

Black Transit: When Public Transportation Decision-Making Leads to Negative Economic Development

Audrey G. McFarlane*

ABSTRACT: In 2015, the Governor of Maryland cancelled a light rail project planned for Baltimore City. Around that time, governors in five states had also cancelled federally funded, mass transit rail projects. Each cancellation was similarly justified by claims that the transportation projects were unwise and unnecessary. This trend is concerning because public transportation is often crucial to low- and moderate-income people. The cancellations raise the question whether there should be some circumstances when a state should not be able to cancel transportation projects. The federal framework for public transportation funding allows seemingly unfettered discretion to cancel, while not acknowledging the perverse incentives that now exist to refuse funding for projects perceived as beneficial to stigmatized racial and class groups. Most strikingly, principles of development worked in reverse. Instead of pursuing economic development through guaranteed infrastructure investment and the multiplier potential of construction jobs and transit-oriented development likely to take place, the state decided to reject development under a rationale that such investment would be wasteful. This Essay argues that there is room in the federalism logic of the Spending Clause to ex ante consider pervasive and systemic racial hostility to public transportation and a discriminatory exercise of discretion. Federal mass transportation decision-making should be structured in a way that accounts for the pervasive, consistent, and structural hostility to Black mobility and projects perceived to benefit Black people. Because mobility is crucial to self-determination, economic survival and flourishing, the veto of rail projects like Baltimore's Red Line is an opportunity to consider the limitations of ex post racial remedies such as the equity-infused planning framework and Title VI disparate impact litigation. The Essay considers how racial equity and racial realism principles can

* Associate Dean of Faculty R&D; Dean Julius Isaacson Professor of Law, University of Baltimore School of Law. Thanks to the University of Baltimore School of Law Summer Research grant for support and Cassandra Havard and Taunya Banks for very helpful comments. Thanks to Jordan Culley for able research assistance.

inform the obligations of federal public transportation funding decision-making.

I. INTRODUCTION.....	2370
II. THE RED LINE PROJECT IN RACIALIZED TRANSPORTATION CONTEXT	2373
A. <i>WHY IS PUBLIC TRANSPORTATION SO INADEQUATE IN BALTIMORE?</i>	2375
B. <i>RED LINE PROJECT OVERVIEW</i>	2377
III. RACE AND CLASS STIGMATIZED PUBLIC TRANSIT AND THE DISINVESTMENT DYNAMIC.....	2383
IV. FEDERALISM AND RAIL TRANSIT AND PRESUMPTIONS OF RACIAL IMPACT	2389
A. <i>FEDERALISM WITH A RACIAL EQUITY LENS</i>	2390
B. <i>CONTRACTING FOR RACIAL EQUITY</i>	2392
C. <i>PARTICIPATORY LOCALISM</i>	2394
V. CONCLUSION	2396

I. INTRODUCTION

In 2015, Baltimore City made national news when protests erupted after Freddie Gray died from injuries sustained while being transported in a police van.¹ While marches, followed by unrest, played out on media, Baltimore, the former industrial powerhouse city, was yet again portrayed as a place of senseless destruction.² The televised standoffs with the police, sporadic looting of businesses amid dilapidated buildings were mesmerizing. The author recalls watching a young teenaged boy being asked by a TV reporter what he thought about nearby burned buildings, a leading question asking the boy to confirm he did not endorse the destruction. The boy did not condone the destruction but instead answered with a structural query: “Why are there three liquor

1. Alec MacGillis, *The Third Rail*, PLACESJ. (Mar. 2016), <https://placesjournal.org/article/the-third-rail/?cn-reloaded=1&cn-reloaded=1> [<https://perma.cc/75XY-9EUA>] (noting the unrest caused “damage to nearly 400 businesses, 144 vehicle fires, fifteen structural fires, 202 arrests, and dozens of injuries to police officers”).

2. See Whitney Richardson, *Devin Allen’s Inside Story in Baltimore*, N.Y. TIMES: LENS (June 24, 2015), <https://lens.blogs.nytimes.com/2015/06/24/devin-allens-inside-story-in-baltimore> [<https://perma.cc/K932-NNK8>] (The author recalls hearing Devin Allen on WYPR talk about how he taught himself photography and went to the protests to document what was really happening on the ground, the complexity, which he knew the mainstream media would not.).

stores on one block?” he asked, “why can’t we have an ice cream store?”³ The query went unanswered but poignantly highlighted that the unrest took place within a context of imbalance in the city that began well before what was depicted on camera.

At the same time, in 2015, in sharp contrast to the dramatic images of that night, efforts had been quietly underway for years to reset the city’s trajectory: a large infrastructure project, a 14.1 mile, east to west, light rail train line. Expected to promote access to employment as well as spur sorely needed development, the rail line was funded with both federal funds and state funds (raised from a gas tax increase). The 19-station route would ferry suburban residents from a park and ride lot at a federal agency office complex in the bordering county, through mostly Black West Baltimore City’s neighborhoods, past Freddie Gray’s impoverished neighborhood, tunnel beneath the city’s downtown out to the formerly industrial, now gentrifying, eastern side of the city. The route would provide access to an Amazon fulfillment warehouse terminating at a large medical center campus run by the largest employer in the state.⁴

Had the media possessed the ability to tear itself away from the spectacle of the unrest, the Red Line’s rigorous planning process would have shown that Baltimore, and cities like it, were capable of addressing problems deemed intractable with local will, state support and federal aid. But shortly after the unrest, the then-newly-elected governor summarily terminated the project.⁵ Despite having met 12 years of federally required planning, consultation, and design hurdles, the “shovel-ready” project with a \$900 million federal commitment and years of community planning, the governor cancelled the project as a wasteful boondoggle.⁶ The federal money available for construction was rejected.⁷ The state matching funds designated for the construction was reallocated to other highway projects in predominantly white areas around the state.⁸ The public reaction was stunned. “I never thought, ever, in my closing year in the US Senate, I would see a letter saying

3. For a similar exchange, see George Lettis, *Teen: ‘I Don’t Feel That Rioting Is the Right Answer’*, WBALTV11 (Apr. 28, 2015, 8:41 PM), <http://www.wbal.tv.com/news/teen-i-dont-feel-that-rioting-is-the-right-answer/32627844> [<https://perma.cc/X6A3-R3QF>].

4. MacGillis, *supra* note 1 (making the connection that this project was long awaited as a way “to reconnect the long segregated city and reduce the isolation of its poorest neighborhoods”).

5. Michael Dresser & Luke Broadwater, *Hogan Says No to Red Line, Yes to Purple*, BALTIMORE SUN (June 25, 2015, 11:25 PM), <https://www.baltimoresun.com/politics/bs-md-hogan-transportation-20150624-story.html> [<https://perma.cc/2R84-DYG3>].

6. *Id.*

7. The Associated Press, *Md. Formally Tells US it Isn’t Seeking \$900M for Red Line*, BALTIMORE SUN (Aug. 18, 2015, 8:48 AM), <https://www.baltimoresun.com/politics/bs-md-red-line-funds-20150818-story.html> [<https://perma.cc/6XVL-RAQJ>].

8. See *Baltimore -Red-Line-Complaint*, NAACP LEGAL DEF. FUND, <https://www.naacpldf.org/document/baltimore-red-line-complaint> [<https://perma.cc/BQM6-JTK7>] (last updated Feb. 22, 2021).

the Baltimore region rejects \$900[] [million] in federal investment,' Senator Barbara Mikulski said at the time."⁹

In and around that same time, the Republican governors of Wisconsin, Ohio, New Jersey and Florida also rejected allocated federal funds for rail projects that had also been in the planning process under prior administrations.¹⁰ In the case of the Red Line, though, the project was at a distinctively advanced stage of implementation; the rejected federal funds were redistributed to the next eligible states on the short list for the funds so transportation was, in fact, built.¹¹ The residents of Maryland and other applicant states in their own various states of funding eligibility were deprived of need-based expectations for public transportation.¹² This cancellation phenomenon presents the pressing question of how transportation decision-making can be structured to acknowledge that the hostility to public transportation may come from within the decision-making process itself.

This Essay considers the Red Line cancellation as part of a small but significant phenomenon of the summary cancellation of federally-funded public transportation projects and argues that because public transit is both expensive and stigmatized, widely perceived to be beneficial to low-income people, public transportation projects are vulnerable to a disinvestment dynamic—a negative economic development. In many places, because lower income is conflated with race, i.e., Blacks, being perceived to give this group of people mobility at public cost is considered inherently wasteful and supports an opposition to investment, thus supporting disinvestment. This disinvestment dynamic is already apparent in places inhabited by Black people and public transportation projects already ostensibly recognize that there are profound racial equity imperatives in ensuring such projects are

9. Baynard Woods, *Maryland Accused of Race Discrimination over Scrapping of Baltimore Rail Project*, *GUARDIAN* (Dec. 23, 2015), <https://www.theguardian.com/us-news/2015/dec/23/maryland-lawsuit-baltimore-rail-project-racism-larry-hogan> [https://perma.cc/A7RY-RCZ7].

10. See Michael Cooper, *More U.S. Rail Funds for 13 States as 2 Reject Aid*, *N.Y. TIMES* (Dec. 9, 2010), <https://www.nytimes.com/2010/12/10/us/10rail.html> [https://perma.cc/RH67-449E]; Mark Holan, *Gov. Rick Scott Turns Down High-Speed Rail Funding*, *TAMPA BAY BUS. J.* (Feb. 16, 2011, 10:00 AM), <https://www.bizjournals.com/tampabay/news/2011/02/16/scott-turns-down-high-speed-rail-funding.html> [https://perma.cc/82CE-FNYL]; Kate Zernike, *Report Disputes Christie's Basis for Halting Tunnel*, *N.Y. TIMES* (Apr. 10, 2012), <https://www.nytimes.com/2012/04/10/nyregion/report-disputes-christies-reason-for-halting-tunnel-project-in-2010.html> [https://perma.cc/T6ET-LVZL].

11. See FED. TRANSIT ADMIN., *ANNUAL REPORT ON FUNDING RECOMMENDATIONS: FISCAL YEAR 2016*, at 4 tbl.1 (2015), https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/FY16_Annual_Report_on_Funding_Recommendations_CIG_Program.pdf [https://perma.cc/J8FZ-AN3M] [hereinafter *ANNUAL REPORT ON FUNDING*] (“New Starts Projects Recommended for Full Funding Grant Agreements”).

12. See John Fritze, *States Scramble as Federal Highway Funding Erodes*, *BALT. SUN* (Feb. 21, 2015, 6:58 PM), <https://www.baltimoresun.com/politics/bs-md-transportation-funding-20150218-story.html> [https://perma.cc/8TBV-SYQM] (discussing Maryland's declining federal gas tax revenues and demonstrating it was egregious to turn the money down).

completed to open up isolated and cut off areas to opportunity.¹³ In order to ensure that projects beneficial to Black communities proceed, Congress and regulators need to structure the transportation funding process to account for this new ideologically based likelihood of cancellation.

The current funding framework incorporates racial equity considerations through the marrying of Title VI and the National Environmental Policy Act's ("NEPA") environmental impact assessments.¹⁴ The local interest in racial equity cannot be protected solely at the planning process stage because such processes are focused on anticipating implementational impact, not the impact of unexpected termination. NEPA equity assessments are focused on ensuring equity in project design—asking who will be hurt in the implementation of the project itself. The same concern applies to the many forgotten public transit projects that are never undertaken. NEPA does not directly contemplate the disinvestment dynamic and its potential for negative economic development: That the project itself might be terminated for great political benefit. The potential for disinvestment is foreseeable and should be accounted for, in advance, in the transportation funding process. Once the planning process has been completed, the assumption should be that federal public transit money requires extraordinary justification before rejecting it.

Part I reviews the Red Line light rail project planning and rejection in the context of a fraught development history of racial containment and hostility to Black geographic and socioeconomic mobility and disinvestment.

Part II explores the public transportation funding process requirement of extensive local planning according to detailed federal standards in order to qualify for and secure a federal commitment to fund construction. This Part argues that the process fails to account for public transit's vulnerability to the powerful disinvestment dynamic that occurs when expenditures are perceived as low status, or Black, negative economic development.

Part III argues that in light of the potential for negative economic development, Title VI should be applied prophylactically to the transportation funding process. Because public transit is often perceived as Black transit, state decision-making about this form of transit needs presumptive enhanced protection against the possibility of decisions with a racially disparate impact.

II. THE RED LINE PROJECT IN RACIALIZED TRANSPORTATION CONTEXT

Baltimore is a densely built, largely car-dependent city with a shockingly inadequate bus-based public transportation system. The consequence is that

13. See generally John A. Powell, *Opportunity-Based Housing*, 12 J. AFFORDABLE HOUS. & CMTY. DEV. L. 188 (2003) (explaining opportunity segregation).

14. See Marianne Engelman Lado, *Toward Civil Rights Enforcement in the Environmental Justice Context: Step One: Acknowledging the Problem*, 29 FORDHAM ENV'T L. REV. 1, 17–18 (2017) ("Title VI and the EJ Executive Order are complementary and mutually reinforcing: Title VI and NEPA provided the legal authority upon which the EJ Executive Order was based and, in turn, the Executive Order was intended to strengthen federal enforcement of Title VI.")

residents of substantial sections of the city have great difficulty traveling reliably and swiftly to places of employment. The Red Line would have been only the third rail line in the city. First envisioned to run due east and west on planners' easels as far back as the late 1960s, the east-west line had to wait as the first two lines were built in the 1980s and 90s, one, a light rail line traveling from the north of the city south to the airport, and the other, a disconnected subway line traveling to the north west of the city in a U-shaped loop to the northeast. Thus, the only way to get directly from west to east in Baltimore is by bus or car. This is a slow, halting process from predominately Black West Baltimore through the downtown to the transitioning and gentrifying eastern industrial side of the city (both Black and white). Thus, in order to get where you need to go easily, you need to own a car. Absent a car, the buses are infrequent, do not necessarily go where you need them to go, and do not get there quickly.¹⁵

It is hard to fully grasp the transportation problems faced by Baltimore City residents or the travel experience unless you experience them. A city official often tells the story of his formative experiences with public transportation in the city. His mother would "wake up at 4:30 a.m. . . . [to] take two buses" daily to get to work across the city from east to west at the Social Security Administration.¹⁶ A county resident with a job on the outskirts of the city could not get a bus directly to that location without taking a bus south, down into the center of the city to pick up another bus and ride north out to the suburban location. With respect to the proposed Red Line corridor, an illustrative depiction of the inadequate public transit experience occurred when a local reporter took the bus with a resident of West Baltimore who was trying to make it in time for the beginning of his shift in East Baltimore at the Amazon Warehouse.¹⁷ Boarding the bus at 5 AM, after 90 minutes of travel for what would have been a 20-minute drive by car, the worker still had not reached his destination in time to catch the Amazon private shuttle to complete the journey.¹⁸ Being late more than three times meant he would lose his job.¹⁹

As further indication of this public transportation inadequacy, up until the advent of rideshare services like Uber and Lyft, one would usually see

15. See generally Alex Holt, *Baltimore's Transit System Is Not Meeting Residents' Needs. Can this Plan Change that?*, GREATER GREATER WASH. (Jan. 27, 2020), <https://ggwash.org/view/75825/baltimores-transit-system-is-not-meeting-the-needs-of-all-its-resident-can-a-city-councilmembers-plan-change-that> [<https://perma.cc/545X-LJDF>].

16. Yvonne Wenger, *Nick Mosby Bills Himself as New-Age Leader in Baltimore Mayoral Race*, BALT. SUN (Mar. 24, 2016, 6:27 PM), <https://www.baltimoresun.com/bs-md-ci-mosby-profile-20160324-story.html> [<https://perma.cc/BMK5-ZVMR>].

17. Jayne Miller, *Video: Baltimore's Struggle to Get to Work*, WBALTV11 (May 11, 2017, 8:20 AM), <https://www.wbaltv.com/article/video-baltimore-s-struggle-to-get-to-work/9636118> [<https://perma.cc/8LBS-BZPG>].

18. *Id.*

19. *Id.*

someone standing on any Baltimore street at an intersection, their arm outstretched and gesturing with their pointing finger up and down repeatedly, trying to hail a private car to stop and give them a ride. Once a car stopped, the passenger and driver would negotiate the price and the driver would drop the person off, pocketing cash for the detour. This system known as the hack system was pervasive throughout the city and worked remarkably well. It was a further indicator that the bus would not get the person to where they wanted to go when they wanted to get there.²⁰ That hack system largely dwindled with the introduction of rideshare apps, which have also thrived as a supplement to an inadequate bus-based system. The east-west Red Line would have been an important first step in turning rail transportation into a truly city-wide system.

A. *WHY IS PUBLIC TRANSPORTATION SO INADEQUATE IN BALTIMORE?*

Baltimore's transportation problems have to be understood as developing alongside and arising out of burgeoning racial segregation. The city started out as one of the early leaders of urban transportation but,²¹ as Alec MacGillis documents, when the city was at its zenith in terms of economic activity and population it was also at its nadir of racial animus and aversion to the growing presence of Black people in the city.²² Street cars facilitated the leaving behind of center city neighborhoods with stately rowhouses for new country-like bucolic garden, street car suburbs.²³ One of the destination neighborhoods was the famous Roland Park, designed by Frederick Law Olmstead, Jr., which also has the dubious distinction of pioneering racially

20. MacGillis, *supra* note 1. The inadequate bus system “follow[s] the old streetcar routes, comprehensible only to those with no alternative but to rely on them.” *Id.* MacGillis describes the gypsy cab system that allowed Black residents to get around and the informal hack system that transported people, showing that people will find a way to overcome barriers to transportation. *Id.* n.12. He cites to a 2013 Berkeley study that describes the informal hacking system. *Id.* (citing Kristen Johnson, *Hacking: The Informal Transportation System in Baltimore*, BERKELEY PLAN. J. (Mar. 5, 2013), <https://berkeleyplanningjournal.com/urbanfringe/2013/03/hacking-the-informal-transportation-system-in-baltimore> [<https://perma.cc/68WN-8ZP8>]).

21. MacGillis, *supra* note 1 (noting the city had “the nation’s first commercially operated electric streetcar in 1885” and a city-wide 400-mile network of street cars including elevated lines).

22. *Id.* MacGillis documents the corresponding expanding Black population and how poorly received it was:

By 1890, 67,000 of the city’s 440,000 residents were [B]lack. . . . By 1940, Baltimore had the highest proportion of [B]lacks of the country’s ten biggest cities — a fifth of the city, 168,000 people By the early 1940s, a fifth of the Baltimore’s residents, mostly [B]lack, were squeezed into 1.5 square miles, one-sixtieth of the city’s area, with an average of eight people per home in [B]lack neighborhoods.

Id.

23. See generally KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES (1985) (chronicling the suburban growth beginning from the 19th century to present day).

restrictive covenants.²⁴ In the more centrally located neighborhoods white wealthy residents had departed, replaced by not quite as wealthy white residents who acutely felt a threat to their social identity and status posed by striver Black professionals who dared move into their neighborhoods.²⁵ In 1911, the city attempted to protect neighborhoods from racial change by pioneering the first racial zoning ordinance in the United States which banned Blacks from moving to majority white blocks and purported to prevent whites from doing the same with respect to majority Black blocks.²⁶ The ordinance's stated goal was to "preserv[e] peace, prevent[] conflict and ill feeling between the white and colored races in Baltimore City."²⁷

When racial zoning was invalidated in *Buchanan v. Warley*,²⁸ Baltimore City engaged in a concerted pattern of containment and dispersal policies and practices aimed at Black residents.²⁹ These policies were worsened by redlining practices which, among other things, created dual real estate markets and deprived Black segregated neighborhoods of mortgage financing to fund purchases of real property in Black neighborhoods.³⁰ Combined with federally encouraged redlining in the 1940s, Baltimore's 168,000 Black residents were squeezed into one-sixtieth of the city's land area, a mere 1.5 square miles.³¹ MacGillis astutely notes that redlining ironically coincided with a historical moment of high employment. Thus, segregation paradoxically was at its worst while the potential for Black

24. Elizabeth Evitts Dickinson, *Roland Park: One of America's First Garden Suburbs, and Built for Whites Only*, JOHNS HOPKINS MAG., Fall 2014, <https://hub.jhu.edu/magazine/2014/fall/roland-park-papers-archives> [<https://perma.cc/3JKN-88HY>].

25. Carl H. Nightingale, *The Transnational Contexts of Early Twentieth-Century American Urban Segregation*, 39 J. SOC. HIST. 667, 673-74 (2006).

26. *Id.* at 667; Garrett Power, *Apartheid Baltimore Style: The Residential Segregation Ordinances of 1910-1913*, 42 MD. L. REV. 289, 289 (1983); Emily Lieb, *The "Baltimore Idea" and the Cities It Built*, 25 S. CULTURES 104, 105 (2019).

27. Power, *supra* note 26, at 289; see *Baltimore Tries Drastic Plan of Race Segregation: Strange Situation Which Led the Oriole City to Adopt the Most Pronounced "Jim Crow" Measure on Record.*, N.Y. TIMES, Dec. 25, 1910, at 2, ProQuest Historical Newspapers: The New York Times, document ID no. 97075778 (characterizing Baltimore's segregation ordinance as radical because it restricted use of privately owned property in the entire city. "It seeks to cut off from men of a certain class—[B]lack in one set of circumstances, white in another—the right to purchase and enjoy property anywhere within the limits of Baltimore, under a certain limitation, saying: 'Thus far shalt thou come but no further.'").

28. *Buchanan v. Warley*, 245 U.S. 60, 61-62 (1917).

29. See Power, *supra* note 26, at 315 ("The plan was 'to forc[e] out the blacks already residing in [white] neighborhoods and [to ensure] that no others entered.'"); ANTERO PIETILA, NOT IN MY NEIGHBORHOOD: HOW BIGOTRY SHAPED A GREAT AMERICAN CITY 51-52 (2010) (describing how the power of eminent domain was used to condemn and acquire properties in a downtown Black neighborhood that was then razed to create a park to purposefully contain and disperse Black communities).

30. PIETILA, *supra* note 29, at 61-75, 97-98.

31. MacGillis, *supra* note 1.

economic mobility was actually at its highest because of wartime employment.³²

As the streetcar lines dwindled, Baltimore became a bus and car city and whites left the city via the federally funded highways.³³ Mirroring turn of the nineteenth century's mobility wars, the highways of the 1950s and 60s transformed the racialized ability to escape locally to a racialized ability to escape far and wide. "[I]n one neighborhood after another, as the middle-class [B]lacks arrived, the middle-class whites left."³⁴ During the 1960s, the east-west route across the city (later planned for the Red Line) was first designated for a highway project to be built from the east historic waterfront neighborhood in Fells Point through an intact, thriving Black neighborhood in West Baltimore, Harlem Park. As Debora Archer's work most recently demonstrates, such highways were purposeful and consistently built through decimated black communities.³⁵ While most of Harlem Park was demolished, the east-west expressway eventually became a failed highway project when opposition successfully halted construction.³⁶ The tiny, 1.4-mile-long section of highway that was built is today dubbed the "Highway to Nowhere."³⁷

B. RED LINE PROJECT OVERVIEW³⁸

Beginning in 2003, in recognition of burgeoning development and employment opportunities in the eastern side of the city and the benefits to the economically stagnant western side of the city, the Red Line project commenced the elaborate and detailed planning process structured by federal law. Under the Federal Transit Administration's ("FTA") rail construction grant program, the New Starts Program, funding for construction was available only after compliance with an extensive and rigorous project

32. *Id.*

33. See CLAYTON NALL, *THE ROAD TO INEQUALITY: HOW THE FEDERAL HIGHWAY PROGRAM POLARIZED AMERICA AND UNDERMINED CITIES* 131–32 (2018) (attributing today's political polarization to a partisan geography between Republican suburbs and Democratic cities caused by the demographic sorting that took place when highways facilitating white middle- and upper-middle-class flight to the suburbs shaping today's public transportation policy choices).

34. MacGillis, *supra* note 1. MacGillis emphasizes that white flight did not happen because of riots, or crime or drugs, what he terms Baltimore's "unraveling"; it happened before. *Id.* ("[I]t's vital to understand that most of that flight came long before the convulsions of the late 1960s and '70s—before the dramatic surge in street crime and heroin addiction . . .").

35. Deborah N. Archer, "White Men's Roads Through Black Men's Homes": *Advancing Racial Equity Through Highway Reconstruction*, 73 VAND. L. REV. 1259, 1276–78 (2020).

36. See generally ERIC AVILA, *THE FOLKLORE OF THE FREEWAY: RACE AND REVOLT IN THE MODERNIST CITY* (2014) (noting that Black neighborhoods were less successful than white neighborhoods in battling highway projects).

37. MacGillis, *supra* note 1.

38. See generally *Red Line Project Overview*, BALT. CITY DEP'T OF TRANSP., <https://transportation.baltimorecity.gov/transportation-projects/red-line> [<https://perma.cc/EP2B-5S3E>] (last updated Mar. 13, 2021) (describing the Red Line project and the different project phases).

development phase including ample public input and planning.³⁹ The project development phase required undertaking a rigorous “environmental review process including developing and reviewing alternatives” for the rail route and mode of transit (light or heavy rail, bus etc.) culminating in local selection of the “locally-preferred alternative (LPA).”⁴⁰ The LPA decided what type of train (heavy or light rail, above or below ground) and adopted that selection into the long-range transportation plan prepared by the regional planning entity.⁴¹ At all stages, the extensive project development phase involved both a significant public participation process as well as simultaneously securing commitments for state funding in addition to completing a detailed engineering and design process. Only after the multi-year compliance with planning and engineering requirements would the FTA consider the project as meeting the requirements for the substantial award of federal funding for construction in the form of the Full Funding Grant Agreement.⁴² The purpose of this funding structure was to ensure that the actual federal funding would be applied only to fully developed, cost-efficient projects.

When Maryland filed a Notice of Intent for the Red Line Project to initiate the NEPA process, the public planning was guided by various local, regional, and state entities. The planning included entities such as the city, State Transportation Department, and the Metropolitan Planning Organization (“MPO”).⁴³ Over a period of years, the regional planning entity conducted multiple (dozens) of public consultation sessions, open houses, community workshops, and community input culminating in locally-based citizen committees assigned to each planned rail stop, coordination with neighborhoods, specifications and mock-ups of the actual train; consideration of different train types and configurations were attended by hundreds of

39. See 49 U.S.C. § 5309 (2018) (providing for a rail construction grant program for fixed guideway capital investments in either existing or new heavy, commuter and light rail, street cars and bus rapid transit); Candy Thomson, *Red Line’s Environmental Plan Gains Federal Approval*, BALT. SUN (Mar. 5, 2013, 7:18 PM), <https://www.baltimoresun.com/latest/bs-md-red-line-decision-20130305-story.html> [<https://perma.cc/WG22-Q7HE>].

40. *Project Development Process MAP-21 CIG Program*, FED. TRANSIT ADMIN., <https://cms7.fta.dot.gov/funding/grant-programs/capital-investments/project-development-process-map-21-cig-program-0> [<https://perma.cc/MZP9-XQKT>] (last updated Mar. 13, 2021); *About the Program*, FED. TRANSIT ADMIN. (Mar. 31, 2020), <https://www.transit.dot.gov/funding/grant-programs/capital-investments/about-program> [<https://perma.cc/4GPA-59EK>].

41. See generally BALT. RED-LINE, RED LINE FEIS – EXECUTIVE SUMMARY (2012), https://transportation.baltimorecity.gov/sites/default/files/Redline_executive%20Summary_feis.pdf [<https://perma.cc/XLU5-HEE5>] (describing the alternative considered and selected for the Red Line).

42. 49 U.S.C. § 5039.

43. See NALL, *supra* note 33, at 131 (describing MPOs as created to ensure a local role in highway planning: “MPOs . . . adopt decisions that reflect the preferences of those who sit on MPO boards. These board members are often elected officials responsive to their own voters’ preferences.”) (citations omitted).

citizens. The Notice of Intent filed to initiate the NEPA process recounts the extensive planning that took place.⁴⁴

In 2009, once the LPA was announced, the next phase involved a massive expenditure of money spent of engineering the project:

After the announcement of the LPA, the MTA conducted additional technical studies, continued public involvement and agency coordination activities, including the Station Area Advisory Committees (SAACs). The SAACs are an interactive community-based design initiative formed to fulfill a commitment for community-centered station design, development, and stewardship as set forth in the 2008 Baltimore City Red Line Community Compact. Seventeen SAACs were formed in Fall 2010 and began providing input into the planning and design of the 19 proposed light rail stations. In the Spring of 2011, four public meetings were held to highlight the work of the SAACs and receive additional public input.⁴⁵

44. See FED. TRANSIT ADMIN., RECORD OF DECISION: BALTIMORE RED LINE PROJECT BALTIMORE COUNTY AND CITY, MARYLAND 16–17 (2013), https://transportation.baltimorecity.gov/sites/default/files/Redline_record%20Of%20Decision.pdf [<https://perma.cc/C8LH-CBVQ>] [hereinafter RECORD OF DECISION] (“The NOI to initiate the NEPA process was published in the Federal Register on April 11, 2003. Scoping meetings were held at various locations throughout the project study corridor in May and June of 2003. An agency scoping meeting was held on May 16, 2003 at the offices of the Baltimore Metropolitan Council (BMC). Five public scoping meetings were held between May 21 and June 18, 2003 to provide opportunities for the public to comment. Between 2004 and 2007, the MTA held five sets of open houses and community workshops to involve the public in the development of alternatives and station locations: fall 2004 Open House, spring 2005 Open House, fall 2005 Community Workshop, Spring 2006 Community Workshop, and Fall 2007 Open Houses. Four public hearings for the AA/DEIS were held at various locations throughout the study corridor on November 6, 8, 12, and 13, 2008. Over 500 citizens attended the four hearings, and over 650 comments were received from individuals and organizations on the AA/DEIS.”).

45. *Id.* at 2; *see id.* at 17 (“Since the AA/DEIS Public Hearings, approximately 350 outreach events have been held with stakeholders along the project study corridor. Red Line public involvement activities during this phase included: public hearings, open houses in May 2011 and June 2012, Citizens’ Advisory Council and SAAC meetings, community events, small group meetings, and the distribution of various project publications. In addition, non-traditional targeted outreach efforts which included grocery store outreach, door-to-door canvassing, ministerial outreach, transit center outreach, and social media campaigns were employed to provide a comprehensive program to reach stakeholders and more specifically traditionally underserved populations such as minority, low-income, elderly, and disabled populations. Comments received on the AA/DEIS were addressed in the FEIS. The Red Line FEIS was approved by FTA on December 4, 2012.”); *see also* ANNA RICKLIN, BALT. CITY DEP’T OF TRANSP., THE RED LINE TRANSIT PROJECT HEALTH IMPACT ASSESSMENT 3 (2008), <https://www.pewtrusts.org/~media/assets/2008/12/19/baltimoreredline.pdf> [<https://perma.cc/JGJ7-5CGL>] (assessing how the Redline impacts community health) (“On May 10, 2008 Mayor Sheila Dixon organized a Community Summit for Red Line . . . [a] starting point for the Community Compact, an innovative agreement among the city, state, and Baltimore City residents to define success for the Red Line on community terms.”).

The chosen path for the light rail was along the route of one of the busiest bus lines with the longest commuting times, finally putting the right-of-way along the Highway to Nowhere to beneficial and productive use, at least partly redeeming the demolition of the now impoverished Harlem Park neighborhood.⁴⁶

The total sunk cost for state expenditures in compliance with the federally required planning and engineering was approximately \$288 million.⁴⁷ While the Red Line would have been a direct counter to the disinvestment along the planned route and was ripe with gentrification potential (a double-edged sword the city would have happily looked forward to contending with), the plan was far from perfect and not without opposition.⁴⁸ As Alec MacGillis observes, gentrification was likely what gave the Red Line viability and was also a hidden source of the local opposition it faced.⁴⁹ Residents from more affluent neighborhoods on each end of the line were likely concerned either by the disruption from construction or objected to the mobility that it would provide to low-income people.⁵⁰ These concerns echoed the earlier opposition to Baltimore's earlier rail projects which were then derisively referred to as the "LOOT rail."⁵¹

Despite the over a decade's worth of planning, studies, and engineering, the plans came to an abrupt halt when Governor Hogan announced he had cancelled the entire project. State funds allocated for the project would be withdrawn and the \$900 million in New Starts funds for which the state had

46. See MacGillis, *supra* note 1.

47. Michael Dresser, *With Red Line Canceled, \$288 Million May Be Gone*, BALT. SUN (June 27, 2015, 1:53 PM), <https://www.baltimoresun.com/maryland/bs-md-sun-investigates-transit-20150627-story.html> [https://perma.cc/4BD7-22XF] ("With Gov. Larry Hogan's decision to pull the plug on Baltimore's Red Line, \$288 million appears to be down the drain. That's how much the Maryland Transit Administration has spent over a dozen years on planning, design, engineering and land acquisition for what was to have been an almost \$3 billion light rail project between Woodlawn and Bayview, said Maryland Department of Transportation spokeswoman Erin Henson.").

48. MacGillis, *supra* note 1.

49. *Id.* MacGillis makes clear that what made the Red Line finally viable was gentrification ironically publicly funded with generous tax incentives:

[A]s the neighborhoods prospered—the arrival of Whole Foods in Harbor East . . . helped give new life to the prospect of the old third rail line. No longer was the line merely a link for impoverished West Baltimore; its eastern stretch would run through the most active and gentrifying frontier in the city, . . . [M]any of the new arrivals, especially the younger ones, saw the new line for the progress it represented.

Id.

50. *Id.* ("There was some resistance, too, in ever-more gentrified Canton, among the neighborhood old-timers and the empty-nesters who'd moved back into the city—and who, in an echo of the suburbs' fear of the "loot rail," fretted about making their increasingly tony neighborhood that much more accessible.").

51. Scott M. Kozel, *Baltimore Metro Subway*, RDS. TO THE FUTURE (Oct. 13, 2002), http://www.roadstothefuture.com/Baltimore_Metro.html [https://perma.cc/Jp46-2D2G].

competitively qualified to receive were rejected.⁵² According to one account the declaration seemed to involve a performative display of governance: “He announced his decision with gusto, telling reporters, ‘We are not opposed to public transportation. We are opposed to wasteful boondoggles.’”⁵³ The announcement was accompanied by a map of transportation projects planned around the state that had a blank hole in the center of the map where Baltimore City was left out of the map.⁵⁴ The blank space powerfully and insultingly signaled a geography for transportation project funding that eliminated the place with the highest concentration of black and poor residents as a priority.⁵⁵ Instead, the governor “announced that he would increase infrastructure spending on roads and bridges by \$1.35 billion—from Western Maryland to the Eastern Shore.”⁵⁶ Later, the governor “defended his administration’s treatment of Baltimore, noting that he recently sent millions to the city to help it recover from recent rioting.”⁵⁷

In Baltimore City, the sudden cancellation was devastating and greeted with stunned dismay.⁵⁸ To this day, residents still talk bitterly about the cancelled project. The new rail line had been highly anticipated for sorely needed transportation service and seen as a crucial step in the direction of

52. See Dresser & Broadwater, *supra* note 5. Indeed, the Maryland governor “proved his willingness to invest billions in mass transit by announcing his decision to build the Washington, D.C., region’s Purple Line on the same day he deep-sixed the \$2.9 billion Baltimore project.” Bruce DePuyt, *Four Years Later, Death of Red Line Still Angers ‘Car-Free’ Lawmaker*, MD. MATTERS (June 25, 2019), <https://www.marylandmatters.org/2019/06/25/four-years-later-death-of-red-line-still-angers-car-free-lawmaker> [https://perma.cc/7VMW-6UXE] (“The state sunk nearly \$300 million into planning the Red Line, a project that—like the Purple Line in Prince George’s and Montgomery—qualified for approximately \$900 million in hard-to-get federal funds.”); see also Katherine Shaver, *New Bus System Revives Anger, Frustration over Lost Light-Rail in Baltimore*, WASH. POST (July 15, 2017), https://www.washingtonpost.com/local/trafficandcommuting/new-bus-system-revives-anger-frustration-over-lost-light-rail-in-baltimore/2017/07/15/oa11b22a-61a4-11e7-8adc-fea80e32bf47_story.html [https://perma.cc/DA52-FMZK] (discussing Baltimore citizens’ frustration with the cancellation of the Red Line project).

53. DePuyt, *supra* note 52; see also Christian Schaffer, *Governor Hogan Defends Decision to Cancel the Red Line*, WMAR BALT. (Oct. 30, 2018, 5:41 PM), <https://www.wmar2news.com/news/political/governor-hogan-defends-decision-to-cancel-the-red-line> [https://perma.cc/G83Q-V2QK] (“I can confirm today that the Red Line, as currently designed, is not going to be built.”).

54. Schaffer, *supra* note 53; Dresser & Broadwater, *supra* note 5.

55. See Ruth Colker, *The Power of Insults*, 100 B.U. L. REV. 1, 1 (2020) (explaining how insults are used to impede reform to structural subordination. For example, “[i]nsults have played an important and previously unrecognized role in the creation of . . . limitations [on effective civil rights reform].”).

56. Ron Cassie, *Hogan Puts Brakes on Red Line*, BALT. (June 25, 2015, 7:06 PM), <https://www.baltimoremagazine.com/section/community/hogan-says-no-to-red-line> [https://perma.cc/JF M3-TL39]; see also *Governor Larry Hogan Announces \$1.97 Billion in Transportation Funding*, MARYLAND.GOV, <https://governor.maryland.gov/2015/06/25/governor-larry-hogan-announces-1-97-billion-in-transportation-funding> [https://perma.cc/S48D-UKMZ] (last updated Mar. 16, 2021) (discussing the announcement of the plan to improve road and bridges).

57. Dresser & Broadwater, *supra* note 5.

58. Rachel Monroe, *Strong Reactions to Hogan’s Red Line Decision*, BALT. FISHBOWL (June 26, 2015), <https://baltimorefishbowl.com/stories/strong-reactions-to-hogans-red-line-decision> [https://perma.cc/S49H-N85F].

meaningfully improving the city's fortunes and that of its residents. Residents and participants were at a loss. How could it simply just be over? How could all that work, citizen energy and participation have come to naught? "Cynthia Shaw, an elderly woman from Edmondson Village, asked about the upgrades that her community group had devised for the area around the planned station. 'What happens to the trees we were planning, the other designs? Who do we talk to?'"⁵⁹ Glenn Smith of Baltimore Equity Transit Coalition observed later,

the lack of reliable public transportation remains the biggest impediment to employment in many neighborhoods "This was 13 years of planning, working with community leaders and community associations, and then just to come in and call it a 'boondoggle,' instead of, 'How can we fix this? What can be improved?' And to send \$900 million back to the federal government—who does that? . . . It felt punitive and mean-spirited."⁶⁰

The Red Line had been included as one of seven New Starts Projects approved around the country, in Los Angeles, San Diego, Denver, Minneapolis, and Fort Worth (including another Rail Project in the Maryland and DC suburbs, the Purple Line), as recommended for Full Funding Grant Agreements.⁶¹ After the project was cancelled, the federal funds were redistributed to other projects in the federal funding pipeline.⁶² State matching funds in Maryland were distributed in primarily white areas for car-dependent highway projects.

The NAACP and the ACLU brought a Title VI complaint challenging the racially disparate impact of the cancellation and the reallocation of the dedicated state funds to highway projects.⁶³ As one of their experts opined:

Comparing the results of the user benefit analysis for the Red Line with those for the Highway Improvements Alternative, we find that

59. MacGillis, *supra* note 1.

60. Ron Cassie, *Likable Larry: Improbably, Larry Hogan is the Second-Most-Popular Governor in the Country. But is he Good for Baltimore?*, *BALT.* (Oct. 2018), <https://www.baltimoremagazine.com/section/historypolitics/how-did-larry-hogan-become-second-most-popular-governor-in-the-country> [<https://perma.cc/R76K-3MRG>].

61. See ANNUAL REPORT ON FUNDING, *supra* note 11 ("New Starts Projects Recommended for Full Funding Grant Agreements").

62. See *Transit: Maryland to Lose \$100 Million in Federal Funding over Red Line Cancellation*, RDS & BRIDGES (Aug. 13, 2015), <https://www.roadsbridges.com/transit-maryland-lose-100-million-federal-funding-over-red-line-cancellation> [<https://perma.cc/6NCG-RUQN>] (noting then-DOT Secretary Foxx's statement that "if the governor's [sic] slated decision to cancel the project stands, the funds must be redirected to projects in other communities to ensure that they remain actively deployed for New/Small Start investments") (alterations in original); ANNUAL REPORT ON FUNDING, *supra* note 11, at 6.

63. See *Baltimore-Red-Line-Complaint*, *supra* note 8.

canceling the Red Line and instead building the specified highway improvements would take away user benefits from blacks and other racial minorities, primarily in the Baltimore area, and would increase user benefits to white residents, primarily in other parts of Maryland.⁶⁴

While there was initially a favorable read of the complaint in a letter from the FTA Office of Civil Rights, after a change in Presidential administrations, the Red Line Title VI complaint was shelved with no decision. This meant that the residents deprived of the project would not get justice for their loss. But the lawsuit, had it been successful, could not have restored the Red Line project, but instead would have provided merely an allocation of federal resources possibly as a substitute compensation for the loss.⁶⁵

III. RACE AND CLASS STIGMATIZED PUBLIC TRANSIT AND THE DISINVESTMENT DYNAMIC

The Red Line story lays bare several layers of complexity. Not only is the federal transportation funding process complex, but the story also took place against a backdrop of racialized highway development and public transportation underinvestment that made the need for public transportation acute while simultaneously difficult to effectuate. The racialized geography of the preceding 90-plus years of development meant that connecting places with sustained investment in separation and disconnection was always going to result in public transportation that was going to be inadequate. This is because, as Deborah Archer points out, the terrain was shaped by racial

64. ECONORTHWEST, BALTIMORE RED LINE CANCELLATION: THE IMPLICATIONS FOR BLACK HOUSEHOLDS 13 (2015), <https://www.naacpldf.org/wp-content/uploads/Economic-Impacts-of-Baltimore-Red-Line-Cancellation-1.pdf> [<https://perma.cc/8VP6-FZC5>]. Applying the *Castaneda v. Partida*, 430 U.S. 482 (1977) standard, the report found:

7.926 million of the trips that would be harmed by the policy change were by [B]lack travelers, a difference of 1.093 million, or 487 standard deviations, from the expected number. . . . 70.5 percent of trips by [B]lack travelers, 57.4 percent of trips by white travelers, and 56.9 percent of trips by other travelers would be negatively affected. Additionally, model results show that [B]lacks would be made worse off by more than \$19 million per year, other minorities would be made worse off by more than \$600 thousand, and whites would be made better off by almost \$35 million.

Id.

65. MacGillis, *supra* note 1. The Title VI lawsuit suit took the governor by surprise. After the cancellation, the State reorganized the buses by identifying routes with colors, the red, yellow and pink lines instead of numbered routes. See *BaltimoreLink Basics*, MD. TRANSIT ADMIN., <https://www.mta.maryland.gov/baltimorelink-basics> [<https://perma.cc/J42W-5NLP>] (last updated Mar. 17, 2021). The bus reorganization was touted as being just as good as the cancelled rail line. Some bus routes were improved. Others worsened the travel experience by requiring riders to take two buses when before one bus would do. See Colin Campbell, *Five Years Later, Many Across Baltimore Bitterly Lament Gov. Hogan's Decision to Kill the Red Line Light Rail*, BALT. SUN (Sept. 11, 2020, 6:00 AM), <https://www.baltimoresun.com/politics/bs-md-pol-red-line-five-years-20200911-b2d3knbvpngdrirbc44fd55pti-story.html> [<https://perma.cc/J8SE-CHAS>].

segregation, purposefully.⁶⁶ The challenges today are shaped and constrained by a multi-layered history and constrained and impeded by present practices and beliefs that treat that terrain as fixed and inevitable. In particular, the Red Line project was expected to traverse a terrain of inequality in power of privileged voices versus a stigmatized customer base with little status. That it was also expected to do so in a cost-effective way to vindicate the federal investment enhanced an emergent political calculus that cancellation would be politically beneficial by telling a racially coded story.

An unstated aspect of the obstacles that a public transit project faces is that public transit itself is racialized as Black and classified as low income. While mass transit is generally viewed as a racialized and classified form of transportation, private automobile ownership is seen, in the popular imagination, as desirable; it indicates independence, a valorized, conspicuous display of consumer purchasing power seen as prestigious.⁶⁷ In comparison, public transportation, while egalitarian and accessible, is considered for those same reasons low status and assumed to be used only by those who have no choice. Public transportation ultimately conveys unworthiness. For illustration, a Black female friend recounted to me that she asked a neighbor, a contractor, to do renovations on her home. He declined to do the work for her after querying whether she was the person in the neighborhood taking the bus to work. Why did that matter? Taking the bus (which ironically was why she had the money to pay for the renovation work in cash) not only made him doubt whether she had the money to pay him but also whether he wanted to do business with someone who used a low-class form of transit.⁶⁸ This negative connotation assigned to public transit is consistent with the attitudes toward social programs in general. Public transportation is a social program and is considered as providing mobility to stigmatized unwanted people, i.e., the “element.”

In America, . . . opponents of reform argue that social programs needed by many will help undeserving [B]lacks. . . . Programs to improve slums are seen by many as programs to “subsidize” [B]lacks All too often, the fear and resentment of [B]lacks take precedence over the social problem itself.⁶⁹

66. Archer, *supra* note 35, at 1286–94.

67. See BENJAMIN ROSS, DEAD END: SUBURBAN SPRAWL AND THE REBIRTH OF AMERICAN URBANISM 31 (2014) (noting that early planners viewed the automobile as prestigious and preferable to mass transit).

68. See generally TODD LITMAN, VICTORIA TRANSP. POL’Y INST., MOBILITY AS A POSITIONAL GOOD: IMPLICATIONS FOR TRANSPORT POLICY AND PLANNING 8 (2011) (“Buses are often called ‘loser cruisers,’ and walking and cycling are often portrayed as undesirable and inferior travel modes.”).

69. Derrick Bell, *Racism: A Major Source of Property and Wealth Inequality in America*, 34 IND. L. REV. 1261, 1267–68 (2001).

Accordingly, opposition to transportation projects is so common as to call it a phenomenon. It is well understood that public transit is seen “as the vehicle of the less affluent.”⁷⁰ Class concerns are often coded for and conflated with Blackness. Thus, the opposition to public transit projects is common. Many examples abound of transit projects that are opposed or blocked.⁷¹ Public transportation that will allow people to be transported

70. ROSS, *supra* note 67, at 56 (“The long-standing suburban antipathy to the city persisted Public transit, already disdained as the vehicle of the less affluent, was now feared as a carrier of black criminals.”). This author argues that elite opinion misreads this tendency as being purely about race rather than the intertwining of race, class and economics. *Id.* (“Race . . . joined property values, beauty, and sanitation as a code word for status-seeking.”).

71. See, e.g., Woods, *supra* note 9 (“When the light rail system was first proposed in 1965, residents of predominantly white areas surrounding the city, such as Anne Arundel County, objected, complaining that [sic] ‘that the Metro would enable poor, inner-city [B]lacks to travel to the suburbs, steal residents’ TVs and then return to their ghettos in Baltimore.’ Just last year, nearby Carroll County introduced a ‘Mass Transit Protection Resolution’, [sic] intended to keep public transportation riders from Baltimore out.”); Burkely Hermann, *Baltimore Region Needs Transit not Transit Phobia*, BALTIMORE SUN (Aug. 9, 2018, 2:05 PM), <https://www.baltimoresun.com/opinion/readers-respond/bs-ed-rr-transit-needed-letter-20180809-story.html> [<https://perma.cc/58JA-GHF4>] (decrying efforts to close suburban stops on existing light rail line); Randy Kennedy, *Voters Weigh Initiatives on Spending for Transit*, N.Y. TIMES (Nov. 8, 2000), <https://www.nytimes.com/2000/11/08/us/2000-elections-referendum-voters-weigh-initiatives-spending-for-transit.html> [<https://perma.cc/JX6F-RD5P>] (explaining that New York voters opposed bonds for the New York Metropolitan Transportation Authority, effectively eliminating the governor’s plan for transit improvement); Katya Schwenk, *Branching Out: Georgetown’s Campaign Against Public Transport*, GEO. VOICE (Dec. 7, 2018), <https://georgetownvoice.com/2018/12/07/branching-out-georgetown-campaign-against-public-transport> [<https://perma.cc/AAQ6-TCBG>] (explaining why the Washington, D.C. Metro does not have a stop in Georgetown); Hiroko Tabuchi, *How the Koch Brothers are Killing Public Transit Projects Around the Country*, N.Y. TIMES (June 19, 2018), <https://www.nytimes.com/2018/06/19/climate/koch-brothers-public-transit.html> [<https://perma.cc/3UNZ-W5UY>] (highlighting Koch-founded grassroots organizations campaigns against public transportation using arguments such as “wast[ing] taxpayer money on unpopular, outdated technology”); Laura J. Nelson, *Voters Defeated Metro’s Ambitious Plan to Raise Money in 2012, and they Might Do it Again*, L.A. TIMES (Oct. 3, 2016, 3:00 AM), <https://www.latimes.com/local/lanow/la-me-ln-metro-tax-geopolitics-20161002-snap-story.html> [<https://perma.cc/EZ8W-YPXg>] (highlighting that Southern Los Angeles County opposes a half-cent tax increase on a new metro line because there wouldn’t be an improvement of public transportation in their neighborhoods); Jane Stancill, *Thanks to Duke, Durham’s Light Rail Dream is All but Dead*, BLOOMBERG CITYLAB (Mar. 14, 2019, 8:00 AM), <https://www.bloomberg.com/news/articles/2019-03-14/why-duke-killed-the-durham-orange-light-rail-project> [<https://perma.cc/P8ME-FWEC>] (attributing the demise of a planned light rail line to Duke University withdrawing support for the project); Bryan Kirk, *Spring Residents Voice Opposition to Houston METRO Lines*, PATCH (July 20, 2017, 1:31 PM), <https://patch.com/texas/houston/spring-residents-voice-opposition-houston-metro-lines> [<https://perma.cc/J9U9-GPXY>] (expressing opposition to a proposed bus line in Spring, Texas, on the belief that a public transportation system in their neighborhood was going to increase crime and decrease property values); Scott Gordon, *North Dallas Homeowners Oppose Cotton Belt Rail Line*, NBCDFW (Aug. 16, 2019, 1:01 PM), <https://www.nbcdfw.com/news/local/north-dallas-homeowners-oppose-cotton-belt-rail-line/209591> [<https://perma.cc/QJ6Z-M4P2>] (noting North Dallas residents expressing concern over increased train traffic); Doug Monroe, *Where It All Went Wrong*, ATLANTA (Aug. 1, 2012), <https://www.atlantamagazine.com/great-reads/marta-tsplost-transportation> [<https://perma.cc/US52-L8FT>] (describing Atlanta’s public transit system as set up for dysfunction in the 1960s and 70s).

through metropolitan regions is stigmatized as an unworthy detrimental public expenditure. For example, residents of a county adjoining Baltimore have tried on several occasions to close down light rail stops in the county because they feared that “crime” has been brought to what they considered their private communities—though there is no evidence supporting this.⁷² Moreover, the stories of projects that failed to even advance to the planning stage are ones yet to be compiled and told.

The Red Line planning and decision-making process was inclusive and seen by most residents as empowering and wealth enhancing, an expression of local will. The city seemed like it was about to finally receive what was needed to begin to turn the economic tide and improve the circumstance for its residents, but that potential improvement was met with hostility. Yet ultimately, contrary to principles of local control, the disadvantaged residents of Baltimore had no control. What explains the disregard for local control by proponents who were ostensibly otherwise localists? On display, the waning political power of a city racialized Black and perceived as unworthy. Considered within this backdrop of race and class stigmatization, cancellation of the Red Line and other transit projects like it signals that, depending on the location, standing in the way of public transportation can be oddly politically beneficial as a public performance of fiscal restraint. Rather than adhere to respect for the local will, which in this case called for the public transportation project, it was beneficial to signal political virtue through fiscal restraint as disciplining the Black city. At the same time, the city was castigated for its dilapidated economic conditions and resulting unrest. The governor’s cancellation highlighted that Baltimore, with a predominately Black population, was profligate, not worthy of consideration and in need of the provided correction.

Rail “transportation decisions [present not merely geographical] mobility questions” of how to allow travel, but also as a financial policy decision directing “the [city’s] future development of the metropolitan area.”⁷³ In other words, transportation infrastructure investment is not only mobility enhancing, but also a vehicle for economic development. As Olatunde Johnson observes, transportation policy decisions “have vast consequences for the economic development of communities, the environment, and human health.”⁷⁴ Even more so, mobility and economic development are intertwined with a

72. Canaan Merchant, *Some Anne Arundel County Residents Want to Shut Down Their Light Rail. Again.*, GREATER GREATER WASH. (Aug. 2, 2018), <https://ggwash.org/view/68549/some-anne-arundel-county-wants-to-shut-down-their-light-rail-again> [<https://perma.cc/93YE-WK4J>].

73. Benjamin K. Olson, Note, *The Transportation Equity Act for the 21st Century: The Failure of Metropolitan Planning Organizations to Reform Federal Transportation Policy in Metropolitan Areas*, 28 *TRANSP. L.J.* 147, 152 (2000); see Richard A. Marcantonio, Aaron Golub, Alex Karner & Louise Nelson Dyble, *Confronting Inequality in Metropolitan Regions: Realizing the Promise of Civil Rights and Environmental Justice in Metropolitan Transportation Planning*, 44 *FORDHAM URB. L.J.* 1017, 1077 (2017).

74. Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 *N.Y.U. L. REV.* 1339, 1379 (2012).

potentially reciprocal, wealth-enhancing multiplier effect from facilitating access to individuals to gain and maintain employment, access services and businesses, as well as providing an injection of work through interim term construction jobs and some permanent jobs to operate and maintain the network. Thus, Maryland's refusal of nearly \$1 billion of relatively rare infrastructure investment is quite significant. The expenditure would have been a dramatic investment with long term implications. The state was committed to contribute state funds to the project, but the leverage effect of the federal funds was even more significant; the development potential was starkly apparent.

That an investment of this magnitude was foregone is extraordinary in the annals of economic development where states' heavy focus and emphasis has been economic growth. It is well documented that states have invested billions in seeking to attract wealthy businesses and residents using tax incentives and other vehicles for public subsidies of development financing.⁷⁵ If there is economic development potential, states and cities will usually always make the money or other public resources available.⁷⁶ The most dramatic example of this pervasive practice was the over \$2 billion in subsidies that states and cities offered Amazon to get it to locate its new headquarters in their cities.⁷⁷ Indeed, MacGillis documents that Baltimore pays for Amazon's supplemental shuttle to reach its warehouse on the eastern side of the city.⁷⁸ Though these incentives have been subject to considerable criticism, the trajectory for investments labeled "economic development" is upward with no signs of abating unless certain criteria are met.

Accordingly, rail transit cancellation is best characterized as negative economic development because investment in the city via the project signaled a confounding level of disregard. It was almost as if the city, which happens to be urban with an overwhelmingly Black and low to moderate income population, was a separate, unrelated entity, and not a part of the state. Such negative economic development is countered, however, when there is a perception that the transportation investment will be beneficial to non-city,

75. See Derek Thompson, *Amazon's HQ2 Spectacle Isn't Just Shameful—It Should be Illegal*, ATLANTIC (Nov. 12, 2018), <https://www.theatlantic.com/ideas/archive/2018/11/amazons-hq2-spectacle-should-be-illegal/575539> [<https://perma.cc/2ZXW-M892>].

76. See generally, e.g., *Kelo v. City of New London*, 545 U.S. 469 (2005) (using the state's power of eminent domain for economic development purposes).

77. See Zachary Karabell, *New York and Amazon Played a Zero-Sum Game—and Everyone Lost*, WIRED (Feb. 15, 2019, 3:20 PM), <https://www.wired.com/story/new-york-and-amazon-played-a-zero-sum-gameand-everyone-lost> [<https://perma.cc/M4ZS-EKXA>]; David Dayen, *The HQ2 Scam: How Amazon Used a Bidding War to Scrape Cities' Data*, IN THESE TIMES (Nov. 9, 2018), <https://inthesetimes.com/article/the-hq2-scam-how-amazon-used-a-bidding-war-to-scrape-cities-data> [<https://perma.cc/G9EG-R2Y7>] (arguing that 236 cities submitted futile bids for Amazon's proposed new headquarters and subjected themselves to disclosing future development plans that could be exploited in the future).

78. See MacGillis, *supra* note 1.

predominately non-Black, residents. The Red Line cancellation, however, seems to reflect a perception that economic redevelopment in the Black city needed to be suppressed. The timing was particularly racially hostile and punitive because it came just after the unrest surrounding Freddie Gray's death and was explicitly noted as such. Images of Baltimore's most bereft neighborhoods were attributed to the bad behavior and poor management to every Black resident in the city.⁷⁹ "Hogan dismissed the Red Line [project including a] . . . downtown tunnel . . . as a costly indulgence—as if it was outlandish for rail lines in cities to run underground."⁸⁰ Cancellation and the attendant lack of investment meant that investment was now an ill-begotten privilege. The opportunity to reverse decades of disinvestment was less attractive than using disinvestment as a performative form of ritual discipline. The resulting disinvestment dynamic reflects a rare but noteworthy phenomenon, negative economic development. A promising opportunity for development was both ignored and destroyed, irretrievably lost.⁸¹ Subsequently, Baltimore was one of the many cities that put in a bid for the new Amazon HQ, but did not stand a chance for a number of reasons.⁸² But certainly, its grossly inadequate public transportation system did not help.⁸³

79. *See Id.* ("[Governor Larry] Hogan declared that he viewed Baltimore as a failed city. 'What has been happening — taxing and spending and pouring millions into the city — has not helped. It has really hurt,' Hogan told *The Sun*. 'There's no businesses, there's no jobs. The city's declining rather than improving.' Upon taking office, Hogan cut \$36 million from the city's schools.").

80. *Id.* ("Soon afterward, it would emerge in public-records requests from a pro-transit group that his administration had given the question zero study. In the absence of a regional transportation authority to provide continuity from one administration to another, a new governor could simply toss away a project on which previous administrations had spent nearly \$300 million."). *See generally* BRIANNE EBY & PAUL LEWIS, ENO CTR. FOR TRANSP., TRANSIT REFORM FOR MARYLAND: NEW MODELS FOR ACCOUNTABILITY, STABILITY, AND EQUITY (2020), <https://www.enotrans.org/wp-content/uploads/2020/11/Transit-Reform-for-Maryland-New-Models-for-Accountability-Stability-and-Equity.pdf> [<https://perma.cc/Y95K-69E6>] (critiquing Maryland's public transportation system governance).

81. MacGillis, *supra* note 1. ("Hogan did in fact link the riot with his decision – but only to justify [the decision]. 'We just spent \$14 million extra money on the riots in Baltimore City a few weeks ago,' he said – as if the city . . . had foolishly blown it on a riot. Three weeks later, his administration released a revealing map showing how the money for road upgrades would be allocated around the state. Not only did the governor's map show no money for Baltimore City. *It did not show the city at all.*")

82. Laura Bliss, *Amazon's HQ2 Hunt Is a Transit Reckoning*, BLOOMBERG CITYLAB (Sept. 28, 2017, 8:23 AM), <https://www.bloomberg.com/news/articles/2017-09-28/amazon-hq2-search-is-reckoning-for-transit> [<https://perma.cc/LLX9-Q7P3>] (describing Baltimore's cancelled project as: "\$3 billion crosstown light-rail project was scuttled in 2015, ruefully regretting recent missed opportunities.").

83. Baltimore lost the effort to win the competition for Amazon's HQ2, though they did not really stand a chance, but got a Warehouse. *See* MacGillis, *supra* note 1 (describing the relationship of the Amazon warehouse to the Red Line: "[T]he original 1968 vision for the [Red] line would have brought employees all the way to the site—but it was close enough to run constant shuttles and to contemplate an eventual extension. But of course there would be no Red Line In December it emerged that Amazon, with a market capitalization of more than \$300

Public transportation investment seems to be a uniquely politically vulnerable form of economic development for two overlapping reasons: (1) the racialized location of where public transportation is proposed to take place; and (2) the racialized and stigmatized populations perceived as the beneficiaries can result in “Black transit”—public transit projects that result in negative economic development. The Red Line project was hampered from the outset because it proposed to benefit a stigmatized racialized space experiencing longstanding and persistent economic disinvestment. The deep need experienced by residents cut off from sorely needed transportation access could not outweigh the racialized geography of disinvestment. The racially stigmatized target vulnerable population that would have benefited from the line in fact likely also muted enthusiasm for the project, contributing to a delay in getting the project off the drawing boards. The resulting negative economic development suggests an inclination that beneficial investment should only be done to stave off emergency (like calling in the National Guard to quell unrest) but not long-term investment to lay a foundation for access to inclusive opportunity in the future.⁸⁴ The twin features of Black transit (transportation benefiting Black people and Black places) produces a unique disinvestment dynamic that is foreseeable, one we can expect to appear when racial segregation and existing disinvestment are at hand. The potential for negative economic development in these racialized contexts requires a structural fix to address the reinforcing racial subordination presented by this phenomenon.

IV. FEDERALISM AND RAIL TRANSIT AND PRESUMPTIONS OF RACIAL IMPACT

As the foregoing discussion has shown, public transportation projects can be particularly prone to cancellations because of the political benefits from being seen to be refusing to spend on unworthy projects. Yet, the transportation funding process is largely blind to this possibility: it was not set up to handle the refusal of long-sought funding. The New Starts transportation project funding process logically presumes investment will happen and focuses mainly on fiscal efficiency in project design and implementation. The process can no longer defensibly fail to contemplate nor account for the late-stage cancellations like the Red Line and its resulting disinvestment dynamic. Changing the structure of the process to address the disinvestment dynamic presents somewhat of a federalism dilemma. The funding process contemplates a federal commitment at the point when the Full Funding Agreement was actually signed. Thus, it might seem that since Maryland had not yet signed an actual funding agreement, it was not contractually bound to proceed with the project. Therefore, it might seem

billion, had received a ‘forgivable’ \$100,000 loan from the Baltimore Development Corporation to help cover the cost of the shuttle.”).

84. See generally Powell, *supra* note 13 (explaining opportunity segregation).

that basic contracting principles and federalism allow such a result because the state was simply making a fiscal decision not to proceed. There are a number of reasons, however, for questioning this overly simplified framing. First, the contractual framing does not adequately consider the interplay of racial equity with federalism. Second, the view that a state is a mere contracting party conceives of the state in an overly privatized way without adequately considering its public anti-discrimination obligations. Third, the funding process should reflect that adequate protection should and can be provided to protect inclusive democratic participation.

A. *FEDERALISM WITH A RACIAL EQUITY LENS*

The federal framework for public transportation funding contains up front “equality directives” that prioritize localism by requiring an extensive process to identify and address racial equity concerns as a matter of qualifying for the award of federal funds by ensuring that racial equity is structured into participatory planning, design, and implementation of the project.⁸⁵ Thus, the funding process reflects an effort to ensure that proposed rail projects are well-thought-out and rational, and also minimize negative environmental impacts, including racial impacts that would be inequitable. Originating from a combination of the NEPA and Title VI prohibitions, the project development phase is designed to evaluate how the implementation of a project could negatively impact racial minority communities or perhaps reduce services in ways that are detrimental.⁸⁶ In order to avoid discrimination, grant recipients are required to carefully identify and analyze any potential adverse racial impacts of proposed rail projects, like the Red Line. Requiring extensive local participation reflects a strong commitment to localism⁸⁷ and, in the case of cities like Baltimore, ensures that local input and the voices of vulnerable groups are taken into account.⁸⁸

85. Johnson, *supra* note 74, at 1381 (“These directives did not emerge from a single government pronouncement. Rather, they emerged over a number of years, from a set of regulatory actions and from private group litigation and advocacy.”).

86. Richard Monette, *Environmental Justice and Indian Tribes The Double-Edged Tomahawk of Applying Civil Rights Laws in Indian Country*, 76 U. DET. MERCY L. REV. 721, 722 (1999) (“Title VI itself prohibits intentional discrimination. However, the United States Supreme Court has ruled that section 602 of Title VI allows federal agencies, including EPA, to adopt implementing regulations that prohibit unintentional discriminatory effects.” (quoting Dear Honorable Tribal Leader Letter (on file at University of Detroit Mercy Law Review))).

87. See Marcantonio et al., *supra* note 73, at 1063 (arguing that civic engagement and public participation are crucial for promoting transportation that reflects the interests of underserved communities of color). *But see generally* Elisabeth R. Gerber & Clark C. Gibson, *Balancing Regionalism and Localism: How Institutions and Incentives Shape American Transportation Policy*, 53 AM. J. POL. SCI. 633 (2009) (noting that federal law structures metropolitan planning organizations in such a way that the most relevant actors for determining transportation policy are, in effect, public and private elites).

88. Johnson, *supra* note 74, at 1369–70 (“When a transit agency or locality takes federal funds, they must assess the impacts of existing and proposed programs and policies, conduct

Specifically, funding recipients must integrate into their programs an environmental justice analysis of (1) whether their programs and activities have adverse health and environmental impacts on minority communities, (2) comparisons between effects on minority communities and nonminority communities, and (3) documentation of actions taken to mitigate those concerns. FTA grant recipients must also conduct community outreach to ensure participation of minority and LEP communities. For mass-transit programs and activities in larger regions, DOT requires funding recipients to gather and analyze data to evaluate whether minority groups are benefiting fairly from federally funded programs and services; develop quantitative measures to evaluate whether services are being provided in similar ways to different racial and ethnic groups; evaluate significant system-wide service and fare changes to determine whether they have a discriminatory impact; monitor services every three years to ensure that prior decisions have not resulted in disparate impact; and “take corrective action to remedy [any] disparities.”⁸⁹

The local participation requirements are striking because localism and local control is often invoked in exclusionary, parochial ways. And yet, our law and policies both celebrate and defer to them as worthy principles protected in law.⁹⁰ Due to NEPA and Title VI, localism in this instance was inclusive, wealth-enhancing, and empowering for the disadvantaged. Despite these extensive and carefully calibrated standards for minimizing negative impact in furtherance of Title VI goals, the Red Line cancellation demonstrates that the funding process, as presently structured, provides protections only for a project with a forward trajectory; a project that is being implemented.

Federal funding is not only cooperative under the federalism model, but also cumulative and reciprocal. The Red Line experience certainly suggests that an affirmative racial impact study should be done at the application stage that could be used to establish how the proposed project could ameliorate

outreach to include groups in planning and design, and adopt practices that promote goals of housing integration and access to transit.”).

89. *Id.* at 1380 (alteration in original) (footnotes omitted). “In effect, these requirements transform Title VI’s statutory prohibition on ‘discrimination’ into a set of affirmative requirements: to conduct an equity analysis that analyzes impacts and considers alternatives, and to promote full participation.” *Id.* at 1381. *But see* Archer, *supra* note 35, at 1326–27 (arguing for a state-level racial equity review because “NEPA does not go far enough in assessing the full extent of the impact highway development . . . projects will have on surrounding communities” because it fails to account for the “historical distribution of benefits and burdens” “across racial groups”).

90. *See* Richard T. Ford, *Law’s Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843, 911–13 (1999); David D. Troutt, *Katrina’s Window: Localism, Resegregation, and Equitable Regionalism*, 55 BUFF. L. REV. 1109, 1110–11 (2008); Erika K. Wilson, *Leveling Localism and Racial Inequality in Education Through the No Child Left Behind Act Public Choice Provision*, 44 U. MICH. J.L. REFORM 625, 630–32 (2011).

past racial harms in public transportation development processes.⁹¹ In particular, once a state has initiated the public transit project development phase, the funding procedures should specify that no withdrawal may take place without a racial disparate impact study. In addition, should a state wish to withdraw from pursuing a rail project, they should be required to disclose their withdrawal from previous funding when applying for other federal grants. The federal government should not be involved in a non-productive process wasteful of government resources and, even worse, with a negative racial impact.

B. CONTRACTING FOR RACIAL EQUITY

Title VI is widely understood to be authorized by Congress's power under the Spending Clause.⁹² Under the Spending Clause, Congress may require compliance with certain conditions to achieve certain objectives.⁹³ In other words, where federal money is involved, the Spending Clause rationale underlying federal public transportation funding grants are viewed as a federal/state funding relationship structured to be as much like a contracting relationship as possible.⁹⁴

Some spending programs are structured explicitly as “contracts.” . . . The Highway Trust Fund . . . distributes funds to states and cities through agreements with the Department of Transportation that federal statutes deem “contractual obligation[s]” of the United States. . . . Spending programs also nest miniature (but mighty) contracts inside larger federal agreements and grants by mandating the inclusion of specific assurances in all federal spending programs. The most important of these is Title VI of the Civil Rights Act of 1964, which requires any federally funded program not to discriminate on the basis of race, color, or national origin. When states and cities sign contracts, submit state plans, or accept federal grants, they must certify that they will comply with Title VI. The Supreme Court has repeatedly characterized these assurances as contracts.⁹⁵

91. See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1783 (1993) (“[D]istributive justice as a matter of equal protection requires that individuals receive that share of the benefits they would have secured in the absence of racism.”).

92. Ann Carey Juliano, *The More You Spend, the More You Save: Can the Spending Clause Save Federal Anti-Discrimination Laws?*, 46 VILL. L. REV. 1111, 1163–64 (2001); Keith E. Eastland, Note, *Environmental Justice and the Spending Power: Limits on Using Title VI and § 1983*, 77 NOTRE DAME L. REV. 1601, 1628 (2002).

93. *Leading Cases*, 116 HARV. L. REV. 200, 312–13 (2002) (discussing the Spending Clause).

94. Archer, *supra* note 35, at 1322 (“The goal is to root out the unintended consequences of a new government initiative prior to its adoption.”).

95. Bridget A. Fahey, *Federalism by Contract*, 129 YALE L.J. 2326, 2340, 2342 (2020) (alteration in original) (footnotes omitted).

Arguably, federalism is concerned with the proper balance of power between the federal government and the states and recognizes that the federal government should not force states to enact or implement regulatory programs. Federalism precedents seem to suggest a state can return funds to the federal government based on cases like *Printz v. United States*, which holds that, under revived dual-federalism principles of the Tenth Amendment, the federal government cannot force states to adopt a controversial federal regulatory program like gun control.⁹⁶ Similarly, under an analogous interpretation of federalism concerns, *National Federation of Independent Business v. Sebelius* held that the federal government's imposition of penalties upon a state for failure to comply with certain conditions constituted coercion that violated the Spending Clause because the penalties amounted to a significant percentage of the state's budget.⁹⁷

But the contractual relationship funding model is not built to anticipate a purposeful halt to an approved project through cancellation. Using the contracting rationale, Maryland can be seen as indeed contractually bound to proceed with the Red Line.⁹⁸ The contract consisted of multiple parts which included an involved racial equity assessment. Therefore, it was improper to terminate the contractual relationship in a way that caused a racially disparate impact that negated the purpose of the equity assessment. Though the assessment was focused on harm from the project, the predictable negative economic development phenomenon of Black transit and its attendant disinvestment dynamic means that there was an obligation to proceed with the project. The residents of Baltimore were third party beneficiaries and should have had their interests taken into account when the state declined the federal funds.⁹⁹ The right to refuse such funds is necessarily subject to Title VI and the affirmative obligations to ensure racial equity. There is no federalism coercion issue because the condition is one to fulfill anti-discrimination in the use of federal funds, an existing obligation. Both the state and the federal government had an obligation to the potential rail

96. See *Printz v. United States*, 521 U.S. 898, 935 (1997).

97. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 588 (2012).

98. But see *Fahey*, *supra* note 95, at 2362 (questioning whether the contracting analogy makes sense: "The Spending Clause cases announcing the anticoercion rule present the most sustained discussion of a doctrine akin to a formation defense – namely, the defense of duress. Where an 'improper threat . . . leaves the victim no reasonable alternative' but to enter into the contract, the contract can be voided by that party. As Justice Scalia wrote in his opinion in *NFIB*, 'just as a contract is voidable if coerced,' when 'a federal spending program coerces participation the States have not "exercised their choice" – let alone made an "informed choice."' This rule is a model example of the difficulties of appropriating contract law for the intergovernmental context, as many insightful scholarly analyses of *NFIB* have pointed out." (footnotes omitted) (first quoting RESTATEMENT (SECOND) OF CONTRACTS § 175(1) (AM. L. INST. 1981); and then quoting *Nat'l Fed'n of Ind. Bus.*, 567 U.S. at 676–77 (Scalia, J., dissenting))).

99. See generally, e.g., Patience A. Crowder, *More Than Merely Incidental: Third-Party Beneficiary Rights in Urban Redevelopment Contracts*, 17 GEO. J. ON POVERTY L. & POL'Y 287 (2010) (explicating a framework for urban residents to have a voice in redevelopment projects that affect them).

passengers and to residents of Baltimore City who would be the primary passengers.

Cancelling the Red Line through the refusal of funds triggered no response, it did not need to be justified, and it triggered no immediate agency review. Instead, it fell into a grey hole of federalism formalism, reasoning that the Full Funding Agreement had not been executed, so a state like Maryland had no obligation to proceed with the transaction. NEPA's extensive racial equity review was long completed but did not provide any protection. The tabled administrative review of the Title VI's administrative complaint after the fact obviously did not help. The foreseeable need for protection against racial inequity is formulated for the impact of the project, not for punitive or reckless withdrawal. Politics and transactions do not work in conventional ways for Black people.¹⁰⁰ Thus, the funding process needs to recognize the structures that exist that incentivize the refusal of funding for projects perceived as beneficial to stigmatized race and class groups. When seeking to interfere in a locally based process, the executive or whomever oversees the federal transportation funds should be subject to a presumption of discrimination that must be rebutted in order to justify the cancellation. Racism and classism should be presumed. Class is often a proxy for race even when it should not be.¹⁰¹

C. PARTICIPATORY LOCALISM

The public transportation funding process is inadequate to protect racial equity concerns because it does not recognize that principles of localism can work in reverse. While city residents participated heavily in a locally based planning process, this local decision-making was ignored. Not only was a decade's worth of work destroyed, but the affected community was also not consulted for local input about cancellation. Although localism is often perceived as a necessarily included sub-principle of federalism, in this case localism did not protect against hostility to Baltimore City as a racialized Black and poor place. Derrick Bell argued that even when we acknowledge the

100. See Leora Friedman, Note, *Recommending Judicial Reconstruction of Title VI to Curb Environmental Racism: A Recklessness-Based Theory of Discriminatory Intent*, 32 GEO. ENV'T L. REV. 421, 433 (2020) (arguing that a recklessness-based theory should apply for environmental racism for "rash, inattentive behavior toward a minority group," and that "[p]recedent involving alleged environmental racism reveals how courts often detect an agency's rash, inattentive behavior toward a minority group but refuse to find unlawful intentional discrimination"); Sacred B. Huff, Note, *Overcoming Environmental Racism: A Lesson from the Voting Rights Act of 1965*, 11 GEO. WASH. J. ENERGY & ENV'T L. 22, 23 (2020) (arguing for a preclearance approach before changes can be made—i.e., agency review—and "explain[ing] how the Environmental Justice Movement can learn from the preclearance provisions under Sections 5 and 3(c) of the Voting Rights Act, and how those provisions will apply in practice and succeed in solving issues of environmental injustice").

101. See IBRAM X. KENDI, *HOW TO BE AN ANTIRACIST* 151 (2019) (explaining the intersection of classism and racism).

permanence of racism, we can stop the struggle to overcome it. Professor Bell advocated for racial realism, drawing on the lessons from the legal realists and the disappointments of civil rights litigation.¹⁰² While Bell focused on formalism in judicial decision-making, his insights apply as well to all governmental decision-making. He argued that it was important to consider “historical patterns, . . . contemporary statistics, and . . . [adopt] flexible reasoning . . . [to] observe[] the social landscape and . . . reflect[] on the possible reasons for [skewed] demographics, including inadequate public school systems in urban ghettos.”¹⁰³ Similarly, the history of public transportation and the countless stories, accounts, historical and current records show that racism is so pervasive, endemic, and repetitive in the local context that it begs the question of why we perpetually forget to incorporate this reality into legislative design. Instead, legislative design should be informed by a rebuttable presumption of negative racial impact (as evidenced by the negative economic development in the Red Line case) that racial inequity likely has a role in shaping and allocating benefits, resources, and detriments and hardships in our metropolitan areas, and indeed, the nation. This presumption should be used to structure our assumptions about how processes need to be structured to anticipate racial discrimination with particular respect to public transportation decision-making, because the evidence is clear that public transit is Black transit.

Though these arguments are novel, there is room in the federalism logic of the Spending Clause to consider pervasive and systemic racial hostility to public transportation and a discriminatory exercise of discretion. This is particularly the case where the goal is not to impose liability in litigation but prophylactic—to prevent potential racial impact, the project should not be able to be unwound without checking for negative racial impact. The decision to cancel should, therefore, also be subject to participatory decision-making including notice and hearing requirements to override the local decision.¹⁰⁴ If federalism is supposed to mean anything, funds for the benefit of historically discriminated against and presently stigmatized groups must be affirmatively protected in advance of foreseeable discrimination. This intervention is not unprecedented. In *Lawrence County v. Lead-Deadwood*, for example, federal funds were made available to local governments to expend on federal lands within their midst exclusive of state control.¹⁰⁵ When the state attempted to mandate local governments allocate the money to school districts, the Supreme Court upheld the federal government’s power under

102. See Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 376 (1992).

103. *Id.* at 369.

104. See, e.g., Johnson, *supra* note 74, at 1395 (“[E]quality directives should delineate specific, effective methodologies for conducting impact assessments or analyzing barriers to fair housing, and should provide strong incentives for grantees to adopt such approaches.”).

105. *Lawrence Cnty. v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 270 (1985).

the Spending Clause to allow the local governments to decide which local purposes it would fulfill.¹⁰⁶ An analogous approach should apply here.¹⁰⁷

V. CONCLUSION

Federal mass transportation decision-making should be structured in a way that accounts for the pervasive, consistent, and structural hostility to Black mobility and transit projects perceived to benefit Black people. Because mobility is crucial to self-determination, economic survival, and flourishing, the veto of rail projects like Baltimore's Red Line project is not likely to be an isolated incident. Instead, we must take the opportunity to consider how to extend racial remedies and create an equity-infused transportation planning framework and Title VI disparate impact protections before the foreseeable negative economic development occurs again. The overall solution to what happened to Baltimore's Red Line is a simple one: reverse the disinvestment dynamic with investment.¹⁰⁸ With respect to the transportation funding process, the possibility of disinvestment through cancellation or failure to follow through on public transit projects is foreseeable. Racial equity protections have to be moved up earlier in the transportation decision-making process. While doing so will not cure the problem of racial bias in public transportation funding or the existing geography created by that bias, presuming discrimination as a matter of legislative design can provide sorely needed tools to discourage foreseeable discrimination in advance.

106. *See id.*

107. *See generally* David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377 (2001) (arguing that local decisions that exceed 14th Amendment standards should receive deference).

108. *See* Seema D. Iyer, *Want to Reduce Crime in Baltimore? Invest in the City*, BALT. SUN (Nov. 19, 2019, 11:21 AM), <https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-1020-invest-baltimore-crime-20191119-xcekrob5rfdvloqzwi4gv52rgq-story.html> [<https://perma.cc/4LN9-8UHB>] (noting the increase in crime after termination of the Red Line project and making a common sense argument for reinvestment to address the problem).