreclose the poor and people of color from accessing largely white middle-class and upper-class neighborhoods); see also *Promises Still to Keep*, supra note 73, at 1208 (describing that even though the Fair Housing Act of 1968 “has facilitated a decline in race-based housing segregation for middle-income Blacks, racial segregation by residence for those of low-income remains high and class-based segregation has been rising.”).

⁹⁹ See Jerrett Yan, *Rousing the Sleeping Giant: Administrative Enforcement of Title VI and New Routes to Equity in Transit Planning*, 101 CALIF. L. REV. 1131, 1133 (2013) (noting that the “overt de jure discrimination Plessy and Parks faced is largely a relic of this nation's past; however, transit-related disparities endure.”).

¹⁰⁰ *Id.*

perpetuating it, then a discussion of the technology designed to operate thereupon should encompass the breadth of the problem.

A. *Reliance on Road Transit*

Policies that either directly or indirectly affected modes of transit that rely on roadways have yielded profound social costs. The transportation sector generates an exceptionally high quantity of greenhouse gases; indeed, in 2018, the transportation sector generated the highest quantity relative to any other global contributor.¹⁰¹ In addition to harmful emissions, motor vehicles exact an unnervingly high human cost for their convenience.¹⁰² Furthermore, road and highway systems are accessible almost exclusively to owners of automobiles, which results in a unique disadvantage for persons financially incapable of owning a car.¹⁰³ Understandably, these “vulnerable groups are in need of cost-effective transportation options that are affordable and provide them access to job opportunities.”¹⁰⁴ The annual cost of vehicle ownership in 2018 sat around \$5,899.¹⁰⁵ Despite this, private transit continues to dominate other transit options in America. The next Section examines why.

¹⁰¹ U.S. ENV'T PROT. AGENCY, DATA HIGHLIGHTS: INVENTORY OF U.S. GREENHOUSE GAS EMISSIONS AND SINKS: 1990-2018 1, 3 (2020) (reporting that in 2018, of the 6,677 million metric tons of greenhouse gases emitted in total, twenty-eight percent was attributable to transportation activities).

¹⁰² Gregory H. Shill, *Should Law Subsidize Driving?*, 95 N.Y.U. L. REV. 498, 501-02 (2020) (“Every year, nearly 100,000 Americans are killed by either car crashes (40,000) or car pollution (58,300). Measured by the U.S. Department of Transportation's own formula, the cost of crash fatalities alone is \$384 billion annually. The indirect costs, which have never been calculated rigorously, are likely far higher.”).

¹⁰³ See FED. HIGHWAY ADMIN., FHWA NHTS BRIEF 2014: MOBILITY CHALLENGES FOR HOUSEHOLDS IN POVERTY 1 (2014), <https://nhts.ornl.gov/briefs/PovertyBrief.pdf> (reporting that the “high sticker price of vehicles, increased prices at the pump, and transit fare hikes all pose a financial burden to the mobility of all households, especially those in poverty.”).

¹⁰⁴ *Id.*

¹⁰⁵ *Average Annual Costs of Vehicle Ownership in the United States in 2018*, by Category, STATISTA (Aug. 4, 2021), <https://www.statista.com/statistics/282339/average-cost-of-vehicle-ownership-in-the-united-states/>.

1. Private Transit and the Swelling Tide of Automobile Supremacy

Driving is a “virtual necessity for most Americans.”¹⁰⁶ However, vehicle ownership is disproportionately lower among low-income persons and impoverished households, limiting their ability to travel.¹⁰⁷ In addition, “of the amount spent on local (non-interstate) roads in one recent year (\$39.65 billion in 2019 dollars, calculated from 2002 dollars using the CPI Inflation Calculator), 89% was paid by the general taxpayer and only 11% by motorists themselves.”¹⁰⁸ Even the majority of the costs required to construct roadways are “borne by the general taxpayer, rather than by drivers.”¹⁰⁹ These costs amount to “over \$180 billion, or between \$1012 and \$1488 per household per year” according to some estimates.¹¹⁰ It is no surprise, however, considering that “[c]ars have come to dominate American travel.”¹¹¹ In fact, the focus in transit policy circles is often not on externalized social costs, but rather “personal freedom and flexibility.”¹¹² This trend is largely attributable to “[r]ules embedded across nearly every field of law [which] privilege the motorist and, collectively, build a discriminatory legal structure with no name.”¹¹³ One commentator characterized this “structure” as a system of “automobile supremacy” and forcefully described it thusly:

¹⁰⁶ *Wooley v. Maynard*, 430 U.S. 705, 715 (1977); see generally Jason Laughlin, *For Workers in Philly’s Poor Neighborhoods, Car Ownership Often a Necessity and a Privilege*, PHILA. INQUIRER (Dec. 25, 2018), <https://www.inquirer.com/transportation/car-commute-drive-to-work-census-tioga-philadelphia-poverty-low-income-vehicles-transit-septa-bus-20181225.html>.

¹⁰⁷ FED. HIGHWAY ADMIN., *supra* note 103, at 1.

¹⁰⁸ Shill, *supra* note 102, at 537.

¹⁰⁹ Shill, *supra* note 102, at 537.

¹¹⁰ Shill, *supra* note 102, at 538.

¹¹¹ Patrick Moulding, *Fare or Unfair? The Importance of Mass Transit for America’s Poor*, 12 GEO. J. POVERTY L. & POL’Y 155, 157 (2005) (writing that “[a]ccording to the 2001 National Household Travel Survey, Americans travel about 4 trillion miles annually, with the overwhelming majority of trips (87%) made via personal vehicle—meaning, by and large, cars.”).

¹¹² *Id.* (explaining that “personal freedom and flexibility” is the “main advantage of cars over other modes).

¹¹³ Shill, *supra* note 102, at 502.

[Automobile supremacy] is constructed by diverse bodies of law including traffic regulation, land use law, criminal law, torts, insurance law, environmental law, vehicle safety rules, and even tax law, all of which provide incentives to cooperate with the dominant transport mode and punishment for those who defect. The incentives and disincentives are delivered in the form of legal subsidies. Cumulatively, these subsidies do more than shift costs; they legitimate a state of choice deprivation and inequity, serving as an excuse for the status quo's many curable flaws and injustices.¹¹⁴

It is difficult to deny the dizzying degree to which, in the United States, “the ownership and operation of private motor vehicles—i.e., driving—is comprehensively encouraged by federal, state, and local law.”¹¹⁵ Despite this, laws that directly regulate the use of public streets remain notably absent from policy conversations.¹¹⁶ This area of the law is centrally important, however, because “[w]ithout an automobile, many individuals in the U.S. are left without a means to reach their destination because they cannot drive.”¹¹⁷

The freedom of movement doctrine discussed above has been interpreted by the Supreme Court to protect an individual's right to travel as a pedestrian.¹¹⁸ But the “dominance of the automobile [remains] a policy choice of federal and state governments[.]”¹¹⁹ Despite this, courts have been unwilling to extend the right to travel to encompass the right to use a motor vehicle.¹²⁰ This leaves mobility considerations to the localities

¹¹⁴ Shill, *supra* note 102, at 502.

¹¹⁵ Shill, *supra* note 102, at 503.

¹¹⁶ Shill, *supra* note 102, at 503.

¹¹⁷ Timothy Baldwin, *The Constitutional Right to Travel: Are Some Forms of Transportation More Equal Than Others?*, 1 NW. J. L. & SOC. POL'Y 213, 214 (2006).

¹¹⁸ See *Saenz v. Roe*, 526 U.S. 489, 498-504 (1999); see also *Papchristou v. City of Jacksonville*, 405 U.S. 156, 156 (1972); see also *Kent*, 357 U.S. at 125 (stating the right to travel is a “liberty” that a citizen cannot be deprived of without due process of law).

¹¹⁹ Baldwin, *supra* note 117, at 216.

¹²⁰ See, e.g., *Duncan v. Cone*, No. 00-5705, 2000 U.S. App. LEXIS 33221, at *5

that directly regulate street use. Some scholars have argued that denying non-motor vehicle owners from access to automobile-centric transit infrastructure could give rise to “a cause of action under the federal equal protection doctrine of ‘total deprivation.’”¹²¹ But this theory is similar to those discussed above in that an as-applied challenge would not provide people a means of “opting out of this regime. A person who does not own a car is still conscripted into underwriting driving in numerous ways, overpaying for everything from groceries to commuting” to offset the negative externalities associated with private transit.¹²² Thus, despite the diminished mobility and deprivation of access of some non-motorists, the law nonetheless “hides the true cost of driving from drivers and externalizes it onto other road users and society at large.”¹²³ This reality means that even if the courts could resolve the problem in one case, they may not be sufficient to solve the problem in all cases.

Indeed, motorists and non-motorists alike are subject to the economic, public health, and social costs associated with “secondhand driving.”¹²⁴ This figure includes roughly “one hundred million people in the United States who do not even have a driver’s license.”¹²⁵ The aggregate costs associated with

(6th Cir. Dec. 7, 2000) (finding no fundamental right to drive a car); *State v. Cox*, 16 A.2d 508, 512 (N.H. 1940) (holding that there is no right to use motor vehicles on public highways), *aff’d*, *Cox v. N.H.*, 312 U.S. 569 (1941); *People v. Sweetster*, 140 Cal. Rptr. 82, 85 (Cal. Ct. App. 1977) (holding that counties can reasonably restrict county highway use).

¹²¹ Baldwin, *supra* note 117, at 216 (citing *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 23 (1973) (finding that a “lack of personal resources [that] has not occasioned an absolute deprivation of the desired benefit” does not constitute a violation of equal protection).

¹²² Shill, *supra* note 102, at 504.

¹²³ Shill, *supra* note 102, at 504.

¹²⁴ Shill, *supra* note 102, at 505, n.23 remarking that

[t]he allusion to secondhand smoke exposure is intentional. The U.S. legal system produces excessive levels and risks of driving, and the public health consequences—an epidemic of vehicle and pollution deaths—are felt by all members of society. Much as there was a time when diners, students, and even hospital patients could not avoid exposure to cigarette smoke merely by abstaining from the underlying activity themselves, so too are citizens today powerless to avoid joining the nearly 100,000 Americans who are killed each year by cars.

¹²⁵ *Compare Highway Statistics 2016*, U.S. DEP’T TRANSP., FED. HIGHWAY

private transit are enough to outweigh its personal convenience. Despite its unsustainability, private efforts to perpetuate automobile supremacy show no signs of slowing.¹²⁶

Despite automobile manufacturers' sustained efforts to influence policy through political contributions, the public interest in the fundamental freedom of movement and right to travel must prevail.¹²⁷ This means recognizing the effect automobile supremacy has had on the people whose diminished mobility results from road-centric transit infrastructure. Despite evidence tending to support the proposition that a move toward expanded public transit would better vindicate the freedom of movement, roadway-centric public transit presents unique issues of its own.

2. Public Transit: Community, Capacity, and the Curse of Congestion

In 1956, Congress passed the Federal Highway and the Highway Revenue Acts of 1956, both of which sought to establish pro-highway funding initiatives to link “all major urban areas of the country with a road network comprising of more than 40,000 miles of highway.”¹²⁸ The construction costs incurred by this ambitious goal were paid primarily with tax dollars funneled into the newly created “Highway Trust Fund, with the result that

ADMIN., <https://www.fhwa.dot.gov/policyinformation/statistics/2016/dl22.cfm> (last updated July 11, 2018) (reporting 221,994,424 licensed drivers as of 2016, including drivers with restricted and graduated licenses), *with U.S. and World Population Clock*, U.S. CENSUS BUREAU, <https://www.census.gov/popclock> (last visited Dec. 4, 2021) (estimating a U.S. population of 323,156,182 on January 1, 2016).

¹²⁶ See OPEN SECRETS, <http://www.opensecrets.org> (last visited Dec. 4, 2021) (\$41,045,654 in 2010); (\$45,777,304 in 2011); (\$41,488,141 in 2012); (\$43,355,884 in 2013); (\$40,839,501 in 2014); (\$42,893,739 in 2015); (\$45,135,008 in 2016); (\$50,017,477 in 2017); (\$49,466,252 in 2018); (\$46,535,677 in 2019); (\$39,285,229 in 2020) (to access these figures, search “auto manufacturers” from the site’s home page, select the first result, and then select the “Lobbying” tab. The “Annual Lobbying on Auto Manufacturers” table accessible thereby shows that from 2010 to 2020, auto manufacturers spent a combined \$485,839,866 on lobbying efforts).

¹²⁷ See *Auto Manufacturers: Long Term Contribution Trends*, OPENSECRETS, <https://www.opensecrets.org/industries/totals.php?cycle=2020&ind=T2100> (last visited Dec. 4, 2021) (indicating that from 2010 to 2020, auto manufacturers spent a combined \$23,862,648 on campaign contributions).

¹²⁸ Moulding, *supra* note 111, at 158.

projects were 90% funded by federal dollars.”¹²⁹ Following the development of the interstate highway system and a substantial increase in rates of car ownership, public transit services that once thrived in urban communities declined sharply and steadily.¹³⁰ Despite “some expanded (but still restrictive) federal funding opportunities for transit programs added in the late 1960s and 1970s, the highway-focused federal funding scheme would not be significantly modified until the early 1990s,” but by that time, “American dependence on the car (both in terms of economic infrastructure and national culture) was well-entrenched.”¹³¹

The movement away from urban planning centered around public transit and toward the accommodation of private transit has “caused serious conflict in cities between personal convenience and transportation system efficiency.”¹³² These are not unlike the road congestion issues that plagued the efficient operation of streetcars during a time of rising car ownership in the early to mid-twentieth century.¹³³ In 2018, approximately 131,849,936 commuters aged sixteen and older used either a car, truck, or van to commute to work.¹³⁴ That figure dwarfs the 7,614,524 commuters who travel to work using public transit.¹³⁵ The conflict between efficiency, convenience, and reliance on road travel has resulted in short-term and long-term social costs that contribute to compounding access inequity. Even if one loses sight of short-term costs, such as roadway congestion, traffic

¹²⁹ Moulding, *supra* note 111, at 158.

¹³⁰ See generally Joseph Stromberg, *The Real Story Behind the Demise of America's Once-Mighty Streetcars*, Vox (May 7, 2015), <https://www.vox.com/2015/8/10/9118199/public-transportation-subway-buses> (attributing the demise of streetcars in America to a combination of gridlock, competition for surface space with automobiles, and local rules that kept fares artificially low, which starved streetcar companies of capital to operating costs, which in turn led to restrictions on service that pushed commuters to purchase more convenient cars).

¹³¹ Moulding, *supra* note 111, at 158.

¹³² Vukan R. Vuchic, *Transportation for Livable Cities: Problems, Obstacles, and Successful Solutions*, in *WORLD CITIES: ACHIEVING AND VIBRANCY* 105, 106 (Ooi Giok Ling & Belinda Yuen eds., 2010).

¹³³ See Stromberg, *supra* note 130.

¹³⁴ *U.S. Transportation and Commute Statistics*, LIVE STORIES, <https://www.livestories.com/statistics/us-transportation-commute> (last visited Dec. 3, 2021).

¹³⁵ *Id.*

time, and motor vehicle accidents, it is impossible to ignore the long-term social costs associated with environmental degradation, the livability of urban areas, and the effects of infrastructural exclusion.

As an early means of addressing these issues, transit-oriented development policies became popular because they utilized land use planning that favored public transit, especially in urban and high-density areas.¹³⁶ Transit-oriented development represents a planning strategy that effectively integrates private and public transit access because it “offers an opportunity to break relatively young—but ultimately destructive—cycle of automobile dependence that grips American culture.”¹³⁷ Transit-oriented development also reflects the benefits of multi-modal transit systems because it “reduces automobile dependence, and therefore, reduces greenhouse gas emissions and promotes healthier lifestyles.”¹³⁸ Transit-oriented development also “protects lower-income populations from marginalization by offering mixed-income housing in a connected and socially and economically diverse setting.”¹³⁹ One scholar has cogently summarized the benefits of transit-oriented development thusly:

When neighborhoods or communities are designed around transit or multi-modal transportation, rather than just around cars, certain benefits are inherent. Communities designed on a human scale, rather than on an automobile scale, are healthier; people walk more; there is less pollution; and there are fewer automobile-related accidents. There are economic benefits: foot traffic for local businesses increases; property values increase (in theory offering cities a chance to incorporate mixed-income housing); transit agencies experience increased ridership. There are

¹³⁶ Vuchic, *supra* note 132, at 117–18.

¹³⁷ M. Tanner Clagett, *If It's Not Mixed-Income, It Won't be Transit-Oriented: Ensuring Our Future Developments Are Equitable & Promote Transit*, 41 *TRANSP. L. J.* 1, 2 (2014).

¹³⁸ *Id.*

¹³⁹ *Id.*

environmental benefits: greenhouse gas emissions decrease; consumption of fossil fuels and other non-renewable resources decreases; higher density cities help constrain urban sprawl and conserve surrounding open spaces. And there are human benefits: decreased automobile dependency reduces isolation and encourages a healthier social environment.¹⁴⁰

Public transit is in large part subsidized publicly.¹⁴¹ But the perception that public transit exists as a welfare program designed to “help poor people who lack cars” rather than serve a vitally important social function also lends largely to the forces perpetuating access inequity.¹⁴² Although it is easy to recognize the benefits of transit-oriented development, it can also serve as a means of exclusion that displaces existing populations and historically marginalized communities susceptible to gentrification.¹⁴³ To quell this concern, transit-oriented development policies can utilize a mixed-income approach to urban planning that preserves economic enhancement without negatively impacting existing communities. Inclusionary zoning requirements, for example, are one such means of accommodation. Mixed-used redevelopments are another. Both approaches can capture the kind of multi-modal integration particular to transit-oriented developments, which provides enhanced travel access for persons of varying income levels in one geographic area. But even where one agrees on strategic land use planning that allows expanded access to public transit service, the question of which mode of public transit most effectively achieves access equity looms. Leaving aside for a

¹⁴⁰ *Id.* at 4.

¹⁴¹ Joseph Stromberg, *The Real Reason American Public Transportation Is Such a Disaster*, Vox (Aug. 10, 2015, 5:49 p.m. EDT), <https://www.vox.com/2015/8/10/9118199/public-transportation-subway-buses> (“In most cities, no more than 30 to 40 percent of operating costs are covered by fares . . . [but] there’s a huge downside to viewing public transportation as welfare—it prevents local agencies from charging high enough fares to provide efficient service...” thereby leading to a vicious cycle “that starves the transit agency, which leads to reduced service.”).

¹⁴² *Id.*

¹⁴³ Clagett, *supra* note 137, at 9.

moment which mode is best suited to that end, NJ Transit has embraced and plans to continue to embrace transit-oriented development in its approach to providing public transportation.¹⁴⁴ But NJ Transit's plans for the future of New Jersey's transit are hardly enough.

B. *The Future of Transit in New Jersey*

NJ Transit's "Transit Friendly" approach under its Transit Friendly Planning, Land Use and Development Program ("TFP") merely "encourages growth and development where public transportation already exists."¹⁴⁵ Notably absent from the TFP's mission is a desire to expand public transit access to places where none exists or is either inadequate or redundant. Even in areas where access exists, NJ Transit's preferred mode of transportation merely perpetuates rather than alleviates the swelling tide of access inequity in New Jersey's urban communities. NJ Transit's plans envision "a modern, world-class, 21st century transit network."¹⁴⁶ But its "bold vision" reads more like a rhetorical goal than a practical solution to the problem of access inequity.¹⁴⁷ In the next two years, NJ Transit plans to increase bus service on lines it describes as "congested routes."¹⁴⁸

This plan falls short of fully addressing the volume problem (discussed *infra*).¹⁴⁹ But it also fails to move away from either bus transit or road-centric transit altogether. It fails to do what is needed to achieve access equity, which is a dramatic rethinking of the status quo, let alone lead us toward a "modern, world-class, 21st century transit network."¹⁵⁰ With buses sharing roadways that already lack space for the current number of cars and trucks on the road, adding more buses to already congested routes fails

¹⁴⁴ *Transit Friendly Planning*, N.J. TRANSIT, <https://www.njtransit.com/TransitFriendly> (last visited Dec. 4, 2021).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ NJT2030: A 10-YEAR STRATEGIC PLAN, *supra* note 46, at 81.

¹⁴⁹ See NJT2030: A 10-YEAR STRATEGIC PLAN, *supra* note 46, at 81, (plan not explicitly responding to the transportation volume problem).

¹⁵⁰ *Next Stop: The Future of Transit!*, N.J. TRANSIT, <https://njtplans.com/> (Last visited Feb. 4, 2022).

to fully address the same space problem that afflicted the streetcar.¹⁵¹ What is more, with a focus on achieving a “net-zero emissions fleet” in the next ten years, NJ Transit has focused only on the atmospheric effects of a fossil fuel-dependent fleet, leaving unaddressed other environmental concerns that demand equal consideration.¹⁵² Without accounting for a strategic redesign of roadways or the implementation of transit alternatives, NJ Transit’s reliance on bus transit will merely perpetuate and quite possibly exacerbate the congestion and service problems it earnestly seeks to resolve.

Public transit in the form of the streetcar or trolley died quietly in the mid-twentieth century.¹⁵³ At that time, another public transit technology emerged that could accommodate the steady investments in roadways and highways. There are several reasons apart from the obviously harmful negative externalities fostered by bus transit that counsel against adopting public transit options that rely on roadways and fossil fuels.¹⁵⁴ Those issues aside, the issues presented by road-centric transit are reducible to two: the volume problem and the space problem.

1. The Volume Problem

The volume problem describes the issue of limited passenger capacity aboard public transit options. To address this issue, transit authorities have widely adopted the use of articulate buses, which are extended buses comprised of two rigid sections connected by a pivoting articulation joint, designed to accommodate higher passenger capacity.¹⁵⁵ But the volume of commuters who depend on bus transit as their primary means of travel sometimes outweighs the volume capacity of even articulate buses, which in turn requires an even greater number of buses on

¹⁵¹ Cf. Stromberg, *supra* note 130 (describing how the strain on sharing road space between streetcars and automobiles ultimately contributed to the former’s demise).

¹⁵² NJT2030: A 10-YEAR STRATEGIC PLAN, *supra* note 46, at 81.

¹⁵³ Stromberg, *supra* note 46.

¹⁵⁴ *Sources of Greenhouse Gas Emissions*, *supra* note 50 (noting that “[i]n terms of the overall trend, from 1990 to 2018, total transportation emissions have increased due, in large part, to increased demand for travel.”).

¹⁵⁵ *Articulated Buses*, DIMENSIONS.COM, <https://www.dimensions.com/element/articulated-buses> (last visited December 4, 2021).

the roadways and is where the snake starts to swallow its tail.¹⁵⁶

The shortage of passenger volume aboard buses has been a recurrent problem in the past.¹⁵⁷ It has now been further complicated by the COVID-19 pandemic.¹⁵⁸ The volume problem is not likely resolvable by the promise to increase bus service in high-demand areas.¹⁵⁹ The congestion caused by added buses on the roadways and the sheer number of buses in urban areas has already led to horrific tragedies that could become more common by introducing even more buses.¹⁶⁰ But even if increased bus service resolves the volume problem, the space problem persists.

2. The Space Problem

The space problem describes the issue of inadequate roadway space for the number of commuters occupying roadways to travel every day. This problem was once so bad in the City of Newark that NJ Transit effected a study and roadway traffic changes around Newark Pennsylvania Station.¹⁶¹ The study reported that the area surveyed, “a circle with a 1,500-foot radius around Penn Station[,]” was the situs of “excessive delays due to . . . a lack of space” for buses.¹⁶² The report describes the need to

¹⁵⁶ NJT2030: A 10-YEAR STRATEGIC PLAN, *supra* note 46, at 81.

¹⁵⁷ Collen Wilson, *NJ Transit Senate Hearing in Hoboken Terminal Echoes Familiar Complaints From Riders*, NORTH JERSEY.COM (Nov. 14, 2019, 11:23 a.m. EDT), <https://www.northjersey.com/story/news/transportation/2019/11/14/nj-transit-hearing-hoboken-echoes-familiar-complaints-riders/4187026002/> (discussing “overcrowded buses” among the issues raised at the first hearing of the New Jersey Senate Select Committee charged with investigating the agency’s efficacy).

¹⁵⁸ Daniel J. Munoz, *NJ Transit Faces Backlash Overcrowded Commutes Amid COVID-19*, NJBIZ (Apr. 8, 2020), <https://njbiz.com/nj-transit-faces-backlash-crowded-commutes-amid-covid-19/>.

¹⁵⁹ NJT2030: A 10-YEAR STRATEGIC PLAN, *supra* note 46, at 81.

¹⁶⁰ Jeff Goldman & Craig McCarthy, *Driver Killed, 18 Injured After 2 NJ Transit Buses Crash in Newark*, NJ.COM (Aug. 19, 2016, 10:48 a.m. EDT), https://www.nj.com/essex/2016/08/buses_collide_in_newark_report_says.html (last visited Dec. 4, 2021) (reporting that the driver of one of the buses was killed and eighteen passengers injured in a tragic accident involving two NJ Transit buses, which took place at the intersection of Raymond Boulevard and Broad Street in the City of Newark, New Jersey, in 2016).

¹⁶¹ DR. LAZAR N. SPASOVIC & KEIR OPIE, N.J. DEP. OF TRANSP., COMPUTER MODELING AND SIMULATION OF NJ TRANSIT PENN STATION NEWARK 2 (2004).

¹⁶² *Id.*

close lanes to commuter traffic and describes as a “security reason” the fact that “local roadways are very congested.”¹⁶³

With NJ Transit’s planned bus service expansion, in high-density areas, the expansion will more likely than not merely add to the congestion on the roads.¹⁶⁴ Indeed, employees working in the City of Newark already face longer commute times than the average commuter in the United States.¹⁶⁵ In addition, about seven percent of the workforce in Newark endures “super commutes,” which are commutes “in excess of 90 minutes.”¹⁶⁶ In New Jersey, 14.8% of commuters, or every one in seven, travel an hour or more every day.¹⁶⁷ That figure places New Jersey commute times as second-highest in the country behind New York.¹⁶⁸ Nationwide, only 8.1% of commuters endure such lengthy commutes.¹⁶⁹ Traffic density arises from congestion on the roads, and these figures illustrate the need to rethink reliance on bus transit, in light of the lingering space problem.

C. *The Need for a New Way Forward*

The need for a new way forward is clear. NJ Transit’s plan is inadequate, but the North Jersey Transportation Planning Authority (“NJTPA”), a federally authorized Metropolitan Planning Organization, oversees more than \$2 billion in transportation improvement projects and can provide a forum for interagency cooperation and public input on resolving transit problems.¹⁷⁰ To address the issues affecting urban areas in North Jersey, the NJTPA’s Congestion Management Process will “better characterize and communicate system performance regarding

¹⁶³ *Id.* at 3.

¹⁶⁴ NJT2030: A 10-YEAR STRATEGIC PLAN, *supra* note 46, at 81.

¹⁶⁵ *Data USA, Newark, NJ*, DATAUSA, <https://datausa.io/profile/geo/newark-nj/#housing> (last visited Dec. 4, 2021).

¹⁶⁶ *Id.*

¹⁶⁷ Mike Frassinelli, *N.J. Drivers Have Second-Highest Rate of ‘Mega Commutes,’ Census Reveals*, NJ.COM (Mar. 30, 2019), https://www.nj.com/news/2013/03/new_jerseyans_have_second_high.html.

¹⁶⁸ *Id.* (stating that 16.2% of New York commuters travel an hour or more each day).

¹⁶⁹ *Id.*

¹⁷⁰ *The NJTPA*, N. JERSEY TRANSP. PLAN. AUTH., <https://www.njtpa.org/About-NJTPA/Who-We-Are/The-NJTPA.aspx> (last visited Dec. 4, 2021).

accessibility and mobility . . . to support decision making about practical strategies[.]”¹⁷¹ According to the NJTPA, of the 454,780 customers NJ Transit serves on a typical (pre-COVID) weekday, 277,860 customers, or 61% of passengers, used bus service.¹⁷² About 51% of NJ Transit’s 2018 operating budget was supported by passenger fares.¹⁷³ Compared with the 36,574 commuters, or just eight percent of passengers that used light rail service, bus service is NJ Transit’s most used public transit option.¹⁷⁴

According to a report prepared by Sam Schwartz Engineering in collaboration with the NJTPA for the City of Newark, “there are existing bus routes serving Newark which are overcrowded and have frequency and/or running time issues.”¹⁷⁵ The relative inefficiency of NJ Transit’s most widely used form of service may explain why despite “being served by a multimodal transit system, and considering that over 39 percent of households in Newark do not own a car, the reliance on transit by Newark’s residents, commuters and visitors has shrunk over the past 40 years.”¹⁷⁶ Acknowledging that parking for private transit commuters is “plentiful and inexpensive” in the City of Newark, the report also revealed that “in general, the current transit system is underutilized by the City of Newark.”¹⁷⁷

This is attributable to two observations: (1) more commuters prefer private transit by virtue of the relative supremacy of motor-vehicle-centric infrastructure; and (2) the transit options historically utilized in the City of Newark are presently underutilized. The “intermodal opportunities both within the City of Newark and the surrounding areas” are ripe for official reconsideration given the relative inefficiencies of NJ Transit’s

¹⁷¹ N. JERSEY TRANSP. PLAN. AUTH., *Accessibility and Mobility Synthesis*, <https://www.njtpa.org/Planning/Regional-Programs/Studies/Active/Accessibility-and-Mobility-Strategy-Synthesis.aspx> (last visited Dec. 4, 2021).

¹⁷² *Transit*, N. JERSEY TRANSP. PLAN. AUTH., *supra* note 45.

¹⁷³ N. JERSEY TRANSP. PLAN. AUTH., PLAN 2045: CONNECTING NORTH JERSEY 114 (2017), <https://www.njtpa.org/NJTPA/media/Documents/Planning/Plans-Guidance/Plan-2045/Chapter-6.pdf?ext=.pdf> 114.

¹⁷⁴ *Transit*, N. JERSEY TRANSP. PLAN. AUTH., *supra* note 45.

¹⁷⁵ *Newark Master Plan*, *supra* note 49, at 86.

¹⁷⁶ *Newark Master Plan*, *supra* note 49, at 91.

¹⁷⁷ *Newark Master Plan*, *supra* note 49, at 91.

overextended bus service.¹⁷⁸ The need to mitigate and “minimiz[e] roadway congestion” precipitated by insufficient road space has been recognized before.¹⁷⁹ These conditions have in the past led to “some of the most dangerous travel corridors.”¹⁸⁰ But that cannot continue.

The Newark Master Plan contemplates an investigation into “extensions of light rail service” and calls for the City to “[i]denify and preserve rights-of-way in Newark for future Light Rail extensions.”¹⁸¹ Where the plan advocates for improvements to mitigate roadway congestion, it reiterates the need to contemplate the possibility of integrating “intercept parking facilities” outside light rail stations to reduce the number of private transit commuters on the roadways and to encourage light rail transit for the City’s commuters.¹⁸² In order to effectively reduce the persistent problem of road congestion,¹⁸³ improve roadway safety,¹⁸⁴ reduce the likelihood of tragic bus accidents,¹⁸⁵ and provide people with a more efficient, more sustainable public transit option that serves the needs of commuters, vindicates every person’s fundamental freedom of movement and right to travel, and best utilizes the City’s historic transit infrastructure, a bold reevaluation of the Newark Light Rail follows.¹⁸⁶

V. THE SOLUTION

In 2006, the Newark Light Rail Broad Street Extension successfully connected the City of Newark’s two train stations: Newark Pennsylvania Station, and the Broad Street Station.¹⁸⁷

¹⁷⁸ *N. Jersey Transp. Plan. Auth.*, GREATER NEWARK BUS SYSTEM STUDY 2 (2011), https://www.njtpa.org/NJTPA/media/Documents/Planning/Regional-Programs/Studies/Greater%20Newark%20Bus%20System%20Study/GNBSS-Final-Report_Summer2011.pdf?ext=.pdf.

¹⁷⁹ *Newark Master Plan*, *supra* note 49, at 99.

¹⁸⁰ *Newark Master Plan*, *supra* note 49, at 101.

¹⁸¹ *Newark Master Plan*, *supra* note 49, at 94.

¹⁸² *Newark Master Plan*, *supra* note 49, at 107.

¹⁸³ *Newark Master Plan*, *supra* note 49, at 99.

¹⁸⁴ *Newark Master Plan*, *supra* note 49, at 101.

¹⁸⁵ Goldman and McCarthy, *supra* note 160.

¹⁸⁶ *Accessibility and Mobility Synthesis*, *supra* note 171.

¹⁸⁷ *See Newark Light Rail Broad Street Extension, Construction Management*,

2022]

COMMENT

253

Rethinking transit technology and infrastructure as a means of achieving access equity in the City of Newark and its surrounding communities in Essex County means reconceptualizing the area's public transit. The expansion of the Newark Light Rail to connect neighboring municipalities in Essex County and the City captures this aim. The proposed expansion contemplates five extensions along congested, but direct roads, to relieve reliance on bus service along the following routes: up Ferry Street, originating at Newark Pennsylvania Station, terminating at the intersection of Ferry and Wilson Streets; up Springfield Avenue, originating at Newark Pennsylvania Station, through neighboring Irvington, into Maplewood, terminating at the intersection of Millburn Avenue and Springfield Avenue; up South Orange Avenue, originating at Newark Pennsylvania Station, through Vailsburg, terminating at South Orange train station; up Central Avenue originating at Newark Broad Street Station, through neighboring East Orange and Orange, terminating at the Highland Avenue train station; and an expansion of the Grove Street line up Bloomfield Avenue, into neighboring Bloomfield, through Glen Ridge, terminating at the Montclair Train Station. This project can connect communities historically segregated with accessible, permanent mode of public transit that holds up against both the volume and space problems, as well as the inequity inherent in road-reliant transit options. This solution can also vindicate the fundamental freedom of movement and right to travel by granting pedestrian access from much of Essex County to its multi-modal transportation hub, Newark Pennsylvania Station.

The expansion of the Newark Light Rail in Essex County is an obviously bold action plan that lends support not only from precedent (the Broad Street Expansion), but also other light rail expansions in New Jersey. NJ Transit's light rail services include three lines: the Newark Line, the Hudson-Bergen Line, and the River Line.¹⁸⁸ NJ Transit plans to extend the Hudson-Bergen

STV, <https://www.stvinc.com/project/newark-light-rail-broad-street-extension-construction-management> (last visited Dec. 4, 2021) (explaining how the extension connects Newark Penn with Broad Street Station in the City of Newark).

¹⁸⁸ *Light Rail Accessibility*, N.J. TRANSIT, <https://www.njtransit.com/accessibility/Light-Rail-Accessibility> (last visited Dec. 4, 2021).

Light Rail (“HBLR”) north into Bergen County, into the western waterfront area of Jersey City.¹⁸⁹ Currently undergoing “preliminary engineering,” the extension “will expand the HBLR West Side Avenue branch. The approximately 3,700-foot route extension will include one new station west of the state highway, supporting Jersey City’s planned development on the Hackensack waterfront.”¹⁹⁰ The coincidence of the Bayfront development and the HBLR extension serves as a model of the kind of multi-modal, transit-oriented development that is possible in North Jersey’s high-density urban areas.¹⁹¹ Implementation of the HBLR extension aside, a response to the question of how to implement the proposed expansion follows.

A. *New Jersey’s Transit and Home Rule Revisited*

Available to NJ Transit is its power of acquisition “by purchase, condemnation, lease, gift, or otherwise . . . any land or property real or personal . . . which it may determine is reasonably necessary for the purposes of [NJ Transit].”¹⁹² NJ Transit enjoys this acquisition power by virtue of its authority to exercise eminent domain.¹⁹³ The Eminent Domain Act of 1971 delegates the exercise of the State’s power to take property to state agencies and political subdivisions.¹⁹⁴ But NJ Transit is not a public utility.¹⁹⁵ As a creature of statute, NJ Transit may curtail

¹⁸⁹ NJT2030: A 10-YEAR STRATEGIC PLAN, *supra* note 46, at 47; *see also* John Jordan, *Politicos Hope Hudson-Bergen Light Rail Expansion Will Spur Growth in Hudson County*, GLOBEST.COM, (Mar. 4, 2020), <https://www.globest.com/2020/03/04/politicos-hope-hudson-bergen-light-rail-expansion-will-spur-growth-in-hudson-county/> (stating that officials believe the expansion of the Hudson-Bergen Light Rail will encourage economic growth in Hudson County).

¹⁹⁰ *Hudson-Bergen Light Rail Route 440 Extension Project*, HUDSON-BERGEN LIGHT RAIL, <https://hblr440.com> (last visited Dec. 4, 2021).

¹⁹¹ *See* Chris Fry, *New Rendering and Details Emerge as Jersey City’s Bayfront Moves Forward*, JERSEY DIGS (Jan. 11, 2021), <https://jerseydigs.com/new-renderings-details-emerge-as-jersey-city-bayfront-moves-forward/> (describing the Bayfront development as “an endeavor to transform a 95-acre parcel into one of the East Coast’s largest mixed-income developments”).

¹⁹² N.J. STAT. ANN. § 27:25-13(b).

¹⁹³ *See id.* § 27:25-13(c)(1) (“The corporation, when acquiring property . . . shall exercise its power of eminent domain.”).

¹⁹⁴ *See id.*

¹⁹⁵ *See id.* at § 27:25-8.

or abandon rail passenger service lines only if it holds at least two public hearings in the areas affected, and with regard to curtailing or abandoning bus service lines, only one public hearing is required.¹⁹⁶ With regard to fare increases for either bus or rail services, the statutory scheme requires NJ Transit to hold at least ten public hearings distributed geographically throughout New Jersey.¹⁹⁷ As a corporate entity imbued with powers of the State, NJ Transit's acts on a majority vote basis of the corporation's thirteen-member board.¹⁹⁸ New Jersey's Commissioner of Transportation sits as the chairperson of the board.¹⁹⁹ But the Governor retains the right to veto any act taken by the board.²⁰⁰ NJ Transit's ability to deliberate internally allows it to decide on its own whether its decisions are in fact in keeping with the public's interest in accessible, efficient public transit options.

But NJ Transit's authority is not new. Nor is New Jersey's home rule. But both, combined, can achieve something new. NJ Transit enjoys considerable power by law, but New Jersey's home rule gives municipalities significant authority over areas of local control, such as traffic and travel.²⁰¹ This opportunity makes possible a cross-collaborative agreement between the municipalities affected by the proposed expansion and NJ Transit and allows them to agree to authorize an easement or license to NJ Transit for placement of the proposed lines. Although subterranean construction is tedious and expensive, civil engineers managed it over a century ago.²⁰² It is difficult to argue that it is no longer possible today. And in the case of the proposed expansion, unlike in the case of the New York City Subway, the construction of quasi-surface, quasi-subterranean light rail lines would require limited underground construction.

¹⁹⁶ *Id.* at § 27:25-8(d)(1).

¹⁹⁷ *Id.* at § 27:25-8(d)(2).

¹⁹⁸ *Id.* at § 27:25-4(e).

¹⁹⁹ N.J. STAT. ANN. § 27:25-4(d).

²⁰⁰ *Id.* at § 27:25-4(f).

²⁰¹ *See id.* at § 40:9-2.1.

²⁰² *See generally* Frank W Skinner, *Difficult Engineering in the Subway*, CENTURY MAGAZINE, Oct. 1902, at 908–11, [https://www.nycsubway.org/wiki/Difficult_Engineering_in_the_Subway_\(1902\)](https://www.nycsubway.org/wiki/Difficult_Engineering_in_the_Subway_(1902)) (describing in detail the subway construction under the New York City Columbus Monument in 1902).

Where necessary, municipalities can dedicate or reconfigure surface lanes in multi-lane roadways to accommodate the expansion, making one-ways in some cases, and replacing shoulder parking line space in others. But it is not the aim of this comment to conceive of the detail needed to ultimately effectuate the proposed solution.

Also beyond the scope of this comment is the means best to incentivize municipalities to collaborate in the way described. County and state incentives would go a long way to promote agreement and prevent avoidable intrastate preemption litigation. State law would plausibly preempt local laws that conflict with transit matters within NJ Transit's field of authority.²⁰³ The Public Transportation Act of 1979 ("PTA") could arguably preempt conflicting local legislation. The New Jersey Legislature intended the PTA "to establish and provide for the operation and improvement of a coherent public transportation system in the most efficient and effective manner" that provides "efficient, coordinated, safe and responsive public transportation" in New Jersey.²⁰⁴ This language suggests uniformity, and the fact that NJ Transit has become the largest state transit system in the United States suggests that the state scheme is sufficiently pervasive to preempt conflicting local laws.²⁰⁵

Ultimately, these questions are for courts to decide. In the meantime, municipalities and NJ Transit are at liberty to exercise their authority. Although the New Jersey State Constitution provides for a liberal construction of the powers afforded counties and municipalities in New Jersey, the courts have yet to decide whether that construction succeeds in preemption analysis in this context. There are, however, statutory provisions that permit county public transportation authorities to participate in the operation of public transportation facilities.²⁰⁶ To avoid

²⁰³ See *Overlook Terrace Mgmt. Corp. v. Rent Control Bd.*, 71 N.J. 451, 461 (1976) (stating there is a presumption that municipal law is preempted by state law).

²⁰⁴ N.J. STAT. § 27:25-2(a)-(b).

²⁰⁵ NJT2030: A 10-YEAR STRATEGIC PLAN, *supra* note 46, at 10.

²⁰⁶ N.J. STAT. ANN. § 40:37A-98 authorizing
[a]ny county improvement authority [to] engage in the business
of operation of public transportation facilities for

litigation, counties can coordinate with municipalities regarding the operation of routes of the proposed expansion and can also coordinate with the state to ensure proper policing of these routes. There also already exists a public transportation tax benefit designed to encourage employers to provide public transportation benefits to employees.²⁰⁷ The state could opt to amend this provision to incentivize municipalities with tax credits to manage, operate, and staff stations situated along the proposed expansion, or, in the alternative, incentivize county authorities to do the same. In coordination with NJ Transit, either means proposed to effectuate the solution is possible under existing authority, but only if they can muster the courage to do so.

Behind these justifications still lingers the question of funding. In keeping with a collaborative approach, the hope is that the entities directly involved will bear proportionate burdens, which would include several municipalities, Essex County, and NJ Transit. In addition, both the state and federal governments are in an opportune position to contribute substantially to the proposed expansion.²⁰⁸ This comes at a time

the transportation of passengers and property on scheduled routes, within and beyond the territorial limits of the county or any beneficiary county, with the consent of the governing bodies of the municipalities into which such operation is extended, and on nonscheduled routes, by contract.

²⁰⁷ See *id.* § 27:26A-15.

²⁰⁸ See, e.g., Press Release, Office of the Governor, Governor Murphy Announces \$100 Million Investment in Clean Transportation Projects (Feb. 2, 2021), <https://nj.gov/governor/news/news/562021/approved/20210216a.shtml>; see also *U.S. Department of Transportation Announces Up to \$448 Million Loan for the 183A Phase III, 183S, and 290E Phase III Road Projects in Austin*, U.S. DEP'T TRANSP. (Mar. 2, 2021), <https://www.transportation.gov/briefing-room/us-department-transportation-announces-448-million-loan-183a-phase-iii-183s-and-290e> (describing “the first [Transportation Infrastructure Finance and Innovation Act] loan [totaling \$448 million] to be closed under the Biden Administration” for the construction of “tollway projects in the Austin, Texas metropolitan area.”); see also 49 U.S.C.A. §§ 22908(a), (d) (as amended by the Infrastructure Investment and Jobs Act of 2021) (stating that applicants for Section 22908 restoration and enhancement grants include not only “a public agency or publicly chartered authority” but also “a political subdivision of a State[.]” meaning that either NJ Transit, or Essex County, or the City of Newark, or either Essex County or the City of Newark, or both, “in partnership” with NJ Transit, may apply. In addition, priority among applicants is given to proposals “that include . . . other significant participation by State, local, and regional governmental and private entities); 49

when the City of Newark's transit infrastructure is already undergoing historic remediation.²⁰⁹ Including the residents of the City's neighborhoods in the use and enjoyment of these historic developments by permanently connecting them via light rail to the Newark Light Rail terminus at Newark Pennsylvania Station further supports the proposition that the time is now to implement the proposed expansion of the Newark Light Rail. The authority is there, and the money is there. All that is needed is the courage.

VI. CONCLUSION

Using pre-pandemic numbers from 2019, Essex County, neighbor to Hudson and Bergen counties, ranked as the third-most populous county in New Jersey.²¹⁰ But the City of Newark is New Jersey's most populous city.²¹¹ Essex County nonetheless ranks second in the state with a 14.9% poverty rate.²¹² Many, if not all, people living in poverty use or depend on public transit. As a means also of vindicating the fundamental freedom of movement and right to travel and reducing harmful fossil fuel emissions and road congestion, the proposed expansion could relieve reliance on overextended bus service along direct routes

U.S.C.A. § 22901(2)(A) (describing that applicants may apply for Rail Improvement Grants for “acquiring, constructing, improving, or inspecting equipment, track and track structures, or a facility for use in or for the primary benefit of intercity passenger rail service”); 49 U.S.C.A. § 24102(4) (“intercity rail service” means rail passenger transportation, except commuter rail passenger transportation”).

²⁰⁹ See Press Release, Office of the Governor, Governor Murphy Announces \$190 Million in Major Renovations at Newark Penn Station (Dec. 8, 2020), <https://www.nj.gov/governor/news/news/562020/20201208a.shtml> (describing “commitment of \$190 million for renovations and upgrades at historic Newark Penn Station”).

²¹⁰ *New Jersey Population by County*, INDEX MUNDI, <https://www.indexmundi.com/facts/united-states/quick-facts/new-jersey/population#chart> (last visited Dec. 5, 2021).

²¹¹ Benjamin Elisha Sawe, *The Most Populated Cities In New Jersey*, WORLD ATLAS (Apr. 17, 2018), <https://www.worldatlas.com/articles/the-most-populated-cities-in-new-jersey.html> (last visited Dec. 5, 2021) (“The 2010 census placed [Newark’s] population at 277,140, while a 2016 estimate placed the population at 281,764”).

²¹² *New Jersey Poverty Rate by County*, INDEX MUNDI, <https://www.indexmundi.com/facts/united-states/quick-facts/new-jersey/percent-of-people-of-all-ages-in-poverty#chart> (last visited Dec. 5, 2021).

2022]

COMMENT

259

serviced by light rail by implementing expanded high-volume, exclusively electric light rail service. As a means of evaluating the efficacy of the proposed expansion, construction could commence in phases. The construction of any one of the proposed routes could serve as a pilot phase. Eliminating redundant bus service along lines served by the expansion is complete to evaluate whether ridership increases or decreases relative to pre-expansion data could demonstrate whether commuters find the expanded light rail service accessible. Eliminating bus service along the routes serviced by the expansion would require NJ Transit to hold just one public hearing in the area affected.

We face a moral imperative to imagine solutions that work tomorrow as well as they do today. There are special interests that would have us maintain and even expand reliance on road transit, but with limited space in an already densely populated state, we must consider whether our current transit options can sustain tomorrow's needs. With both state and federal governments eager to invest in sustainable transit infrastructure, and with New Jersey's unique home rule in hand, the proposed expansion is a powerfully practical solution in Essex County, New Jersey. Courage is all that is needed to boldly introduce new access opportunities for all. Quasi-surface, quasi-subterranean transit infrastructure in densely populated areas is not a new idea, but it can work in Essex County and is also possible in other high-density areas. We have a duty to leave our posterity a better nation and a more perfect union. If for no other reason than their sake, the time is now to ensure access to opportunity remains open to all, even those who just need a ride.