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Racial Impact Assessment in Land Use Planning and Zoning

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PACE ENVIRONMENTAL LAW REVIEW

ARTICLE

Racial Impact Assessment in Land Use Planning and Zoning

WILLIAM WEST*

ABSTRACT

Racial impact assessments are tools that attempt to predict the effects of actions to help policymakers evaluate the consequences of those actions before their implementation. This article explains the history of race and land use in the United States, the development of racial impact assessments, and the emerging trend of racial impact assessments in land use planning and zoning. The article concludes with an analysis of how racial impact assessments in land use might develop in the future.

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INTRODUCTION

Land use planning and zoning built racial segregation. Recently, local governments have adopted racial impact assessments to address that history, its continuing effects, and its contemporary formulations. Racial impact assessments are new tools that attempt to predict the effects of actions to help policymakers evaluate the consequences of those actions before their implementation. The assessment's premise is that policies have consequences that could be predicted and avoided if only procedures provided the necessary information. This article briefly explains the history of race and land use in the United States, the development of racial impact assessments, and the emerging trend of racial impact assessments in land use planning and zoning.

Part I shows how land use law and policy has contributed to segregation in the United States. Part II explores racial impact assessments in non-land use contexts, including criminal justice, federal agencies, and private advocacy. Part III provides examples of racial impact assessments in land use from three local governments: New York, New York; Seattle, Washington; Montgomery County, Maryland. Part IV explores unresolved issues that challenge the implementation of racial impact assessments in land use planning and zoning. By focusing on institutional structures and systems,¹ this article introduces how municipalities can use racial impact assessments to address the persistent inequity stemming from land use law and policy.

I. A Brief History of Race and Land Use in the United States

Land use planning and zoning regulations have been under attack for its historical role in racial segregation.² For example, in 1910, Baltimore, Maryland enacted the first racial zoning ordinance.³ The ordinance

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1. See John A. Powell, *Structural Racism: Building upon the Insights of John Calmore*, 86 N.C. L. REV. 791, 794–800 (2008) (explaining the difference between racial discrimination that is intentional individual and racial discrimination that is rooted in systems).

2. See generally RICHARD ROTHSTEIN, *Racial Zoning*, in *THE COLOR OF LAW* 39 (2017); see generally URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY: IN THE SHADOWS (June M. Thomas et al. eds., 1997) [hereinafter *IN THE SHADOWS*]; see Andrew H. Whittemore, *The Experience of Racial and Ethnic Minorities with Zoning in the United States*, 32 J. PLAN. LITERATURE 16, 16–23 (2017).

3. Christopher Silver, *The Racial Origins of Zoning in American Cities*, in *IN THE SHADOWS*, supra note 2, at 24.

prohibited African Americans from buying homes in neighborhoods that were majority White.⁴ Many other cities followed this example.⁵ Seven years later, in *Buchanan v. Warley*, the United States Supreme Court held that a racial zoning ordinance in Louisville, Kentucky was unconstitutional.⁶ This holding, however, did not address the Equal Protection rights of minorities.⁷ Rather, the Court found that the ordinance violated the Due Process rights of White landowners to sell to whomever they chose, only indirectly vindicating the rights of Blacks to live wherever they chose.⁸ Nonetheless, urban planners continued to pursue legally defensible race-based planning strategies that skirted the *Buchanan* decision.⁹

Racial covenants complemented the post-*Buchanan* strategies. Racial covenants, effectively upheld by the Supreme Court in *Corrigan v. Buckley*, prohibited occupancy by races for which the zones were not intended.¹⁰ Single-family zoning districts also prevented construction of multi-family buildings, financially excluding Black families who could afford multifamily rents but not single-family homes.¹¹ The same year that the Court upheld racially restrictive covenants, the Court rejected a challenge against the separation of uses by zoning regulations in *Euclid v. Ambler Realty Co.*, writing, “very often the apartment house is a mere parasite.”¹²

In the 1930s, the Federal Housing Administration (“FHA”) mortgage insurance eligibility standards favored single-family zoned properties with racial deed restrictions, implicating local land use practices in national financial assistance.¹³ The FHA Underwriting Manual from 1938 states that restrictive covenants should include “prohibition[s] of the occupancy of

4. *Id.*

5. *Id.* at 27–28.

6. *Buchanan v. Warley*, 245 U.S. 60, 81–82 (1917).

7. *Id.* at 82.

8. *Id.* (“We think this attempt to prevent the alienation of the property in question to a person of color was not a legitimate exercise of the police power of the State, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing state interference with property rights except by due process of law.”).

9. See generally Silver, *supra* note 3, at 32–37 (explaining attempts by various cities to accomplish racialized zoning and circumvent *Buchanan*); see ROTHSTEIN, *supra* note 2, at 46–48.

10. *Corrigan v. Buckley*, 271 U.S. 323, 330–31 (1926) (denying that enforcing racial covenants is state action).

11. See Whittemore, *supra* note 2, at 19.

12. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394 (1926); but see EDWARD M. BASSETT, ZONING 323–24 (1922) (warning that courts might have struck down zoning power if cities separated residential districts by family size).

13. FED. HOUS. ADMIN., UNDERWRITING AND VALUATION PROCEDURE UNDER TITLE II OF THE NATIONAL HOUSING ACT § 980(3)(d) (1938).

properties except by the race for which they are intended.”¹⁴ Neighborhoods that were not exclusively white were outlined in red on maps created by the Home Owners Loan Corporation (“HOLC”).¹⁵ The FHA used these maps to choose which loans to insure, preventing families in low-rated neighborhoods from obtaining favorable financing for purchasing homes.¹⁶

The Supreme Court overturned *Corrigan v. Buckley* in *Shelley v. Kraemer*, holding that restrictive covenants may not be enforced by state court order under the Equal Protection Clause of the 14th Amendment.¹⁷ The Court did not hold that restrictive covenants violated any rights; only the enforcement of the covenants by state courts was unconstitutional.¹⁸ Racial covenants continued to exist, casting a pall over the sale of the restricted parcels to minorities and continuing the segregation of the single-family zoned neighborhoods.¹⁹

The exclusionary zoning measures of the post-*Buchanan* era grew in popularity after the Court’s ruling in *Shelley v. Kraemer*.²⁰ Single-family zones with large minimum lot sizes excluded minorities from wealthy neighborhoods, and industrial use zones depressed property values of nearby minority neighborhoods.²¹ Similarly, municipalities took advantage of politically disempowered minority populations when siting for undesirable uses.²²

14. See *id.* at § 980(3)(g).

15. American Panorama, *Mapping Inequality: Redlining in New Deal America*, UNIV. OF RICHMOND’S DIGIT. SCHOLARSHIP LAB, <https://dsl.richmond.edu/panorama/redlining/> [<https://perma.cc/3BQ9-D5JS>]. This interactive map shows the various categories created by the HOLC and explains the racialized reasons for designating some areas as “definitely declining” or “hazardous.”

16. Adam Gordon, *The Creation of Homeownership: How New Deal Changes in Banking Regulation Simultaneously Made Homeownership Accessible to Whites and Out of Reach for Blacks*, 115 YALE L.J. 186, 207 (2005); see also Jane Kim, *Black Reparations for Twentieth Century Federal Housing Discrimination: The Construction of White Wealth and the Effects of Denied Black Homeownership*, 29 B.U. PUB. INT. L.J. 1, 36 (2019) (“the federal government’s financial expenditure on white-American housing after the New Deal would be the equivalent of 1.239 quintillion dollars in federal spending today This amount does not consider the exponential growth of wealth accrued or accumulated from the benefits of homeownership over time”).

17. *Shelley v. Kraemer*, 334 U.S. 1, 20–21 (1948).

18. *Id.* at 22.

19. See generally Fair Housing Act of 1968, 42 U.S.C. § 3604 (prohibiting housing discrimination based on protected categories including race).

20. Whittemore, *supra* note 2, at 18.

21. See *id.* at 21 (explaining that hazardous use sites were chosen to take advantage of politically disempowered).

22. *Id.*

The combination of judicial, administrative, federal, and local land use policies that furthered segregation also exacerbated generational wealth gaps between races.²³ This support for segregation is largely responsible for why the Black-White wealth gap remains alarmingly large.²⁴

Any short history of racialized land use policy in America will inevitably be incomplete, as it is here. Moreover, the above history represents national practices. As discussed below, an analysis of local conditions is necessary for effective land use impact assessments. This national history, however, indicates why a response at the local level is warranted. What was done by land use to further segregation can logically be addressed by the reform of local land use policy.

II. Racial Impact Assessments in Non-Land Use Contexts

Criminal justice systems,²⁵ federal agencies,²⁶ and private advocacy have used racial impact assessments to advance equitable policy in non-land use contexts. The literature about these racial impact assessments provides suggestions for best practices, including suggestions about frameworks, stakeholders, and mechanisms.²⁷ Section A surveys racial impact assessments in non-land use contexts, Section B discusses the literature's suggestions for what a racial impact assessment should be.

Racial impact assessments analyze how policies, practices, programs, or actions affect racial and ethnic groups.²⁸ Every jurisdiction that adopts

23. See RICHARD ROTHSTEIN, *ECON. POL'Y INST., THE MAKING OF FERGUSON: PUBLIC POLICIES AT THE ROOT OF ITS TROUBLES* 19 (2014).

24. See *id.* (“[W]hile the median family income of African Americans is now about 60 percent of whites’ income, the median household wealth of African Americans is only about 5 percent of whites’ wealth.”); Kriston McIntosh et al., *Examining the Black-White Wealth Gap*, BROOKINGS INST. (Feb. 27, 2020), <https://www.brookings.edu/blog/up-front/2020/02/27/examining-the-black-white-wealth-gap/> [<https://perma.cc/D637-TUJB>].

25. IOWA CODE § 2.56(1) (2023); see also Jessica Erickson, *Racial Impact Statements: Considering the Consequences of Racial Disproportionalities in the Criminal Justice System*, 89 WASH. L. REV. 1425, 1444–45 (2014); see also Marc Mauer, *Racial Impact Statements as a Means of Reducing Unwarranted Sentencing Disparities*, 5 OHIO ST. J. CRIM. L. 19 (2007) [hereinafter *RIS Sentencing Reduction*]; see also Marc Mauer, *Racial Impact Statements – Changing Policies to Address Disparities*, 23 CRIM. JUST. 16 (2009) [hereinafter *RIS Address Disparities*].

26. R.A. Lenhardt, *Race Audits*, 62 HASTINGS L. J. 1527, 1554–56 (2011).

27. The literature that this article refers to encompasses legal scholarship in the forms of both accounts of practical experience and the more traditional peer-reviewed articles published by law reviews. See Erickson, *supra* note 25, at 1459–64; see also *RIS Sentencing Reduction*, *supra* note 25, at 36–38; see also *RIS Address Disparities*, *supra* note 25, at 18–19; see also Lenhardt, *supra* note 26, at 1554–56.

28. William Kennedy et al., *Putting Race Back on the Table: Racial Impact Statements*, 47 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 154, 157 (2013). The term “racial impact

racial impact assessments modifies how the assessment is implemented. Some assessments are forward-looking, evaluating proposed policies. Others are backward-looking, informing decisionmakers of inequity resulting from a policy. Regardless of where racial impact assessments appear in the timeline of events, their purpose is the same: to identify how an action or policy will affect racial equity.

A. Examples

In 2004, the American Bar Association (“ABA”) Justice Kennedy Commission recommended to the ABA House of Delegates that state, territorial, and federal governments conduct racial impact assessments to evaluate the disparate effects of existing and proposed legislation in the criminal justice system.²⁹ A number of states have acted on this recommendation.³⁰

In Iowa, the legislative services agency creates criminal justice racial impact assessments when a legislator proposes a new bill related to criminal justice, sentencing, or parole.³¹ Once the racial impact statement is triggered, the agency assesses how the new law will affect equity in the criminal justice system.³² The agency uses data about prison populations to determine whether the proposed legislation will disproportionately and adversely affect minorities.³³ The purpose of this statement is to inform legislators of foreseeable inequity before a law is passed.³⁴ This information allows legislatures to tailor their legislation to avoid inequity while still accomplishing their other legislative goals.³⁵

assessment” is not universally used for this process. Terms like racial equity and social justice impact analyses, race audits, racial impact statements, analysis of impediments, minority impact statements, and other phrases describe similar processes. Despite the differing nomenclature, the goals of the processes are similar, so this article refers to the nominally different processes as racial impact assessments.

29. AM. BAR ASS’N JUST. KENNEDY COMM’N, REPORTS WITH RECOMMENDATIONS TO THE ABA HOUSE OF DELEGATES, at iv (2004).

30. IOWA CODE § 2.56(1); CONN. GEN. STAT. § 2-24b(1) (2020); OR. REV. STAT. § 137.685(1) (2021).

31. § 2.56(1); see also Erickson, *supra* note 25, at 1446–47.

32. See § 2.56(1).

33. *Id.*; see also Erickson, *supra* note 25, at 1444–45; see generally Frank Kopczynski, *Iowa Gov. Signs Nation’s First Racial Impact Sentencing Bill*, CRIM. JUST. F. (Apr. 25, 2008), <https://criminaljusticeforum.com/news-and-announcements/iowa-gov-signs-nations-first-racial-impact-sentencing-bill-3/> [<https://perma.cc/HF7M-LKB9>].

34. Erickson, *supra* note 25, at 1445.

35. For more information about racial impact assessments in criminal justice, see generally *RIS Sentence Reduction*, *supra* note 25, at 19; see also *RIS Address Disparities*, *supra* note 25, at 17.

Federal agencies have also used racial impact assessments in non-criminal contexts.³⁶ The Department of Housing and Urban Development (“HUD”) has required its funding grantees to produce a racial impact statement that analyzes impediments to fair housing choices.³⁷ In an effort to adhere to its affirmatively furthering fair housing mandate,³⁸ HUD required its applicants for funding to “to identify impediments to fair housing choice” and “take appropriate actions to overcome the effects” of those impediments.³⁹ The analysis of impediments includes a comprehensive review of a jurisdiction’s laws, zoning ordinances, regulations, administrative policy, procedures, and demographic information.⁴⁰ Any action, omission, or decision taken because of race, color, or national origin that has the effect of restricting the availability of housing choices is an impediment,⁴¹ and recipients of HUD funding must “take appropriate actions to overcome the effects of any impediments.”⁴² Grantees certify that they have affirmatively furthered fair housing after this process is complete to receive funding.⁴³ The Trump administration eliminated the use of this tool,⁴⁴ and the Biden administration reintroduced a version of the assessment in a reduced capacity.⁴⁵

The Department of Transportation (“DOT”) requires funding recipients to provide a racial impact assessment about possible sources of inequity whenever a major service change occurs.⁴⁶ This inquiry must determine whether changes accomplished through the funding will have a

36. See Lenhardt, *supra* note 26, at 1554–56.

37. See 1 U.S. DEP’T OF HOUS. & URB. DEV., OFF. OF FAIR HOUS. AND EQUAL OPPORTUNITY, HUD-1582B-FHEO, FAIR HOUSING PLANNING GUIDE, 1–3 (1996) [hereinafter FAIR HOUSING PLANNING GUIDE]; see, e.g., Community Development Block Grants, 24 C.F.R. § 570.303 (2022). Before 2015, HUD called this process an Analysis of Impediments, but in 2015, HUD substituted the Analysis of Impediments for a standardized process called the Assessment of Fair Housing. Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42272, 42272 (July 16, 2015).

38. Fair Housing Act of 1968, 42 U.S.C. § 3608(e)(5).

39. FAIR HOUSING PLANNING GUIDE, *supra* note 37, at 1–2.

40. *Id.* at 4-4 to 4-8.

41. *Id.* at 4-4.

42. *Id.* at 1-2.

43. *Id.* at i.

44. Preserving Community and Neighborhood Choice, 85 Fed. Reg. 47899, 47904 (Aug. 7, 2020) (repealing the 2015 Assessment of Fair Housing and Analysis of Impediments).

45. 24 C.F.R. § 5.152 (2023); Restoring Affirmatively Further Fair Housing Definitions and Certifications, 86 Fed. Reg. 30779, 30787, 30790 (June 10, 2021) (making available for grantees the assessment tools of the Assessment of Fair Housing and Analysis of Impediments but not reinstating the obligation to conduct either process).

46. U.S. DEP’T OF TRANSP., FED. TRANSIT ADMIN., TITLE VI REQUIREMENTS AND GUIDELINES FOR FEDERAL TRANSIT ADMINISTRATION RECIPIENTS, at IV-11 (2012) [hereinafter GUIDELINES FOR FTA RECIPIENTS]; see, e.g., CONN. DEP’T OF TRANSP., 2021 CTDOT SERVICE AND FARE EQUITY ANALYSIS (2021).

discriminatory impact based on race, color, or national origin.⁴⁷ DOT encourages recipients to involve minority communities and engage the public to identify the socio-economic impacts of transportation decisions.⁴⁸ Demographic data, maps, rider information, and customer surveys inform this analysis.⁴⁹ If a negative effect on racial equity is predicted, the entity requesting the service change must choose an alternative option, mitigate the effects, or explain why the service change is substantially justified.⁵⁰

At the local level, agencies have used racial impact assessments to make decisions about education. The Minneapolis School Board used racial impact assessments when it faced fiscal difficulties related to declining enrollment and transportation costs.⁵¹ To evaluate its options, the school worked with a private organization to create a racial impact assessment using data disaggregated by race and ethnicity about enrollment, school transportation routes, residential zones, and potential school closures.⁵² One plan both saved the most money and disrupted the least amount of students of color.⁵³ This plan, however, would have closed an anchor school critical to the Somali community and disproportionately affected American Indians despite their small population size in the school district.⁵⁴ With this knowledge, the school board mitigated the impact on these populations. The school board gave American Indians flexibility in choosing their schools and kept open an anchor school important to the Somali community.⁵⁵

Not for profit organizations efforts have also used racial impact statements to better inform their advocacy strategies.⁵⁶ Legal Services of North California prepared a racial impact assessment showing White families benefitting from county-provided psychiatric healthcare benefits “at a rate double that paid to families of color.”⁵⁷ After the organization confronted the county with the racial impact assessment, the county created an outreach program and hired bilingual staff.⁵⁸ In another example, a gas company tried to store natural gas in a geologic structure

47. GUIDELINES FOR FTA RECIPIENTS, *supra* note 46, at IV-11.

48. Lenhardt, *supra* note 26, at 1556.

49. See GUIDELINES FOR FTA RECIPIENTS, *supra* note 46, at IV-14 to IV-15.

50. See *id.* at IV-16.

51. Jermaine Toney & Terry Keleher, *Using a Racial Equity Impact Analysis in the Minneapolis Public Schools*, 47 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 163, 163 (2013).

52. *Id.* at 165–66.

53. *Id.* at 166.

54. *Id.*

55. *Id.*

56. See, e.g., Kennedy et. al, *supra* note 28, at 159–60.

57. *Id.* at 159.

58. *Id.*

beneath an historically African American neighborhood.⁵⁹ The organization enlisted the local academic community to create a racial impact assessment explaining the historical burdens that the neighborhood had suffered due to “‘degraded space,’ a subconscious pattern of neglect on the part of the elected officials.”⁶⁰ With this racial impact assessment, the organization secured a favorable decision for their client from an administrative body, preventing the company from storing gas beneath the community.⁶¹

B. Recommendations from the Literature

Suggestions about what racial impact assessments should be and how they should be conducted accompany much of the literature about racial impact assessments.⁶² This Section synthesizes those suggestions and discusses them in the context of examples. The following categories structure this discussion: data, mechanisms, and stakeholders.

Data are central to racial impact assessments. For data to be effective, it should encompass a wide enough range of topics to account for the many factors that affect racial and social equity.⁶³ Education, housing, economic development, health, and access to services in these categories should be considered.⁶⁴ These topics serve as umbrellas for narrower indicators. Specific data points, like percentage of cost burdened households disaggregated by geography and race, anchor broader considerations, like housing.⁶⁵

Systems for racial impact assessments do not achieve their potential when they do not standardize methods for using data.⁶⁶ For example, in Iowa, the Legislative Service Agency does not use a standardized method to

59. *Id.*

60. *Id.*

61. *Id.* at 159.

62. See, e.g., Toney & Keleher, *supra* note 51, at 167 (explaining “Lessons Learned” from Minneapolis Public Schools’ experience with racial impact assessments).

63. See Erickson, *supra* note 25, at 1457–61.

64. See Deborah N. Archer, “White Men’s Roads Through Black Men’s Homes”: Advancing Racial Equity Through Highway Reconstruction, 73 VAND. L. REV. 1259, 1327 (2020); see also Toney & Keleher, *supra* note 51, at 165 (“How does the proposed action support and advance racial and economic equity in such areas as education, contracting, immigrant and refugee access to services, health, workforce and economic development?”).

65. See generally ABIGAIL BEATTY ET AL., THE DETERMINANTS OF EQUITY: IDENTIFYING INDICATORS TO ESTABLISH A BASELINE OF EQUITY IN KING COUNTY 4 (2015) (creating a taxonomy for equity with 67 indicators in 13 categories).

66. See NAT’L JUV. JUST. NETWORK, THE PROMISE OF RACIAL IMPACT STATEMENTS: FINDINGS FROM A CASE STUDY OF MINORITY IMPACT STATEMENTS IN IOWA 11 (2020) [hereinafter THE PROMISE OF RACIAL IMPACT STATEMENTS].

analyze the impact of criminal justice legislation.⁶⁷ Thus, impact statements vary dramatically in length, analytical detail, and how they categorize their conclusions.⁶⁸ Many of the impact statements simply reference generic statistics produced every year.⁶⁹

To remedy inconsistent results, authors of racial impact assessments should explain their methodologies and use concrete frameworks to help “ensure questions are considered thoughtfully and systematically.”⁷⁰ Structurally, racial impact assessments should include a description of the proposed action, historical trends relevant to the proposal, demographic data that contextualizes the proposal, explanations of disproportionate effects on minority groups, and possible alternatives or measures to minimize disparate impacts on minorities.⁷¹

Accordingly, data should contemplate multiple scopes. Geographically, data about the larger region contextualizes data in the smaller region.⁷² For example, in criminal justice racial impact assessments, a state’s total population demographics expose the inequity of the state’s prison population demographics.⁷³ Temporal data also contextualizes the policy, procedure, or action by providing background for the baseline of existing conditions for the racial impact assessment.⁷⁴ Trends over time help explain the necessity of policy alternatives if an assessment concludes the policy will exacerbate inequity. Similarly, the racial impact assessment’s analysis of the existing conditions should “endeavor to understand how racial and ethnic minority groups will be impacted by the actions, policies, and practices at every stage of the project.”⁷⁵

Historical trends also develop explanations for patterns of exclusion. Separate categories of data can fail to explain how these categories might interplay to accelerate inequities. Analyzing these separate categories together in a descriptive narrative shows how spatial arrangements, public

67. *Id.* (“The bill categorizations that LSA used included negative effect, no effect, positive effect, minimal effect, and unknown effect, but nowhere are these terms defined.”).

68. *Id.*

69. *Id.*

70. Toney & Keleher, *supra* note 51, at 167; *see also* THE PROMISE OF RACIAL IMPACT STATEMENTS, *supra* note 66, at 11 (explaining that “minority/racial impact statements should consistently provide a thorough and comprehensive analysis of the impact of justice system legislation using a standardized process and methodology.”).

71. Catherine London, *Racial Impact Statements: A Proactive Approach to Addressing Racial Disparities in Prison Populations*, 29 L. & INEQ. 211, 240–41 (2011).

72. *See id.* at 240.

73. *Id.* at 240–41.

74. *Id.* at 240.

75. Archer, *supra* note 64, at 1327.

policies, and private practices produced the structural dimensions of racial inequality.⁷⁶ The task of the historical background is to develop “a theory of race in the area and the particular causes of inequality in the jurisdiction.”⁷⁷ This approach recognizes the national history of discriminatory land use policies and practices that have produced social and economic inequity in America. A racial impact assessment can particularize that national history within a locality to help expose specific methods of racial and social stratification for the assessment area.⁷⁸ Identifying these specific methods of stratification in a historical narrative explains the prudence of an action, policy, or procedure and substantiates any alternative or mitigation technique that addresses that stratification. To be effective, this narrative must not only resonate with community members but also complement the data and trends in the assessment.⁷⁹

The literature suggests that several legal mechanisms should accompany racial impact assessments. Racial impact assessments should be built into standard protocols and initiate automatically.⁸⁰ A related issue asks who should conduct the assessment.⁸¹ When designing a system for implementing assessments, policymakers must consider who has the capacity to produce, manage, and analyze data effectively.

A racial impact assessment system should require decisionmakers to confront the results of the assessment in some substantive way.⁸² If a racial impact assessment finds that the proposed action will disproportionately affect people of color, decisionmakers should have to act upon that

76. See Lenhardt, *supra* note 26, 1549–50 (identifying macrolevel criteria, microlevel criteria, and overall objectives for race audits).

77. *Id.* at 1552; *cf. id.* at 1551 (identifying who should write these narratives as a “community of inquiry” potentially composed of community leaders, historians, law professors, philosophers, sociologists, civil rights organizations, philanthropic entities, religious organizations, and local agencies).

78. See *id.* at 1550 (establishing an objective of the racial impact assessment as providing “a formal account of the structural dimensions of racial inequality and disadvantage within the local government over time”).

79. The natural gas siting example from Legal Services of California shows how the presentation of historical burdens can be effective for racial impact assessments. See Kennedy et al., *supra* note 28, at 159.

80. Erickson, *supra* note 25, at 1459–60; Toney & Keleher, *supra* note 51, at 167.

81. London, *supra* note 71, at 236–39 (analyzing who should be responsible for preparing racial impact statements in criminal justice systems); see Lenhardt, *supra* note 26, at 1551 (identifying who should conduct racial impact assessments as an audit committee potentially composed of community leaders, historians, law professors, philosophers, sociologists, civil rights organizations, philanthropic entities, religious organizations, and local agencies).

82. Erickson, *supra* note 25, at 1461–64.

information.⁸³ For example, fiscal impact statements regularly accompany legislation, but no procedure exists to prevent legislators or agency administrators from glossing over them.⁸⁴ Conversely, the Department of Transportation's service equity analysis requires that a municipal organization adopt an alternative action, mitigate the inequitable effects, or explain why the proposed option is the only way to achieve the organization's objective.⁸⁵

Alternatives and mitigation are particularly important mechanisms for racial impact statements. If a policy or action is likely to increase disparity, a racial impact statement should ask what alternatives or modifications could maximize racial equity and reduce racial disparity.⁸⁶ The separation of asking what could mitigate negative impacts and what could maximize equity is important because the dual analysis helps produce solutions. For example, the Minneapolis School Board discovered the best financial and equitable option by asking what option would best mitigate the harmful effects of school and transportation closures.⁸⁷ By also asking how racial equity could be maximized, the board produced a plan that lessened the disparate effect on Native American and Somali communities and promoted those populations' social fabric.⁸⁸

Stakeholder engagement is another critical mechanism for racial impact assessment.⁸⁹ Involving the voices of groups potentially affected by a proposal is important when searching for alternatives.⁹⁰ Narrative histories that do not incorporate the perspectives and voices of disadvantaged communities would lack credibility and avoid the benefit of engaging the public in a productive collaboration.⁹¹ Public notice and comment can also be implemented along with more active approaches that seek out historically quieted voices. These proactive approaches are especially important where local governments have broken the trust of

83. *Id.* at 1464 (suggesting that lawmakers "take a hard look at that information, whether through public comment, comparison with alternatives, or other appropriate means.").

84. *Id.* at 1462.

85. GUIDELINES FOR FTA RECIPIENTS, *supra* note 46, at ch. IV-16.

86. See Erickson, *supra* note 25, at 1464; see also GUIDELINES FOR FTA RECIPIENTS, *supra* note 46, at ch. IV-16.

87. Toney & Keleher, *supra* note 51, at 166–67.

88. *Id.* at 166.

89. Archer, *supra* note 64, at 1328–29 ("[S]tate REIS mandates should include sufficient monitoring and accountability systems to ensure equity throughout the process.").

90. Toney & Keleher, *supra* note 51, at 167 ("Stakeholder engagement from the outset of planning and decision making is critical . . . Multiracial alliances and analyses are needed.").

91. See Lenhardt, *supra* note 26, at 1551–52.

marginalized communities.⁹² Public engagement can also make racial impact statements powerful tools for gathering support for a policy, procedure, or action.

III. Racial Impact Assessments in Local Land Use Planning and Zoning

Local governments have adopted racial impact assessments for local land use planning and zoning. The following sections describe three novel models. These models can learn from each other and benefit from the experience of racial impact assessments in non-land use contexts. Descriptions of each impact assessment borrow from the suggestions discussed above.

A. New York, New York

New York City Local Law 78 integrates racial impact assessments into its land use review process.⁹³ The law has two basic components: the equitable development data tool and racial equity reports. The Department of Housing Preservation and Development and the Department of City Planning have created an equitable development data tool.⁹⁴ This data tool is used by applicants to create racial equity reports on housing and opportunity.⁹⁵

The equitable development data tool includes the following categories of data: “(i) demographic conditions, (ii) household economic security, (iii) neighborhood quality of life and access to opportunity, (iv) housing security, affordability and quality, (v) housing production and (vi) a displacement risk index.”⁹⁶ Each of these categories consists of multiple indicators,⁹⁷ and the code provides a non-exhaustive list of indicators for each category.⁹⁸ The data is disaggregated by race and includes data “for the prior two decades

92. See *Forum on Underserved Communities and the Regulatory Process*, THE ADMIN. CONF. OF THE U.S., (Nov. 2021) <https://www.acus.gov/meetings-and-events/event/forum-underserved-communities-and-regulatory-process> [https://perma.cc/AQZ4-9BCZ] (addressing participation by underserved communities).

93. Local Law No. 78 (2021) of City of NY § 25-118(b).

94. *Equitable Development Data Explorer*, N.Y.C DEP'T OF CITY PLAN., <https://www1.nyc.gov/site/planning/data-maps/edde/edde-overview.page> [https://perma.cc/7YVQ-BME8].

95. N.Y. City, N.Y., Admin, Code § 25-118(c)(4).

96. § 25-117(c).

97. § 25-117(c)(1–6).

98. *Id.*

to describe recent trends over time.”⁹⁹ The tool presents data at different levels of geography, including neighborhoods, community districts, boroughs, and the entire city.¹⁰⁰ Lastly, the methodologies and indicators for the tool will be updated as best practices develop.¹⁰¹

New York only requires racial equity reports in limited circumstances.¹⁰² Specifically, in New York, zoning amendments affecting five or more community districts and historic district applications affecting four or more city blocks require racial equity reports.¹⁰³ Non-residential and residential projects acquiring or disposing of at least 50,000 square feet also require reports.¹⁰⁴ Increases in residential floor area of at least 50,000 square feet and increases in non-residential floor of 200,000 square feet are included as well.¹⁰⁵ Lastly, changes of a certain size to manufacturing districts and any residential project affecting four contiguous blocks require racial equity reports.¹⁰⁶

The type of project also partly determines what shall be included in a racial equity report. Projects with residential uses shall list the number and type of housing units that the developer expects, the units’ expected rents or prices, and the “household incomes needed to afford such units without incurring housing cost burden.”¹⁰⁷ Types of housing units are categorized from higher income households to extremely low-income households.¹⁰⁸ Projects with non-residential floor areas must list the expected number of jobs created by sector, the median wage levels of those jobs, and the “racial and ethnic composition and educational attainment of the workforce” for these expected jobs.¹⁰⁹

Projects subject to this law must include a community profile.¹¹⁰ The community profile draws data from all categories of the equitable development data tool, approximating a half-mile radius from the project

99. § 25-117(c).

100. § 25-117(b).

101. § 25-117(e).

102. See *Applicability Chart for Racial Equity Reports*, N.Y.C DEP’T OF CITY PLAN. (2022), <https://www1.nyc.gov/assets/planning/download/pdf/data-maps/edde/racial-equity-report-applicability-chart.pdf> [<https://perma.cc/C97K-C3CU>].

103. N.Y. City, N.Y., Admin. Code § 25-118(b) (2021).

104. *Id.*

105. *Id.*

106. *Id.*

107. § 25-118(c)(2).

108. § 25-117(a) (providing definitions for the various types of households and housing units).

109. § 25-118(c)(3).

110. § 25-118(c)(4).

for the local study area.¹¹¹ The report must compare this local study area to boroughwide and citywide data. Additionally, the report must present a summary of the current conditions and trends from the past two decades.¹¹² For residential projects, the report must also present a summary of the types of housing units and affordable housing lottery applicants existing in the study area.¹¹³ All reports must include a narrative statement for “how the proposed project relates to the goals and strategies to affirmatively further fair housing and promote equitable access to opportunity identified within the city’s fair housing plan.”¹¹⁴

Before Local Law 78 was passed Gowanus, a neighborhood in Brooklyn, voluntarily conducted a racial impact assessment on its neighborhood plan according to the model set forth by the New York city law.¹¹⁵

The Gowanus Neighborhood Plan is a long-term vision similar to a comprehensive plan.¹¹⁶ A central feature of the plan is rezoning according to the Mandatory Inclusionary Housing (“MIH”) policy.¹¹⁷ The rezoning plans “to create 8,495 new dwelling units including approximately 2,950 affordable units through MIH and city-sponsored affordable housing development....”¹¹⁸ Although Local Law 78 does not require racial equity reports for neighborhood plans, the type of rezoning and residential additions contemplated in this plan would require racial equity reports.¹¹⁹

The Racial Equity Report on Housing and Opportunity follows the structure that has emerged from other racial impact assessments. The background and history section begins broadly, with national trends of racialized land use policy. As the narrative advances in time, approaching recent trends and existing conditions, the report also narrows in geographic

111. § 25-118(a) (providing the definition for “community profile”).

112. § 25-118(c)(4).

113. *Id.*

114. § 25-118(c)(5).

115. N.Y.C COUNCIL, LAND USE DIVISION, GOWANUS NEIGHBORHOOD PLAN: RACIAL EQUITY REPORT ON HOUSING AND OPPORTUNITY 3 (2021), https://council.nyc.gov/land-use/wp-content/uploads/sites/53/2021/08/20210722_Gowanus-Racial-Equity-Report-1.pdf [hereinafter GOWANUS RACIAL EQUITY REPORT] [<https://perma.cc/MWF9-QUQR>] (explaining that the assessment was a combined effort of local advocates, academics, and municipal officials).

116. See *Gowanus Neighborhood Plan*, N.Y.C DEP’T OF CITY PLAN., <https://www1.nyc.gov/site/planning/plans/gowanus/gowanus.page> [<https://perma.cc/KPS9-484R>].

117. See GOWANUS RACIAL EQUITY REPORT, *supra* note 115, at 3; see also *Mandatory Inclusionary Housing*, N.Y.C DEP’T OF CITY PLAN., <https://www.nyc.gov/site/planning/plans/mih/mandatory-inclusionary-housing.page> [<https://perma.cc/5V49-YBLR>].

118. GOWANUS RACIAL EQUITY REPORT, *supra* note 115, at 3.

119. Local Law No. 78 (2021) of City of NY § 25-118(b).

scope. The end of the narrative leaves the reader at the present moment with an explanation of how the neighborhood was shaped by private and public policies. The literature's suggestions about narrative histories would certainly be satisfied by this account.

The historic narrative is the backdrop for the existing conditions section.¹²⁰ This analysis uses two main categories: housing and economics.¹²¹ These categories reflect the displacement risk and access to opportunity indices from Seattle's Growth and Equity Report.¹²² The profile of Gowanus's current housing compares the Gowanus community to New York City and Brooklyn in the data categories stipulated by Local Law 78.¹²³ Data on income, housing costs, ownership, public housing, and displacement are all disaggregated by race and ethnicity.¹²⁴ Similarly, the economic section presents data on educational attainment, labor force participation, and wages.¹²⁵ These data are disaggregated by workforce sectors and race.¹²⁶

These snapshots of the existing conditions support the predictions for how the neighborhood plan will affect racial equity. The analysis of the plan's effect on housing uses a distributional impact perspective and a residential segregation perspective.¹²⁷ The report finds that the new affordable units will help redress the imbalance of Whites who will disproportionately benefit from the new market-rate housing.¹²⁸ The report also concludes that the plan "unequivocally" reduces Black-white and

120. GOWANUS RACIAL EQUITY REPORT, *supra* note 115, at 22 ("Understanding the current demographic makeup of the local area and the trends in population, housing stock, and local economic opportunities is the essential foundation for any attempt at understanding racial disparities of a proposed policy change.").

121. *See id.* (delineating two main data sources: the Housing and Vacancy Survey and the American Community Survey which measures demographics through the U.S. Census Bureau, including factors such as citizenship, educational attainment, income, employment, and housing characteristics). *About the American Community Survey*, U.S. CENSUS BUREAU, <https://www.census.gov/programs-surveys/acs/about.html> [<https://perma.cc/N27Y-SW9F>].

122. *See infra* Part III.B. CITY OF SEATTLE OFFICE OF PLANNING & COMMUNITY DEVELOPMENT, GROWTH AND EQUITY: ANALYZING IMPACTS ON DISPLACEMENT AND OPPORTUNITY RELATED TO SEATTLE'S GROWTH STRATEGY 12 (2016) [hereinafter GROWTH AND EQUITY REPORT], <http://www.seattle.gov/documents/departments/opcd/ongoinginitiatives/seattlescomprehensiveplan/finalgrowthandequityanalysis.pdf> [<https://perma.cc/WR3V-EBYU>].

123. GOWANUS RACIAL EQUITY REPORT, *supra* note 115, at 23.

124. *Id.* at 32–34.

125. *Id.* at 37–42.

126. *Id.*

127. *Id.* at 43. The distributional impact perspective "considers . . . the racial and economic composition of those who would benefit from the new development." The second perspective "consider[s] how the proposed development relates to existing residential patterns and the extent to which residential segregation might be affected." *Id.*

128. *See id.* at 51.

Latino-white segregation for Gowanus.¹²⁹ The economic analysis finds that the workforces most negatively affected by the zoning changes disproportionately provide more jobs for people of color.¹³⁰ In light of these findings, the report suggests policy levers for both housing and economic development.¹³¹

Accordingly, almost all of the literature's suggestions are followed by both Local Law 78 and the Gowanus report. The equitable development data tool explains its indicators and methodologies, which have been open to community feedback for drafts of the tool and will continue to be updated. Multiple geographic scopes are incorporated along with temporal data about trends from the past two decades. The reports are automatically initiated and required for land use applications. Although alternatives and mitigation are not explicitly described in the City's law, Gowanus provided policy levers after its analysis. Additionally, applicants under the law are required to explain how their projects will conform to larger equitable development plans for the city.

B. Seattle, Washington

While in the process of updating its comprehensive plan in 2016, Seattle produced an environmental impact statement (EIS) that assessed how projected growth would affect the city.¹³² The EIS examined potential strategies for guiding its growth.¹³³ As a companion document to that EIS, Seattle conducted a racial impact assessment called the Growth and Equity Report, which analyzes the growth strategy adopted by the comprehensive plan.¹³⁴

The racial impact assessment begins with a short history of racialized private lending practices and public policy in Seattle.¹³⁵ A narrative of the demographic trends the city has experienced in the past three decades follows.¹³⁶ Contrasting this historical experience with the city's future goals,

129. *Id.*

130. *See id.* at 53.

131. *Id.* at 54.

132. CITY OF SEATTLE OFF. OF PLANNING. & CITY DEV., FINAL ENVIRONMENTAL IMPACT STATEMENT FOR THE SEATTLE COMPREHENSIVE PLAN UPDATE 2-20-2-44 (2016), http://www.seattle.gov/documents/Departments/OPCD/OngoingInitiatives/SeattlesComprehensivePlan/SeattleCPFEIS2016_0505.pdf#page=66 [https://perma.cc/2NHJ-P5SC].

133. *Id.* at i–ii (summarizing the proposed alternatives).

134. GROWTH AND EQUITY REPORT, *supra* note 122, at 3.

135. *Id.* at 6 (“Critical to crafting policy and investment strategies to achieve equity is an understanding of existing disparities and their historical origins.”).

136. *Id.* at 6–9.

the report then describes an equitable city and the framework that the city is using to achieve this vision.¹³⁷ These discussions frame the purpose of the report: to evaluate the growth strategy's effects on displacement and access to opportunity.¹³⁸

The assessment establishes two indices as its main tools: the displacement risk index and the access to opportunity index.¹³⁹ The displacement risk index maps areas “where displacement of marginalized populations is more likely to occur[,]” while “[t]he access to opportunity index identifies disparities in marginalized populations’ access to some key determinants of well-being.”¹⁴⁰ Each of these indices include individual indicators that culminate in the respective index.¹⁴¹ The displacement risk index’s indicators focus on vulnerability, amenities, development capacity, and median rent.¹⁴² Indicators for the access to opportunity include “measures related to education, economic opportunity, transit, civic infrastructure, and public health.”¹⁴³

The report sorts the city’s urban villages and centers into four categories: low displacement risk/low access to opportunity, low displacement risk/high access to opportunity, high displacement risk/low access to opportunity, and high displacement risk/high access to opportunity.¹⁴⁴ The report describes the characteristics of the villages and centers that fit into these categories and the equitable development strategies that apply to each category.¹⁴⁵

The structure of this report set a standard for racial impact assessments in land use planning and zoning that mostly conforms to the literature’s suggestions.¹⁴⁶ History and recent trends lead into a snapshot of

137. *Id.* at 10–12.

138. *See id.* at 28. Specifically, the report tries to answer three questions. First, “[i]s the intensity of expected growth in particular urban centers and villages likely to have an impact on displacement of marginalized populations?” Second, “[i]s the intensity of expected growth in particular urban centers and villages likely to have an impact on marginalized populations’ access to key determinants of physical, social, and economic well-being?” Third, “[w]hat strategies and levels of investment are necessary to mitigate the impacts of expected growth and to maximize opportunities for equitable outcomes?” *Id.* at 5.

139. *Id.* at 13–14.

140. *Id.* at 12.

141. *Id.* at 13 tbl.3 (listing and describing the Displacement Risk Index indicators); *id.* at 14 tbl.4 (listing and describing the Access to Opportunity Index indicators).

142. *Id.* at 16.

143. *Id.* *See also Opportunity Mapping*, KIRWAN INST., <https://kirwaninstitute.osu.edu/opportunity-mapping> [https://perma.cc/4DRX-67KN] (further illustrating the factors involved in an Opportunity Mapping analysis).

144. *Id.* at 22 fig.7.

145. *Id.* at 23–24.

146. London, *supra* note 71, at 240–41.

current conditions that are heavily supported by data. The report does not provide a local theory on race,¹⁴⁷ but the report does reference specific historical practices that led to inequitable conditions in the city.¹⁴⁸ And although the report explicitly disavows any intention to give predictions about future development,¹⁴⁹ policy recommendations for anticipated development implicitly include the future.¹⁵⁰ Thus, the report incorporates historical, current, and future temporal considerations.

The report concludes by analyzing how the recommended growth strategy from the new comprehensive plan will affect displacement risk and access to opportunity, followed by identifying how “equitable investments can lower the risk of displacement and expand access to opportunity to create an equitable city.”¹⁵¹ In this way, the report integrates a mitigation mechanism. After such an extensive analysis, where methodologies are clearly explained, racial impact assessments like this one are well positioned perfectly to advance such policy suggestions.

Overall, Seattle’s Growth and Equity Report raises questions about how racial impact assessments should be incorporated into land use law. The report references a series of initiatives, resolutions, and executive orders that affirm the city’s commitment to racial equity and social justice.¹⁵² These commitments have been effective, for when the city’s planning department evaluated the effects of growth on the city, producing a racial impact assessment was a natural step. But unlike New York City, no legal mechanism required the report. The voluntariness of Seattle’s model raises the question of how to integrate racial impact assessments into land use laws as the literature suggests—with an automatically initiated procedure. New York provided one example and the following example also begins to answer that question.

C. Montgomery County, Maryland

In contrast to Seattle, Section 2-81C of Montgomery County, Maryland’s code requires the Office of Legislative Oversight to submit racial

147. See Lenhardt, *supra* note 26, at 1552 (tasking the creators of racial impact assessments with “developing a theory of race in the area and the particular causes of inequality in the jurisdiction.”).

148. GROWTH AND EQUITY REPORT, *supra* note 122, at 6.

149. *Id.* at 15.

150. See *id.* at 28, 31.

151. *Id.* at 28. See also CITY OF SEATTLE OFF. OF PLAN. & CMTY. DEV., EQUITABLE DEVELOPMENT IMPLEMENTATION PLAN, S. 9-11, at 7-8 (2016) (describing strategies and projects to mitigate high displacement risk and increase access to opportunity).

152. See, e.g., GROWTH AND EQUITY REPORT, *supra* note 122, at 3.

equity and social justice impact statements to the County Council for every bill and zoning text amendment that the council considers.¹⁵³ These “racial equity and social justice impact statement[s] must include . . . an estimate of both positive and negative changes in racial equity and social justice in the County as a result of the . . . bill” or zoning text amendment.¹⁵⁴ Like Seattle and New York, Montgomery County generally follows the literature’s suggestions about how to structure racial impact assessments.¹⁵⁵

The statements begin by summarizing the zoning text amendments’ (“ZTAs”) main purpose and the changes the amendment makes.¹⁵⁶ Next, the statements describe the ZTA’s topic in relation to racial equity. For example, a racial impact statement for a ZTA that expedited the permitting process for biohealth campuses “describes the historical drivers of racial inequities in land use and economic development and available data on racial disparities, especially within the biohealth industry.”¹⁵⁷ An assessment about a ZTA that allows property owners to renovate historically preserved structures for certain commercial uses describes the tendency of historic preservation to serve “high-income and White communities.”¹⁵⁸ This approach to telling the county’s history might appear piecemeal, but a racial impact analysis of the county’s forthcoming comprehensive plan could provide the type of historical narrative envisioned by some of the literature.

After this background of the ZTA and its relevance to racial equity and social justice, the racial impact statements predict and explain the impact of the proposed amendment on racial equity and social justice.¹⁵⁹ The

153. See MD. CODE REGS. § 2-81C(b) (2023).

154. *Id.* at § 2-81C(d).

155. See London, *supra* note 71, at 240–41 (suggesting that a structure should include a description of the proposed action, historical trends relevant to the proposal, demographic data that contextualizes the proposal, explanations of disproportionate effects on minority groups, and possible alternatives or measures to minimize disparate impacts on minorities).

156. See, e.g., MONTGOMERY CNTY. COUNCIL, OFF. OF LEGIS. OVERSIGHT, RESJ TEXT AMENDMENT STATEMENT ZTA 21-06: EXEMPTIONS – DENSITY TRANSFER AND HISTORIC RES. 1 (2021) [hereinafter HISTORIC PRESERVATION RACIAL IMPACT STATEMENT], <https://www.montgomerycountymd.gov/OLO/Resources/Files/resjis/ZTA/2021/RESJIS-ZTA21-06.pdf> [https://perma.cc/6S5L-GBZX]. Montgomery County makes all Racial Equity and Social Justice Impact Statements available online. See *Racial Equity and Social Justice Impact Statements*, MONTGOMERY CNTY. COUNCIL OFF. OF LEGIS. OVERSIGHT, <https://www.montgomerycountymd.gov/OLO/resjis.html> [https://perma.cc/JVS8-GYKQ].

157. MONTGOMERY CNTY. COUNCIL, OFF. OF LEGIS. OVERSIGHT, RESJ ZONING TEXT AMENDMENT STATEMENT ZTA 21-09: OFFICE AND PROFESSIONAL-BIOHEALTH PRIORITY CAMPUS 1 (2021) [hereinafter BIOHEALTH RACIAL IMPACT STATEMENT], <https://www.montgomerycountymd.gov/OLO/Resources/Files/resjis/ZTA/2021/ZTA21-09.pdf> [https://perma.cc/35VV-VM62].

158. HISTORIC PRESERVATION RACIAL IMPACT STATEMENT, *supra* note 156, at 2.

159. See, e.g., MONTGOMERY CNTY. COUNCIL, OFF. OF LEGIS. OVERSIGHT, RESJ ZONING TEXT AMENDMENT STATEMENT ZTA 21-07: DENSITY AND HEIGHT ALLOCATION – DEVELOPMENT WITH MODERATELY

assessments also provide mitigation strategies for changing ZTAs to better address inequities.¹⁶⁰ For example, in the bio-health campus ZTA, the racial impact statement suggests investing in bio-health workforce development programs for BIPOC residents and locating these campuses in BIPOC communities.¹⁶¹ In a racial impact statement about a ZTA which provides density bonuses for affordable housing developers, the assessment suggests that the ZTA would be even more effective at reducing housing, transit, and economic inequities if the affordable housing units served families with multiple children.¹⁶² Just like in the Seattle, racial impact analyses lend themselves to policy suggestions for maximizing social equity.

Accordingly, the racial impact assessment scheme in Montgomery County applies some of what the literature suggests. Bills and zoning text amendments automatically trigger racial impact assessments. The available statements explain the relevant historical inequities that have led to current conditions, and the assessments include mitigation strategies tailored to the assessments' topics.

Some of the literature's suggestions, however, are not present. While predictions about the zoning text amendments' effects on racial equity are supported by data,¹⁶³ some methodology sections lack clarity.¹⁶⁴ Additionally, the County Council is not forced to grapple with the results of the racial impact assessment. The racial impact assessments also do not incorporate community engagement.

Montgomery County's scheme also leaves questions unanswered regarding racial impact analysis in land use planning and zoning. First, do racial impact assessments for every bill or zoning text amendment make sense? Several of the racial impact assessments barely extend past a page and conclude that racial equity results are negligible.¹⁶⁵ This could be a recurring problem for bills or amendments with subjects that the Office of Legislative Oversight thinks are irrelevant to racial equity. To rephrase this

PRICED DWELLING UNITS 3 (2021) [hereinafter MPDU RACIAL IMPACT STATEMENT], <https://www.montgomerycountymd.gov/OLO/Resources/Files/resjis/ZTA/2021/ZTA21-07.pdf> [<https://perma.cc/F92D-XESF>] (providing "Anticipated RESJ Impacts").

160. MD. CODE 2-81C(b) (requiring statements to include "describing the racial equity and social justice impact").

161. BIOHEALTH RACIAL IMPACT STATEMENT, *supra* note 157, at 5.

162. MPDU RACIAL IMPACT STATEMENT, *supra* note 159, at 3.

163. *See, e.g.*, BIOHEALTH RACIAL IMPACT STATEMENT, *supra* note 157, at 5.

164. *See, e.g.*, HISTORIC PRESERVATION RACIAL IMPACT STATEMENT, *supra* note 156, at 3.

165. *See, e.g.*, MONTGOMERY CNTY. COUNCIL, OFF. OF LEGIS. OVERSIGHT, RESJ ZONING TEXT AMENDMENT STATEMENT ZTA 21-11: SANDY SPRING/ASHTON RURAL VILLAGE OVERLAY ZONE—AMENDMENTS 1 (2021), <https://www.montgomerycountymd.gov/OLO/Resources/Files/resjis/ZTA/2021/ZTA21-11.pdf> [<https://perma.cc/3CN2-4RY3>].

critique and provide an example, the best venue to address the racialized foundations of historic preservation might not be a non-binding racial impact statement about a zoning text amendment affecting a singular property.¹⁶⁶ But a response to this critique might argue that structural changes are accomplished by both small, individual decisions, like zoning text amendments, and large, encompassing decisions, like comprehensive plans. New York City tries to solve this problem by requiring racial equity reports for actions only of a certain size. Theoretically, New York will avoid administrative hassle for *de minimis* projects, but this approach's effectiveness shall wait to be seen.

Second, each Montgomery County racial impact assessment includes a caveat that states “predicting the impact of zoning text amendments on racial equity and social justice is a challenging, analytical endeavor due to data limitations, uncertainty, and other factors.”¹⁶⁷ Seattle created the displacement risk index and access to opportunity index to compensate for this difficulty, but the indices were only constructed for the individual purpose of assessing the comprehensive plan's growth strategy. Conversely, Montgomery County has no unified analytical tools to assess racial equity,¹⁶⁸ but the county has implemented procedures that automatically initiate racial impact assessments. New York's approach appears to capitalize on the strengths of both of these systems by automatically initiating racial equity reports and by providing a data tool that is for many different types of projects. New York, however, differs by creating a creating a system that puts responsibility on private parties for creating racial impact assessments.

In combination, the examples from New York, Seattle, and Montgomery County provide initial models that appear to learn from their counterparts in non-land use contexts. Although many questions still surround this emerging topic, these models provide frameworks for a valuable approach that local governments can use to begin addressing the racialized history of land use planning and zoning.

166. See Casey Anderson, chair, Montgomery Cnty. Plan. Bd., *Panel for the 2022 Midyear Meeting of American Bar Association Section of State and Local Government Law: Reconciling the Past and Planning for the Future* (Feb. 11, 2022) <https://www.americanbar.org/news/abanews/aba-news-archives/2022/02/will-racial-impact-assessments-really-lead-justice-in-land-use/?login> [<https://perma.cc/HC2H-UC8V>].

167. See, e.g., MPDU RACIAL IMPACT STATEMENT, *supra* note 159, at 4.

168. *But see* MONTGOMERY CNTY. PLAN. DEP'T., THRIVE MONTGOMERY 2050 – BRIEFING ON DRAFT VISION, GOALS, POLICIES AND ACTIONS 26, <https://montgomeryplanning.org/wp-content/uploads/2020/06/Final-staff-report-vision-goals-policies-and-actions-for-6-11-20-PB-.pdf> [<https://perma.cc/VA2L-WDR3>] (clearly identifying that the development of “composite displacement risk and opportunity access indices” is a desired goal).

IV. Future Implementation

Because racial impact assessments in land use planning and zoning are at an early stage in their own development, this note raises issues about future implementation. Section A addresses the importance of data indicators. Section B addresses how each land use example for racial impact assessments fails to require that decisionmakers confront the results of a racial impact assessment.

A. Importance of Indicators for Data

The importance of the indicators used for displacement and opportunity indices should not be understated. Indicators produce indices, and the culmination of the indicators' data supports an assessment's evaluation on equity. In this way, the report attempts a quantitative definition of social equity. But choosing indicators for racial equity and social justice has not been uniform.¹⁶⁹

One study applies four cities' methodologies for mapping gentrification and displacement pressure to Boston.¹⁷⁰ The results varied according to what indicators each methodology used. The indicators chosen for each assessment "relate at the most fundamental level to their authors' decisions about the most salient causes and indicators of gentrification, highlighting the degree to which they understand gentrification to be driven by private investment, rent gaps, state-led public investment or changing consumer preferences"¹⁷¹ The difference in these results might suggest that methods for assessing displacement risk arbitrarily reflect the ideologies of those who create the mapping tools. Alternatively, the difference in these results might signal that generalizing methodologies for measuring equity is difficult because different parts of the country have different meanings for equity. Accordingly, each methodology is tailored to the circumstances of that place.

All the methodologies in this study, however, identified seven tracts that are "consistent with anecdotal accounts of neighborhoods experiencing gentrification and displacement in Boston."¹⁷² Indeed, "the five neighborhoods [that are] most often discussed as [threatened by] gentrification and displacement" are all identified by each methodology.¹⁷³

169. Benjamin Preis et al., *Mapping Gentrification and Displacement Pressure: An Exploration of Four Distinct Methodologies*, URBAN STUDIES 1, 2 (2020).

170. *Id.* at 1, 10–11.

171. *Id.* at 13.

172. *Id.* at 12–13.

173. *Id.*

This overlap reinforces the value of stakeholder participation and input. While displacement and opportunity mapping can be powerful tools, the products of these tools often reflect the experience of community members. How a methodology chooses indicators should be open to feedback and be selected in the context of lived experiences. Stakeholder input regarding indicators can substantiate quantitative definitions of equity in the actual community's view of equity.

B. Requiring Decisionmakers to Confront Results

One significant drawback of racial impact assessments is that they are often only informative, and decisionmakers in local agencies and legislatures are not bound to consider the assessment's results. For example, at the end of every racial impact assessment in Montgomery County, a caveat states that "this RESJ impact statement on the proposed zoning text amendment is intended to inform the Council's decision-making process rather than determine it."¹⁷⁴ This criticism does not imply that racial impact assessments are not useful tools because they are merely informative. Indeed, activists can use the information that the assessments provide for organizing local support or opposition of a project.

Nonetheless, all three examples of racial impact assessments in local land use provided in this article fail to follow one of the literature's major suggestions from Part II: racial impact assessments should require decisionmakers to reconcile their decisions with the results of the racial impact assessment. This suggestion is most salient when a racial impact assessment finds that a proposed policy, action, or procedure will further exacerbate racial and social inequity in a community. Because of this obvious misalignment between the literature's suggestions and the land use examples, this section explores suggestions for how a land use system could require decision makers to confront the results of racial impacts assessments. These suggestions do not fully analyze all the possible issues involved but provide topics for future research.

i. Integration with Environmental Impact Assessments

Litigants have already attempted to require decisionmakers to consider the results of a racial impact assessment by integrating racial impact assessments into environmental impact assessments. Initially, this idea appears to adhere to how many people think about the environment. For example, the EPA defines environmental justice as "the fair treatment

174. See, e.g., MPDU RACIAL IMPACT STATEMENT, *supra* note 159, at 4.

and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”¹⁷⁵

But attempts to integrate racial impact assessments into environmental impact assessments have failed.¹⁷⁶ The National Environmental Policy Act (“NEPA”) requires agencies to produce EISs for major federal actions that would alter the quality of the human environment.¹⁷⁷ Cultural, economic, and social effects on the human environment are all relevant to this analysis, but reading racial equity concerns into these categories has mostly failed due to the Supreme Court’s narrow interpretation of NEPA.¹⁷⁸

Using state environmental policy acts is not promising either. In *Seattle Coalition for Affordability, Livability, and Equity (SCALE), et al., v. City of Seattle*, a court specifically denied that a city must consider social and economic displacement in its environmental impact assessment of an upzoning.¹⁷⁹ Moreover, relatively few states have environmental policy acts, so this solution for requiring decisionmakers to confront the results of a racial impact assessment would be limited.

The value of racial impact assessments might be lost if they are added to environmental assessments. Environmental policy statutes and regulations usually state what factors need to be considered in an environmental impact analysis.¹⁸⁰ For example, in Washington the built environment for the purposes of environmental impact analysis consists of public services and utilities, transportation, environmental health, and land use.¹⁸¹ Adding racial equity to the end of this list loses sight of racial equity belonging in each of these categories. While adding racial lenses to each of these categories appears desirable, doing so might effectively take away the benefit of having an assessment specifically about racial equity.

Because of these practical concerns¹⁸² and the discouraging caselaw, racial impact assessments could benefit from pursuing other avenues for

175. *Environmental Justice*, U.S. EPA, <https://www.epa.gov/environmentaljustice> [<https://perma.cc/QG4H-ELBS>].

176. See Archer, *supra* note 64, at 1314–21.

177. National Environmental Policy Act, 42 U.S.C. § 4332(C).

178. See Archer, *supra* note 64, at 1315–19 (providing a discussion of cases that have attempted to emphasize socio-economic impacts in NEPA EISs).

179. *Seattle Coalition for Affordability, Livability, and Equity, et al. v. City of Seattle*, No. 19-3-0011c, 2019 WL 7598711, at *24 (Wash. Central Puget Sd. Growth Mgmt. Hrgs. Bd., Dec. 30, 2019).

180. See, e.g., WASH. REV. CODE § 43.21C.110(1)(f).

181. See *id.*

182. See Archer, *supra* note 64, at 1319–21 (describing other practical concerns).

requiring decisionmakers to confront the results of assessments, like modifying enabling statutes. But overcoming the challenges of integrating racial impact assessments with environmental impact assessments could prove worthwhile in places like New York with strong environmental policy acts. The integration would make racial impact assessments enforceable and apply the process outside of large urban environments.

ii. Disparate Impact Liability

In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, the Supreme Court first affirmed that “disparate-impact claims are cognizable under the Fair Housing Act” (“FHA”).¹⁸³ Disparate impact claims challenge practices that have “a disproportionately adverse effect” on minorities and are otherwise unjustified by a legitimate rationale.¹⁸⁴ Racial impact assessments could provide support for disparate-impact claims because they provide statistical comparisons, discuss causation, and consider alternatives to the proposed action.

The *Inclusive Communities* opinion establishes a three-step framework for disparate-impact cases.¹⁸⁵ First, a plaintiff must establish a prima facie case for disparate impact. If the plaintiff meets this burden, the defendant must prove the challenged policy is “necessary to achieve a valid interest.”¹⁸⁶ Finally, if a defendant satisfies this burden, a plaintiff must prove that another practice with a less discriminatory effect could advance the defendant’s valid interest.¹⁸⁷ This discussion will focus on the first and third steps.

Proving a prima facie case of disparate impact involves showing a statistical comparison¹⁸⁸ and causation.¹⁸⁹ The statistical evidence must “show[] that this policy has a greater impact on a protected class than it

183. *Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 545 (2015).

184. 24 C.F.R. § 100.500(b)(2) (2022); *see also* Reinstatement of HUD’s Discriminatory Effects Standard, 86 Fed. Reg. 33590, 33594 (June 25, 2021) (proposing to recodify the 2013 rule).

185. Robert G. Schwemm & Calvin Bradford, *Proving Disparate Impact in Fair Housing Cases After ‘Inclusive Communities,’* 19 N.Y.U. J. LEGIS. & PUB. POL’Y 685, 692 (2016).

186. *See Inclusive Cmty.*, 576 U.S. at 541.

187. *See id.* at 527.

188. *Oviedo Town Ctr. II, L.L.L.P. v. City of Oviedo, Fla.* 759 Fed. Appx. 828, 834–35 (11th Cir. 2018) (“[T]he plaintiff must provide evidence comparing members of the protected class affected by the ordinance with non-members affected by the ordinance.”).

189. *See Inclusive Cmty.*, 576 U.S. at 543; *see also* Schwemm & Bradford, *supra* note 185, at 693.

does on others.”¹⁹⁰ Additionally, plaintiffs “must provide evidence comparing members of the protected class affected by the ordinance with non-members affected by the ordinance.”¹⁹¹ But plaintiffs cannot rely on statistics alone.¹⁹² Prima facie disparate-impact cases must also show that the challenged policy proximately caused the disparity.¹⁹³ The Supreme Court has yet to determine exactly what causality means in this context,¹⁹⁴ but foreseeability alone is not enough.¹⁹⁵

Racial impact assessments could be the definitive tool for establishing a prima facie case of disparate impact. Fair housing and the data to assess housing are central concerns for racial impact assessments. Because the assessment disaggregates data by race, comparative statistics are present. Additionally, the ability of a racial impact assessment to tell a historical narrative, relate that history to current conditions, and then predict how a policy will affect conditions in the future could be invaluable for proving causation. Moreover, the land use systems for racial impact assessments are set to produce a large volume of these assessments through automatically initiated procedures. Analyzing a larger set of assessments together could provide even stronger evidence for causation.

If a defendant shows that the challenged policy is necessary for a valid interest, plaintiffs must also prove that another practice with a less discriminatory effect could advance the defendant’s valid interest.¹⁹⁶ Racial impact assessments are replete with examples of mitigation strategies, policy levers, and alternatives. Pairing this discussion of alternatives in the same document as the proof for a prima facie case makes a racial impact assessment a strong tool for disparate impact claims. Indeed, many features of the racial impact assessment appear tailored to the requirements of *Inclusive Communities*. The strength and specificity of racial impact assessments could influence decisionmakers in local governments to confront fair housing to avoid disparate impact claims.

190. *Schwemm & Bradford, supra* note 185, at 697.

191. *Oviedo Town Ctr. II, L.L.P.*, 759 Fed. Appx. at 835.

192. *Inclusive Cmty.*, 576 U.S. at 540.

193. *See* *Bank of America Corp. v. City of Miami*, 581 U.S. 189, 197 (2017).

194. *Id.* at 203 (“The parties have asked us to draw the precise boundaries of proximate cause under the FHA and to determine on which side of the line the City’s financial injuries fall. We decline to do so.”).

195. *Id.* *See also* Kimberly Ferrari, *The State of Disparate Impact Under the Fair Housing Act: Interpreting Robust Causality After ‘Inclusive Communities,’* 29 J. OF AFFORDABLE HOUS. 327, 342 (2020) (arguing that plaintiffs do not need to prove direct causation).

196. *See Inclusive Cmty.*, 576 U.S. at 527.

CONCLUSION

Racial impact assessments are an emerging trend in land use planning and zoning. As local governments continue to implement this tool, they can learn from the experiences of other racial impact assessments.