

## ARTICLES

### “White Men’s Roads Through Black Men’s Homes”\*: Advancing Racial Equity Through Highway Reconstruction

*Deborah N. Archer\*\**

*Racial and economic segregation in urban communities is often understood as a natural consequence of poor choices by individuals. In reality, racially and economically segregated cities are the result of many factors,*

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\* “White men’s roads through black men’s homes” was the mantra of a coalition led by Reginald M. Booker and Sammie Abbott in opposition to highway development in Washington, D.C. See Harry Jaffe, *The Insane Highway Plan that Would Have Bulldozed DC’s Most Charming Neighborhoods*, WASHINGTONIAN (Oct. 21, 2015), <https://www.washingtonian.com/2015/10/21/the-insane-highway-plan-that-would-have-bulldozed-washington-dcs-most-charming-neighborhoods/> [<https://perma.cc/6YCR-PKKR>] (discussing the campaign to halt the building of highways in Washington, D.C.).

\*\* Associate Professor of Clinical Law and Co-Faculty Director of the Center on Race, Inequality, and the Law, New York University School of Law. I thank Rachel Barkow, Richard Buery, Audrey McFarlane, Michael Pinard, Russell Robinson, Sarah Schindler, Tony Thompson, Kele Williams, and Katrina Wyman for helpful comments on earlier drafts. I also appreciate the insights I received from participants of faculty workshops at Brooklyn Law School and the University of Miami School of Law and participants at the 2019 Clinical Law Review Workshop at NYU Law School. I am grateful to Nelson Castano, Anna Applebaum, Michael Milov-Cordoba, and Rachel Sommer for their research assistance and to Sarah Jaramillo for her constant support of my research. Thank you to the wonderful editors of the *Vanderbilt Law Review* for their very helpful edits. Finally, I gratefully acknowledge support from the Filomen D’Agostino and Max E. Greenberg Research Fund, New York University School of Law.

*including the nation’s interstate highway system. In states around the country, highway construction displaced Black households and cut the heart and soul out of thriving Black communities as homes, churches, schools, and businesses were destroyed. In other communities, the highway system was a tool of a segregationist agenda, erecting a wall that separated White and Black communities and protected White people from Black migration. In these ways, construction of the interstate highway system contributed to the residential concentration of race and poverty and created physical, economic, and psychological barriers that persist.*

*Today, the interstate highway system is on the verge of transformational change as aging highways around the country are crumbling or insufficient to meet growing demand and must be rebuilt or replaced. The possibility of significant infrastructure development offers an opportunity to redress some of the harm caused by the interstate highway system, to strengthen impacted communities, and to advance racial equity. Still, there is a risk that federal, state, and local highway builders will repeat the sins of the past at the expense of communities of color whose homes, businesses, and community institutions again stand in the path of the bulldozers. Moreover, there is reason to believe that traditional civil rights laws, standing alone, are insufficient to redress the structural and institutional racism that shaped the interstate highway system and continues to threaten communities of color as the highways are rebuilt.*

*This Article is the first in the legal literature to explore in depth the racial equity concerns and opportunities raised by modern highway redevelopment. It also builds on the work of legal scholars who advocate for addressing systemic racial inequality by requiring that policymakers conduct a thorough and comprehensive analysis of how a proposed action, policy, or practice will affect racial and ethnic groups. The Article concludes by proposing a way forward for highway redevelopment projects: requiring jurisdictions to complete comprehensive racial equity impact studies prior to any construction. Racial equity impact studies have been used or proposed in various contexts to reform racialized institutions and structures. This Article argues that highway redevelopment projects should join this growing list.*

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## INTRODUCTION

The increased mobility ushered in by the rise of the automobile and expansion of the interstate highway system has been a complex issue for Black people. In many ways, automobiles and highways offered a much-needed respite from the daily indignities of living in Jim Crow America. For decades, using public transportation was a daily reminder of the legal and social inferiority of Black people, particularly in the South. Black people were relegated to the back of the bus and required to give up their seats to white people on demand.<sup>1</sup> In train stations, Black people were forced to wait in separate waiting areas, with separate bathrooms and drinking fountains.<sup>2</sup> In contrast, the

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1. See *Montgomery Bus Boycott*, HIST. (Feb. 3, 2010), <https://www.history.com/topics/black-history/montgomery-bus-boycott> [<https://perma.cc/4Z2N-8MTH>] (noting a Montgomery, Alabama city ordinance requiring Black people “to sit in the back half of city buses and to yield their seats to white riders if the front half of the bus, reserved for whites, was full”); see also, e.g., Daniel B. Moskowitz, *No, I Will Not Move to the Back of the Bus*, 52 AM. HIST. 40, 41 (2017) (detailing the story of a Black woman in Virginia who was asked to give up her seat for a white passenger but refused).

2. See Elizabeth Guffey, *Knowing Their Space: Signs of Jim Crow in the Segregated South*, 28 DESIGNISSUES 41, 52–53 (2012) (detailing the complexities of entering and using the “right”

ability to drive on the interstate highways offered Black people a certain amount of freedom from the oppression they experienced on public transportation. Sociologist and economist Gunnar Myrdal spoke of the liberating impact of the automobile for Black people, observing that cars were “for Southern Negroes, who c[ould] afford one, a partial emancipation from Jim Crowism.”<sup>3</sup> Indeed, the “opportunity to travel ‘incognito’ in a covered car without constantly confronting the significance of their skin color gave southern blacks a taste of the mobility, freedom, and equality that otherwise had not materialized after Reconstruction.”<sup>4</sup>

At the same time, Black people faced the many dangers of traveling through “white spaces.” Many Black travelers had to bring buckets or portable toilets along with them, sleep in their cars, or drive through the night because they were turned away by motels, restaurants, and service stations.<sup>5</sup> Many were caught on dangerous roads, unable to find hotels willing to let them stay.<sup>6</sup> As one *Washington Post* writer recalled about the violence Black people faced on the road, “[s]o many black travelers were just not making it to their

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facilities in segregated train stations); Thomas J. Sugrue, *Driving While Black: The Car and Race Relations in Modern America*, AUTOMOBILE AM. LIFE & SOC’Y, [http://www.autolife.umd.umich.edu/Race/R\\_Casestudy/R\\_Casestudy2.htm](http://www.autolife.umd.umich.edu/Race/R_Casestudy/R_Casestudy2.htm) [<https://perma.cc/WZP4-8WK2>] (“In the South, black patrons at bus and train stations were cordoned off into separate waiting rooms, with separate bathrooms, drinking fountains, and (when they were provided to blacks at all) separate concession stands.”).

3. 2 GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 1368 n.50 (Harper & Bros. Publishers 1944).

4. SARAH A. SEO, *POLICING THE OPEN ROAD: HOW CARS TRANSFORMED AMERICAN FREEDOM* 36 (2019).

5. See TOM LEWIS, *DIVIDED HIGHWAYS: BUILDING THE INTERSTATE HIGHWAYS, TRANSFORMING AMERICAN LIFE* 270 (Cornell Univ. Press 2013) (noting that traveling on the highway “could be a frightening experience” for Black people); ISABEL WILKERSON, *THE WARMTH OF OTHER SUNS: THE EPIC STORY OF GREAT MIGRATION* 202 (Vintage 2011) (recounting the story of a grandfather who had to present himself as White and sneak his darker skinned grandson into a hotel under a blanket in order to get a room); Erin Blakemore, *A Black American’s Guide to Travel in the Jim Crow Era*, SMITHSONIAN MAG. (Nov. 3, 2015), <https://www.smithsonianmag.com/smart-news/read-these-chilling-charming-guides-black-travelers-during-jim-crow-era-180957131/> [<https://perma.cc/UNS7-Y9J9>] (discussing *The Green Book*, a resource for Black travelers published between 1936 and 1966, which listed businesses that would serve Black travelers); Tanvi Misra, *How Turbans Helped Some Blacks Go Incognito in the Jim Crow Era*, NPR (July 19, 2014, 5:32 AM ET), <https://www.npr.org/sections/codeswitch/2014/07/17/332380449/how-turbans-helped-some-blacks-go-incognito-in-the-jim-crow-era> [<https://perma.cc/5XE7-DNG6>] (discussing how some Blacks wore turbans while traveling in the Jim Crow South in order to appear Indian and avoid harassment); Jeff Wallenfeldt, *The Green Book*, ENCYCLOPEDIA BRITANNICA (Nov. 28, 2018), <https://www.britannica.com/topic/The-Green-Book-travel-guide> [<https://perma.cc/4698-UM7E>] (“To address the uncertainty of attaining lodging, meals, and fuel, African American car travelers brought with them blankets and pillows, extra food, drinks, and gasoline, as well as portable toilets.”).

6. See LEWIS, *supra* note 5, at 269 (noting that Black travelers would have to carefully plan their travels so that the night would not catch them on a dangerous road, but many Black travelers were unsuccessful in reaching their destinations before nightfall).

destinations.”<sup>7</sup> Beginning in the 1930s, Black travelers were able to turn to resources such as *The Negro Motorist Green Book*<sup>8</sup> and the *Travelguide* to help navigate their way around the harassment and humiliation that often accompanied long-distance road travel. The *Travelguide* promised “Vacation and Recreation Without Humiliation,”<sup>9</sup> while *The Negro Motorist Green Book* promised to give “the Negro traveler information that will keep him from running into difficulties, embarrassments, and to make his trip more enjoyable.”<sup>10</sup> These guides helped Black people find towns where they would be welcomed, hotels and restaurants that would serve them, and service stations where they could stop to use the restroom.<sup>11</sup> Still, Black drivers were never able to fully escape the challenges of “driving while black,” including harassment and violence at the hands of the police and white travelers.<sup>12</sup>

Those aspects of automobile travel focus on the experiences of Black people when they were traveling the highways. Significantly less attention has been paid to the broader impact the highways had on the lives of Black people, whether or not they ever stepped into a car. The interstate highway system revealed “all our fantasies and fears, our social ideas and racial divisions, our middle-class aspirations and underclass realities.”<sup>13</sup> One enduring yet underexplored aspect is the impact the expansion of the interstate highway system had, and continues to have, on the physical and economic isolation of communities of color. Racial and economic segregation is often understood as a natural consequence of poor choices by individuals. The narrative is that residents of central cities are themselves primarily to blame for concentrations of poverty and violence.<sup>14</sup> In reality, racially

7. *Id.*

8. VICTOR H. GREEN, *THE NEGRO MOTORIST GREEN BOOK* (1937). The last edition of the Green Book was published in 1966. LEWIS, *supra* note 5, at 271.

9. Evan Andrews, *The Green Book: The Black Travelers' Guide to Jim Crow America*, HIST. (Feb. 6, 2017), <https://www.history.com/news/the-green-book-the-black-travelers-guide-to-jim-crow-america> [<https://perma.cc/8R9K-DBGM>].

10. See LIONEL C. BASCOM, *HARLEM: THE CRUCIBLE OF MODERN AFRICAN AMERICAN CULTURE* 165 (Praeger 2017) (quoting Victor Green’s reason for publishing the guide).

11. See Andrews, *supra* note 9 (“In the pages that followed, they provided a rundown of hotels, guest houses, service stations, drug stores, taverns, barber shops and restaurants that were known to be safe ports of call for African American travelers.”).

12. See BASCOM, *supra* note 10, at 166 (detailing some of the dangers Black drivers faced on the road); SEO, *supra* note 4, at 37 (acknowledging that “driving in a racist society diminished the liberating potential of the automobile”).

13. LEWIS, *supra* note 5, at xiii.

14. See PAUL MASON FOTSCH, *WATCHING THE TRAFFIC GO BY: TRANSPORTATION AND ISOLATION IN URBAN AMERICA* 159–63 (2007) (explaining that advocates of the suburbs attributed poor city living conditions “to the culture of new immigrants” and also describing freeways as a “shield” protecting suburban people from contact with the urban population).

segregated cities are the result of many factors, including federal, state, and local housing policies; private housing discrimination; migration patterns; public education systems; employment opportunities; mortgage practices; and the country's interstate highway system.<sup>15</sup> Construction of the interstate highway system played a key role in creating the spatial and economic conditions prevalent in urban centers today—conditions that influence interracial interactions, economic mobility, and community stability.<sup>16</sup> Indeed, highway construction both “symbolically and physically” encouraged racial segregation and isolation.<sup>17</sup>

The passage of the Federal-Aid Highway Act of 1956, popularly known as the National Interstate and Defense Highways Act or the Interstate Highway Act,<sup>18</sup> buoyed both highway construction and the

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15. See RONALD H. BAYOR, RACE AND THE SHAPING OF TWENTIETH-CENTURY ATLANTA 53 (1996) (“The creation of these separate racial enclaves is the result of various perennial factors, including decades-old migration patterns, occupational choices, and federal government and local banking appraisal and mortgage policies.”); RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA VII–IX (2017) (discussing the history of laws that have created and helped maintain segregated communities in the United States); Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 1987 (2000) (“Marginalized populations, particularly the minority poor who are relegated to poverty-ridden, central city neighborhoods, are largely excluded from participating in the favored quarter’s economic prosperity.”); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1861 (1994) (“[A]n important source of segregation and of the isolation and oppression of minorities that accompany it, is the autonomous municipality that forms a racially homogenous jurisdiction.”); David D. Troutt, *Katrina’s Window: Localism, Resegregation, and Equitable Regionalism*, 55 BUFF. L. REV. 1109, 1145–46 (2008); Erika K. Wilson, *Toward a Theory of Equitable Federated Regionalism in Public Education*, 61 UCLA L. REV. 1416, 1418 (2014).

16. FOTSCH, *supra* note 14, at 169 (“[A]s a physical formation the freeway’s construction helped create the spatial divisions now regarded as natural.”); see Roger Biles, Raymond A. Mohl & Mark H. Rose, *Revisiting the Urban Interstates: Politics, Policy, and Culture Since World War II*, 40 J. URB. HIST. 827, 829 (2014) (“[T]he Interstate produced harsh and mostly unyielding consequences for urban residents, for their neighborhoods, and for their livelihoods. . . . In central cities, Interstate construction uprooted businesses, churches, schools, and residents.”); see also Robert D. Bullard, *Introduction to HIGHWAY ROBBERY: TRANSPORTATION RACISM AND NEW ROUTES TO EQUITY 2* (Robert D. Bullard, Glenn S. Johnson & Angel O. Torres eds., South End Press 2004) (emphasizing “the role transportation plays in shaping human interaction, economic mobility, and sustainability”).

17. See FOTSCH, *supra* note 14, at 4.

18. *Congress Approves the Federal-Aid Highway Act*, U.S. SENATE, [https://www.senate.gov/artandhistory/history/minute/Federal\\_Highway\\_Act.htm](https://www.senate.gov/artandhistory/history/minute/Federal_Highway_Act.htm) (last visited Sept. 9, 2020) [<https://perma.cc/6Y9J-X7LT>] (“On June 26, 1956, the Senate and House both approved a conference report on the Federal-Aid Highway Act (also known as the National Interstate and Defense Highways Act).”); Kat Eschner, *Three Ways the Interstate System Changed America*, SMITHSONIAN MAG. (June 29, 2017), <https://www.smithsonianmag.com/smart-news/three-ways-interstate-system-changed-america-180963815/> [<https://perma.cc/US3Y-AFWK>] (“[I]n 1956, President Dwight Eisenhower signed the Interstate Highway Act, the piece of legislation that led to the creation of America’s current highway system.”).

destruction of Black communities.<sup>19</sup> Often under the guise of “slum removal,” federal and state officials purposely targeted Black communities to make way for massive highway projects. In states around the country, highways disproportionately displaced Black households and cut the heart and soul out of thriving Black communities as homes, churches, schools, and businesses were destroyed.<sup>20</sup> In some cases, entire Black communities were leveled. In St. Paul, Minnesota, the construction of Interstate 94 displaced one-seventh of the city’s Black residents.<sup>21</sup> As one observer noted, “[v]ery few blacks lived in Minnesota, but the road builders found them.”<sup>22</sup>

Similarly, in Pittsburgh, Pennsylvania, a Black community known as the Hill District was devastated in order to build Interstate 579.<sup>23</sup> When Interstate 579 opened to traffic, it had effectively cut off the Hill District from Pittsburgh’s thriving downtown area and

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19. Although Black neighborhoods were the primary targets of the highways, they were not the only targets. Latinx, Native American, and Asian communities were also harmed by highway development and transportation policy. See, e.g., Robert D. Bullard, *The Anatomy of Transportation Racism*, in HIGHWAY ROBBERY: TRANSPORTATION RACISM AND NEW ROUTES TO EQUITY, *supra* note 16, at 19 (“[C]ontemporary race relations in America can no longer be viewed in the black-white paradigm. Racism makes the daily life experiences of most African Americans, Latino Americans, Native Americans, and Asian and Pacific Islander Americans very different from that of most white Americans.”); Omar Freilla, *Burying Robert Moses’s Legacy in New York City*, in HIGHWAY ROBBERY: TRANSPORTATION RACISM AND NEW ROUTES TO EQUITY, *supra* note 16, at 76 (stating, in reference to Robert Moses’s legacy of racism, “poor Latinos and African Americans made up a disproportionate share of those kicked into the street to make way for Moses’s vision”); RAYMOND A. MOHL, POVERTY & RACE RESEARCH ACTION COUNCIL, THE INTERSTATES AND THE CITIES: HIGHWAYS, HOUSING, AND THE FREEWAY REVOLT 26 (2002) [hereinafter MOHL, PRRAC] (noting that an inner city expressway in Boston destroyed the Chinatown district and part of an Italian section of the city); Biles et al., *supra* note 16, at 828 (discussing highway building in Boyle Heights, a predominantly Latinx community in Los Angeles). For example, in Camden, New Jersey, the Civil Rights Division of the New Jersey State Attorney General’s Office prepared a report entitled “Camden, New Jersey: A City in Crisis,” which stated: “It is obvious from a glance at the renewal and transit plans that an attempt is being made to eliminate the Negro and Puerto Rican ghetto areas by two different methods. The first is building highways that benefit white suburbanites.” Raymond A. Mohl, *Planned Destruction: The Interstates and Central City Housing*, in FROM TENEMENTS TO THE TAYLOR HOMES: IN SEARCH OF AN URBAN HOUSING POLICY IN TWENTIETH-CENTURY AMERICA 239 (John F. Bauman, Roger Biles & Kristin M. Szylvian eds., 2000).

20. In St. Petersburg, Florida, alone, ten Black churches were removed from the path of I-275. Raymond A. Mohl, *Race and Space in the Modern City: Interstate-95 and the Black Community in Miami*, in URBAN POLICY IN TWENTIETH-CENTURY AMERICA 100, 135 (Arnold R. Hirsch & Raymond A. Mohl eds., Rutgers Univ. Press 1993).

21. *Id.* at 134.

22. *Id.*

23. See Sam Ross-Brown, *Transportation Secretary Foxx Moves to Heal Scars of Urban Renewal*, AM. PROSPECT (Sept. 30, 2016), <https://prospect.org/civil-rights/transportation-secretary-foxx-moves-heal-scars-urban-renewal/> [<https://perma.cc/G8Z3-NSPP>] (explaining that thousands of residents of the Hill District, an area known as “Little Harlem,” were displaced by Interstate 579).

displaced thousands of Black residents.<sup>24</sup> The population of the Hill District dropped from approximately fifty-four thousand in 1950 to approximately 9,500 in 2013. More than four hundred businesses were lost. “When you displace that many people, you essentially damn that community.”<sup>25</sup> So it should be no surprise that today, approximately forty percent of the Hill District’s residents live below the poverty line.<sup>26</sup>

Two historically Black communities in Flint, Michigan, were cleared to make a path for a highway. The first community, Sugar Hill, was established by enslaved people who escaped the South and settled east and south of downtown.<sup>27</sup> Then, following World War II, Black people migrating from the South settled north of the city in deteriorating houses that were abandoned by white flight.<sup>28</sup> Sugar Hill families were forced out and into the neighborhood north of downtown.<sup>29</sup> When the highway path was finally cleared, approximately three thousand families had been moved out of the way, many without any financial assistance or relocation compensation.<sup>30</sup> Over fifty-eight percent of the families displaced to build Flint’s highways were Black.<sup>31</sup> In contrast, Black people were only twenty-eight percent of the city’s population and twelve percent of the region’s population at the time.<sup>32</sup>

In other communities, the highway spared Black homes but became a permanent racial barrier between white and Black neighborhoods, further entrenching racial segregation and walling off economic opportunity. This was often accomplished at the request of white residents who feared integration.<sup>33</sup> In Orlando, Florida, Interstate 4 was built to provide a barrier separating Black residents on the west side of town from white residents and the central business district on the east side.<sup>34</sup> In Los Angeles, California, the highway system was designed to serve the dual purposes of segregation and

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24. *Id.*

25. *Id.* (quoting R. Daniel Lavelle, a Pittsburgh City Council Member who represents the Hill District).

26. *Id.*

27. RICHARD HÉBERT, *HIGHWAYS TO NOWHERE: THE POLITICS OF CITY TRANSPORTATION* 20 (1972).

28. *Id.*

29. *Id.*

30. *Id.* at 21.

31. *Id.*

32. *Id.*

33. Mohl, *supra* note 20, at 135; *see, e.g.*, Charles E. Connerly, *From Racial Zoning to Community Empowerment: The Interstate Highway System and the African American Community in Birmingham, Alabama*, 22 J. PLAN. EDUC. & RES. 99, 101–04 (2002) (explaining how highway structures in Birmingham were placed according to the desires and concerns of white residents, including to protect against the threat of potential “black occupancy” in white neighborhoods).

34. Mohl, *supra* note 20, at 135.



isolation.<sup>35</sup> The Los Angeles freeway “created a barrier to the blight of downtown and allowed those coming from Pasadena or other eastern suburbs to bypass it.”<sup>36</sup> Thus, highways in Los Angeles “worked to hide the brutal violence of racial segregation and also helped to maintain it.”<sup>37</sup>

The highways tore through once-vibrant communities, ripping the social fabric and inflicting psychological wounds on those who were forced to leave their homes and those who were left behind. In his memoir, Sam Fulwood III describes the impact the highway built through his west-side Charlotte, North Carolina, neighborhood had on him as a child and throughout adulthood. He grew up believing that he “lived in a near-perfect world. God in Heaven was perfection, and [he] had the closest thing on Earth, in Charlotte, North Carolina.”<sup>38</sup> He went on to observe:

But that was in the early 1960s, before the bulldozers uprooted the dogwoods and oaks; gobbled up wide paved streets; and turned my playmates’ homes into rubble. I vividly remember the change, in terms that a little boy can understand: Jimmy Don Arnold, who had the largest and best comic book collection, tearfully told me he couldn’t hang with the fellas any more because the mysterious “They” were tearing down his house. William “Beegee” White’s huge front yard, where we played pickup football games, became a mound of dirt for an embankment to support an off-ramp to I-77. . . . Biddleville Elementary School, where I attended first and second grade—and heard about President John F. Kennedy’s assassination—was no more, gone to make way for the Brookshire Freeway, which connects I-77 and I-85. . . .<sup>39</sup>

Professor Derrick Bell argued that “racism is an integral, permanent, and indestructible component of this society.”<sup>40</sup> The interstate highway system stands as a material manifestation of his theory—a physical realization of our racialized norms and values. Highways were built through and around Black communities to physically entrench racial inequality and protect white spaces and privilege. The physical boundaries they created would become permanent tools of white supremacy, boundaries that could withstand

35. FOTSCH, *supra* note 14, at 94.

36. *Id.* at 102.

37. *Id.* at 94.

38. ANDREW WIESE, PLACES OF THEIR OWN: AFRICAN AMERICAN SUBURBANIZATION IN THE TWENTIETH CENTURY 164 (2004).

39. Sam Fulwood III, *When Home Disappears*, CTR. FOR AM. PROGRESS (Apr. 7, 2016, 9:01 AM), <https://www.americanprogress.org/issues/race/news/2016/04/07/134933/when-home-disappears/> [<https://perma.cc/52CH-QBRD>] (quoting SAM FULWOOD III, *WAKING FROM THE DREAM: MY LIFE IN THE BLACK MIDDLE CLASS* (1995)).

40. Derrick Bell, *The Racism Is Permanent Thesis: Courageous Revelation or Unconscious Denial of Racial Genocide*, 22 CAP. U. L. REV. 571, 573 (1993). See generally DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992) (arguing that racism is ingrained in American society).

the evolution of civil rights laws. Rather than be forced to comply with the law, the highways were the law.

Ultimately, the nation's highway system contributed to the concentration of race and poverty and created physical, psychological, and economic barriers that persist to this day. United States Congressman John Lewis wrote, "the legacy of Jim Crow transportation is still with us. Even today, some of our transportation policies and practices destroy stable neighborhoods, isolate and segregate our citizens in deteriorating neighborhoods, and fail to provide access to jobs and economic growth centers."<sup>41</sup> Class and racial inequality, economic deprivation and depression, and residential isolation and segregation are all a part of the legacy of highway politics that focus on growth and expansion at the expense of Black communities: by building roads to whites-only suburbs through the heart of Black neighborhoods. While the highways connected white people living in suburbia with economic opportunities in the city,<sup>42</sup> Black residents were excluded from white neighborhoods and forced to find new housing in communities already intensely segregated by race and class, further taxing inadequate housing, employment opportunities, and public services.<sup>43</sup> Those communities and their residents bear the marks of decades of accumulated disadvantage—racial segregation, concentrated poverty, neighborhood instability, and economic divestment.<sup>44</sup>

Today, the country has a renewed focus on highways and infrastructure development. The interstate highway system is on the verge of transformational change as aging highways around the country

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41. John Lewis, *Foreword* to HIGHWAY ROBBERY: TRANSPORTATION RACISM AND NEW ROUTES TO EQUITY, *supra* note 16, at viii.

42. See FOTSCH, *supra* note 14, at 97 (noting that "a large number" of Los Angelinos "were migrants from the Midwest" and that "[t]he automobile permitted people to live in pastoral environs while still having access to the economic opportunities of the city"). Redlining practices and the free reign given to racist financial institutions under the GI Bill helped create the suburbs and the white wealth derived from home ownership in the suburbs, subsidized by the federal government, while Black folks were left to abandoned cities. See *id.* at 90 ("The federal housing policies . . . barred government-backed loans in neighborhoods with even a single African American resident."); Erin Blakemore, *How the GI Bill's Promise Was Denied to a Million Black WWII Veterans*, HIST. (June 21, 2019), <https://www.history.com/news/gi-bill-black-wwii-veterans-benefits> [<https://perma.cc/4GHW-QWYS>] (noting that the GI Bill gave "white-run financial institutions free reign to refuse mortgages and loans to black people").

43. See HÉBERT, *supra* note 27, at 20 (describing how highway construction displaced Black families, forcing them into crowded neighborhoods where public services were already overburdened).

44. Anthony V. Alfieri, *Black, Poor, and Gone: Civil Rights Law's Inner-City Crisis*, 54 HARV. C.R.-C.L. L. REV. 629, 640 (2019) (noting some of the "multifaceted dynamics of accumulated disadvantage"); see Matthew Desmond, *Severe Deprivation in America: An Introduction*, 1 RUSSELL SAGE FOUND. J. SOC. SCI. 1, 8 (2015) (describing two ways of assessing hardship: the multidimensional nature of it and the generational or historical quality of certain hardships that affect individuals, such as systemic racism).

are crumbling or insufficient to meet growing demand, and they must be rebuilt or replaced.<sup>45</sup> The possibility of significant infrastructure development offers an opportunity to redress some of the harm caused by the interstate highway system, to strengthen impacted communities, and to advance racial equity. Still, there is a risk that federal, state, and local highway builders will repeat the sins of the past, relying on the “traditional patterns of highway politics and policy focused on growth and expansion”<sup>46</sup> at the expense of communities of color and low-income populations whose homes, businesses, and community institutions again stand in the path of the bulldozers.<sup>47</sup>

The officials who built the interstate highway system in the 1950s and 1960s were often motivated explicitly by racism and placed little value on Black lives, Black families, and Black communities.<sup>48</sup> This racism persists, of course, and Black lives and homes continue to be valued less than others.<sup>49</sup> As communities engage in the project of

45. See Raymond A. Mohl, *The Expressway Teardown Movement in American Cities: Rethinking Postwar Highway Policy in the Post-Interstate Era*, 11 J. PLAN. HIST. 89, 89–90 (2012) (discussing the general need to replace the country’s aging infrastructure and the cities that have already begun replacing or are considering the replacement of their highways); Fred Bayles, *Interstates Can’t Handle Much More, Report Says*, USA TODAY, Jan. 17, 2003, at A9 (noting that the Federal Highway Administration found that traffic on the nation’s interstates would increase forty-two percent over two decades); Jeremy Kutner, *Downtown Need a Makeover? More Cities are Razing Urban Highways*, CHRISTIAN SCI. MONITOR (Mar. 2, 2011), <https://www.csmonitor.com/USA/2011/0302/Downtown-need-a-makeover-More-cities-are-razing-urban-highways> [<https://perma.cc/Q6PF-TDED>] (reporting that many cities across the country are considering replacing the highways running through their cities, in part because the highways are “nearing the end of their useful lives”); Daniel C. Vock, *A Road Runs Through It*, GOVERNING, July 2014, at 53, [https://drjdbij2merew.cloudfront.net/GOV/GOV\\_Mag\\_July14.pdf](https://drjdbij2merew.cloudfront.net/GOV/GOV_Mag_July14.pdf) [<https://perma.cc/NCF7-S245>] (“Roads built in the 1960s—particularly elevated spans that travel across a series of bridges—are nearing the end of their useful life, which means they may need to be replaced entirely.”); Dan Bobkoff, *The End of the Road: Saying Goodbye to Freeways*, NPR (Mar. 21, 2011, 5:04 PM ET), <https://www.npr.org/2011/03/21/134743606/the-end-of-the-road-saying-goodbye-to-freeways> [<https://perma.cc/VND2-3T8Y>] (“Half a century after cities put up freeways, many of those roads are reaching the end of their useful lives.”); Jack Skelley, *Tear Down That Freeway!*, URB. LAND (Apr. 20, 2011), <https://urbanland.uli.org/sustainability/tear-down-that-freeway/> [<https://perma.cc/964N-PPQ3>] (“America’s infrastructure is crumbling.”).

46. Mohl, *supra* note 45, at 90.

47. See, e.g., *id.* at 92–95 (discussing several communities that were affected by the construction of now-aging highways and how they stand to be affected again by reconstruction).

48. See discussion *infra* Part I (discussing the ways in which highway construction was used to destroy and maintain segregated Black communities); see also, e.g., Mohl, *supra* note 20, at 134 (discussing how highway plans were shifted to target Black neighborhoods in Minnesota).

49. For examples of instances of Black Americans being told to “go back” to Africa, see Rachel Dicker, *Man at Trump Rally Yells ‘Go Back to Africa’ at Black Woman*, U.S. NEWS & WORLD REP. (Mar. 14, 2016, 3:25 PM), <https://www.usnews.com/news/articles/2016-03-14/man-at-trump-rally-yells-go-back-to-africa-at-black-woman> [<https://perma.cc/SQ2S-2VJQ>]; Cleve R. Wootson Jr., *‘Go Back to Africa?’ This Man Will – if Racists Pay His Way*, WASH. POST (July 19, 2016, 4:55 AM CDT), <https://www.washingtonpost.com/news/morning-mix/wp/2016/07/19/go-back-to-africa-this-man-will-if-racists-pays-his-way/> [<https://perma.cc/Z6X9-7UW2>]. Today, efforts to banish Black people are being seen. See, e.g., Sam Levin, *‘We’re Being Pushed Out’: The Displacement of Black Oakland*,

highway redevelopment, racial equity—focusing on repairing racialized harm and advancing racial justice in both process and outcome—must be a central calculus at each stage. These projects must shed light on the ways that systemic, structural, implicit, and individual biases can impact critical decisionmaking by transportation policymakers.

Between 1962 and 1970, Congress enacted legislation to slow the devastation wrought by highway development by protecting parks, historic districts, and other environmentally sensitive places during transportation projects<sup>50</sup> and, significantly, by requiring relocation housing for people displaced before the construction of any roads.<sup>51</sup> Yet, today, these laws are insufficient to fully redress the potential harms of highway development. They lack strategies to harness the opportunity to invest in these often resource-starved communities and fail to ensure that racial equity and civil rights remain central to policymaking as redevelopment projects move forward.

Similarly, civil rights laws specifically adopted and designed to challenge racial discrimination, as currently interpreted and applied by

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GUARDIAN (June 1, 2018, 4:00 EDT), <https://www.theguardian.com/us-news/2018/jun/01/from-black-panthers-to-bbq-becky-the-displacement-of-black-oakland> [<https://perma.cc/D8K7-87SZ>] (discussing how white newcomers to a community call the police on Black residents as a way to suppress expressions of Black culture that the white residents dislike). For other modern-day examples of racism in the United States see Christina Caron, *A Black Yale Student Was Napping and a White Student Called the Police*, N.Y. TIMES (May 9, 2018), <https://www.nytimes.com/2018/05/09/nyregion/yale-black-student-nap.html> [<https://perma.cc/98JS-M6CX>] (a white student called the police on a Black graduate student who fell asleep in her dorm's common area); Christina Caron, *5 Black Women Were Told to Golf Faster. Then the Club Called the Police*, N.Y. TIMES (Apr. 25, 2018), <https://www.nytimes.com/2018/04/25/us/black-women-golfers-york.html> [<https://perma.cc/6MJ7-VB7S>]; Marwa Eltagouri, *A Woman Called 911 About Burglars at Her Neighbor's House. They Were Black Airbnb Guests*, WASH. POST (May 8, 2018, 7:08 PM CDT), <https://www.washingtonpost.com/news/business/wp/2018/05/08/a-woman-called-911-about-burglars-at-her-neighbors-house-they-were-black-airbnb-guests/> [<https://perma.cc/56NG-GMMU>]; *Living While Black*, HUFFINGTON POST, <https://www.huffingtonpost.com/topic/living-while-black> (last visited Sept. 9, 2020) [<https://perma.cc/44JY-HQ7P>] (listing different racist encounters); P.R. Lockhart, *Living While Black and the Criminalization of Blackness*, VOX (Aug. 1, 2018, 8:00 AM EDT), <https://www.vox.com/explainers/2018/8/1/17616528/racial-profiling-police-911-living-while-black> [<https://perma.cc/QL7D-A67C>] (“These stories and others have been published so frequently that they’ve formed a new news genre: ‘Living While Black,’ a phrase that encompasses the myriad ways black people are viewed with suspicion, profiled, and threatened with responses from police for minor infractions, or less.”); Cleve R. Wootson Jr., *#LivingWhileBlack Victims Want a Congressional Hearing on Racial Profiling*, WASH. POST (June 4, 2018, 6:02 AM CDT), <https://www.washingtonpost.com/news/post-nation/wp/2018/06/04/they-were-harassed-for-livingwhileblack-now-they-want-congressional-hearings-on-profiling/> [<https://perma.cc/8Y2F-CUAL>] (“Trying to turn their bad moments into a national call for action, Martin and several other black people who’ve had police sicced on them while they’ve been doing innocuous things — a meme-able phenomenon hashtagged #LivingWhileBlack — are asking for a congressional hearing on the issue.”).

50. See *infra* notes 317, 319–321 and accompanying text (discussing advocacy efforts and legislation passed to protect parks, historic districts, and the environment).

51. See *infra* note 318 and accompanying text (discussing laws passed in the 1960s to secure relocation housing for people displaced by highway construction).

federal courts, cannot address this systemic racism because they leave undisturbed “the white privilege and Black subordination fostered by systems of interlocking private and public power”<sup>52</sup> exemplified in highway development. Title VI of the Civil Rights Act of 1964, for example, can be used to challenge decisions that result in significant racial disparities or were motivated by intentional racial bias.<sup>53</sup> Title VI, however, is primarily designed to challenge discriminatory decisions after they have been made, accepts modern racial inequality as a neutral baseline, and is limited in its ability to redress the decades of accumulated structural racism that shaped the interstate highway system and continues to threaten communities of color as the highways are rebuilt.<sup>54</sup>

Although historians have long written about the racially discriminatory history of the interstate highway system, study of this history and its present-day implications is just emerging in the legal literature.<sup>55</sup> This Article is the first to explore in depth the racial equity and civil rights concerns and opportunities raised by modern highway redevelopment. It also builds on the work of scholars who advocate for addressing systemic and embedded racial inequality through a comprehensive analysis of how racial and ethnic groups will be affected by a proposed action, policy, or practice.<sup>56</sup> The Article proceeds in five

52. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1757 (1993).

53. Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-7 (2012) (prohibiting discrimination on the basis of race, color, and national origin in programs receiving federal financial assistance).

54. See *infra* notes 278–289 and accompanying text (discussing the limits of Title VI in this context).

55. See, e.g., Sarah Schindler, *Architectural Exclusion: Discrimination and Segregation Through Physical Design of the Public Environment*, 124 YALE L.J. 1934 (2015) (discussing the exclusionary impact of man-made physical features); Omari Scott Simmons, *Urban Removal: Reshaping Urban Landscapes Through a Responsive Communitarian Lens*, CORNELL J.L. & PUB. POL’Y (forthcoming) (drawing on a case study of urban renewal, highway building, and housing policies in Tampa, Florida, to argue for a balanced approach to reshaping urban landscapes), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3393034](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3393034) [<https://perma.cc/4X3V-VFVL>].

56. See, e.g., Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 18 (1998) (emphasizing the need to engage in racial impact studies “in prosecution offices to advance the responsible, nondiscriminatory exercise of prosecutorial discretion”); Olatunde C.A. Johnson, *Stimulus and Civil Rights*, 111 COLUM. L. REV. 154, 160 (2011) (arguing that federal spending programs “are salient in producing racial inequality due to their massive scale, their creation of new programmatic and spending infrastructures, and through their failure to impose explicit inclusionary norms”); R.A. Lenhardt, *Race Audits*, 62 HASTINGS L.J. 1527, 1533–34 (2011) (arguing that a “race audit” focused on assessing structural, persistent racial inequality would help identify strategies for addressing racial inequality); Rachel E. Barkow, *Statement of Rachel E. Barkow Before the United States Sentencing Commission*, U.S. SENT’G COMMISSION 28 (2009), [https://www.uscc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20090709-10/Barkow\\_testimony.pdf](https://www.uscc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20090709-10/Barkow_testimony.pdf) [<https://perma.cc/9H2Z-WD3J>] [hereinafter Barkow] (encouraging the Sentencing Commission to follow the example

parts. Part I provides a brief overview of the ways in which highway development following adoption of the 1956 Interstate Highway Act deliberately destroyed or isolated Black communities around the country in the name of progress, using examples from Georgia, Florida, and Alabama. Part II explores the lasting impacts of interstate highway construction on Black communities and other communities of color, focusing on entrenching racial segregation, concentrating poverty, and walling off opportunity for those targeted communities. Part III briefly discusses the opportunities presented by the country's renewed focus on highway development, as well as the practical challenges this focus creates. Part IV explores and critiques some of the legal and public policy tools adopted following the "highway revolts" of the late 1950s and early 1960s that were intended to protect individuals and communities from this depth of harm in the future. In this Part, I also focus on the limits of traditional civil rights law and the National Environmental Policy Act<sup>57</sup> to ensure racial equity in highway development projects. Finally, Part V proposes a different way forward: jurisdictions exploring infrastructure projects should be required to complete comprehensive racial equity impact studies prior to commencing construction. Racial equity impact studies have been used or proposed in various contexts to influence public policy and reform racialized institutions and structures.<sup>58</sup> This Article argues that

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set by states that have started using racial impact statements and "begin analyzing the likely racial and ethnic impact of proposed criminal legislation and Guideline amendments").

57. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370m-12 (2012).

58. See Davis, *supra* note 56, at 18 (proposing the use of racial impact studies "in prosecution offices to advance the responsible, nondiscriminatory exercise of prosecutorial discretion"); Lenhardt, *supra* note 56, at 1552-56 (discussing some of the ways audit mechanisms have been used "to uncover racially exclusionary practices"); Barkow, *supra* note 56, at 26-27 (discussing the social costs of mass incarceration and the efforts some states have made to "investigate" why Black and Latinx people are disproportionately imprisoned). Iowa was the first state to pass a law requiring a "Minority Impact Statement" for any proposed criminal law. Nicole D Parker, *Racial Impact Statements*, SENT'G PROJECT (Sept. 30, 2019), <https://www.sentencingproject.org/publications/racial-impact-statements/> [<https://perma.cc/S3DN-PL8L>] ("During 2008, Iowa passed the nation's first racial impact statement measure, HF 2393."). It requires an examination of the impact all proposed criminal laws will likely have on racial and ethnic minorities. Iowa House File No. 2393, <https://www.edinfo.state.ia.us/web/legisupdate.asp> [<https://perma.cc/L8B8-TTGT>]. As of 2019, Connecticut, Oregon, and Minnesota also use racial impact statements. *State Advocacy News: Expanding Racial Impact Statements*, SENT'G PROJECT (Mar. 1, 2019), <https://www.sentencingproject.org/news/7002/> [<https://perma.cc/UB3H-FRVU>] (noting that Minnesota's racial impact statement requirement is not mandated by statute). Likewise, the city of Seattle formed the Seattle Race and Social Justice Initiative, which created a "Racial Equity Toolkit" that "lays out a process and a set of questions to guide the development, implementation and evaluation of policies, initiatives, programs, and budget issues to address the impacts on racial equity." SEATTLE RACE & SOC. JUSTICE INITIATIVE, RACIAL EQUITY TOOLKIT TO ASSESS POLICIES, INITIATIVES, PROGRAMS, AND BUDGET ISSUES 1 (2012), [https://www.seattle.gov/Documents/Departments/RSJI/RacialEquityToolkit\\_FINAL\\_August2012.pdf](https://www.seattle.gov/Documents/Departments/RSJI/RacialEquityToolkit_FINAL_August2012.pdf) [<https://perma.cc/4BUN-YRGA>]. The Juvenile Justice and Delinquency Prevention Act, passed in 1974 and reauthorized in 2018,

highway and other infrastructure development projects should join this growing list.

## I. BUILDING THE INTERSTATE HIGHWAY SYSTEM AND THE DESTRUCTION AND ISOLATION OF BLACK COMMUNITIES

*[T]hose freeways were there to carry people through my neighborhood, but never to my neighborhood.*

—Anthony Foxx, Former United States Secretary of Transportation<sup>59</sup>

In 1956, Congress passed the Interstate Highway Act,<sup>60</sup> allocating \$26 billion to construct a forty-one thousand mile network of interstate highways that would span the country and link metropolitan areas.<sup>61</sup> President Eisenhower, who signed the bill into law, said it would create a “National System of Interstate and Defense Highways” that would yield “speedy, safe transcontinental travel” by replacing unsafe roads and inefficient routes and alleviating traffic and congestion.<sup>62</sup> The massive construction effort would vastly change urban and suburban landscapes.<sup>63</sup> The expansion of the highway system helped alleviate traffic congestion caused by growing automobile use and enabled large-scale residential and industrial development in whites-only suburbs.<sup>64</sup> While the highways facilitated

requires states to assess and address racial disparities in the juvenile justice system. *See* Juvenile Justice Reform Act of 2018, Pub. L. No. 115-385, § 205, § 11133(O)(15), 132 Stat. 5123, 5137 (2018) (requiring states to “implement policy, practice, and system improvement strategies at the State, territorial, local, and tribal levels, as applicable, to identify and reduce racial and ethnic disparities among youth who come into contact with the juvenile justice system”).

59. Ashley Halsey III, *A Crusade to Defeat the Legacy of Highways Rammed Through Poor Neighborhoods*, WASH. POST (Mar. 29, 2016), [https://www.washingtonpost.com/local/trafficandcommuting/defeating-the-legacy-of-highways-rammed-through-poor-neighborhoods/2016/03/28/ffcfb5ae-f2a1-11e5-a61f-e9c95c06edca\\_story.html](https://www.washingtonpost.com/local/trafficandcommuting/defeating-the-legacy-of-highways-rammed-through-poor-neighborhoods/2016/03/28/ffcfb5ae-f2a1-11e5-a61f-e9c95c06edca_story.html) [<https://perma.cc/RP2A-VHWJ>].

60. Federal-Aid Highway Act of 1956, Pub. L. No. 627, 70 Stat. 374 (1956).

61. *See The Interstate Highway System*, HIST. (May 27, 2010), <https://www.history.com/topics/us-states/interstate-highway-system> [<https://perma.cc/ULJ6-ZH7V>] (noting that the Federal-Aid Highway Act of 1956 “authorized the construction of a 41,000-mile network of interstate highways that would span the nation” and that “[i]t also allocated \$26 billion to pay for them”).

62. *Id.*

63. Mohl, *supra* note 20, at 100 (“The wide ribbons of concrete and asphalt stimulated new downtown physical development, but soon spurred the growth of suburban shopping malls, office parks, and residential subdivisions as well. At the same time, the interstates tore through long-established inner-city residential neighborhoods in their drive towards the city cores.”).

64. FOTSCH, *supra* note 14, at 171; *see also* Raymond A. Mohl, *The Interstates and the Cities: The U.S. Department of Transportation and the Freeway Revolt, 1966-1973*, 20 J. POL’Y HIST. 193, 194, 196 (2008) (“The interstates were good for the economy, the commuters and truckers, and the suburban developers and retailers, but they had a devastating impact on American cities.”).

flight to and the economic development of white communities, it also facilitated the physical and economic destruction of Black communities.<sup>65</sup> This Part explores the ways highway development, following passage of the Interstate Highway Act, intentionally furthered racial politics and goals. It did this both by destroying Black neighborhoods—poor, struggling communities as well as economically and socially vibrant ones—and by maintaining segregation through the demarcation of Black from white neighborhoods during a time when the traditional tools of racial segregation were being struck down by federal courts.

By the time the interstate highway system was completed in the early 1970s, it had fundamentally restructured urban America.<sup>66</sup> In almost every region of the country, the new interstate highway system uprooted, displaced, and isolated hundreds of thousands of people. The United States Department of Transportation estimates that more than 475,000 households and more than a million people were displaced nationwide as a direct result of federal highway building.<sup>67</sup> Millions of additional people were left living in “hollowed-out communities” after the bulldozers left.<sup>68</sup> The neighborhoods destroyed and families displaced were overwhelmingly Black and poor.<sup>69</sup>

This was by design. Transportation policy in the 1950s and 1960s was crafted to reinforce racial and class inequalities and divisions.<sup>70</sup> Alfred Johnson, executive director of the American Association of State Highway Officials at the time the Interstate

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65. See Kevin Douglas Kuswa, *Suburbification, Segregation, and the Consolidation of the Highway Machine*, 3 J.L. SOC'Y 31, 47 (2002) (“Highways made suburban housing available on one end while destroying urban housing on the other.”).

66. Mohl, *supra* note 20, at 100.

67. Anthony Foxx, *Beyond Traffic 2045*, U.S. DEPT OF TRANSP. 95 (2017), [https://www.transportation.gov/sites/dot.gov/files/docs/BeyondTraffic\\_tagged\\_508\\_final.pdf](https://www.transportation.gov/sites/dot.gov/files/docs/BeyondTraffic_tagged_508_final.pdf) [<https://perma.cc/K6EU-QE8U>]; see also Mohl, *supra* note 20, at 101 (noting that building the interstate highway system displaced hundreds of thousands of people).

68. Ross-Brown, *supra* note 23.

69. Mohl, *supra* note 20, at 101.

70. See FOTSCH, *supra* note 14, at 4 (“[T]he narrative resolutions found in these transportation plans affirmed inequalities of race, class, and gender, and implementation of these plans helped sustain these inequalities.”); Raymond A. Mohl, *Citizen Activism and Freeway Revolts in Memphis and Nashville: The Road to Litigation*, 40 J. URB. HIST. 870, 879 (2014) (noting that in both Memphis and Nashville, Tennessee, “many public policy decisions had racial implications and racial intentions—[including] . . . interstate highway routing”). It is important to note that although the federal government was funding ninety percent of the cost of building the interstate highway system, highway engineers were given “near sovereign authority” for building the highways. Joseph F.C. DiMento, *Stent (or Dagger?) in the Heart of Town: Urban Freeways in Syracuse, 1944–1966*, 8 J. PLAN. HIST. 133, 136, 139 (2009) (quoting Mark H. Rose, *Reframing American Highway Politics, 1956–1995*, 2 J. PLAN. HIST. 212, 217 (2003)) (noting that the federal government provided ninety percent of funds necessary for interstate construction and that engineers were initially given a great deal of authority in building the interstates).



Highway Act was passed, recalled that “some city officials expressed the view in the mid-1950s that the urban Interstates would give them a good opportunity to get rid of the local ‘niggertown.’”<sup>71</sup> Their wish was granted.

Part of the perceived genius in utilizing highways to cement racial inequality was the belief that the exclusionary impact would outlast then-current laws that facilitated racial exclusion and skirt future laws that might otherwise facilitate integration. Robert Moses, an influential New York public official who shaped urban development and public works projects both in New York and around the country, was a leader among those who believed infrastructure projects and physical barriers would be effective, semipermanent barriers to access for poor people of color.<sup>72</sup> He took great pains to build New York’s roads and highways in a way that would limit the ability of poor people of color to visit the parks and beaches he built.<sup>73</sup> For example, Moses instructed highway engineers to build the bridges across the Southern State Parkway with one foot less clearance than bridges on the Hutchinson, Saw Mill, and Bronx River Parkways.<sup>74</sup> The clearance was intentionally too low for buses coming from New York City to pass, as he believed Black and Puerto Rican New Yorkers would most likely use buses to access the beach.<sup>75</sup> As a result, bus trips to the beach would have to be made on local roads, making the trips “discouragingly long and arduous.”<sup>76</sup> The law already prohibited commercial traffic, including trucks and buses, from using all the American parkways.<sup>77</sup> When asked why he made the bridges low, Moses replied, “Legislation can always be changed; It’s very hard to tear down a bridge once it’s up.”<sup>78</sup> In communities of color around the country, highways were designed to be walls, wedges, and extractors. They became “the

71. ROTHSTEIN, *supra* note 15, at 128.

72. See ROBERT A. CARO, *THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK* (1974) (discussing Robert Moses’s role in building highways and other infrastructure across New York State).

73. *Id.*

74. See *id.* at 8, 318 (noting that Moses built every mile of parkway in New York and that he attempted to limit bus access to parks by “poor and lower-middle-class families” by having “bridges across his new parkways [built] low—too low for buses to pass”).

75. See *id.* at 318–19, 513 (discussing the steps Moses took to limit access of beaches and pools for Blacks and Puerto Ricans, whom Moses “classed with” Blacks).

76. *Id.* at 318.

77. Thomas J. Campanella, *Robert Moses and His Racist Parkway, Explained*, BLOOMBERG CITYLAB (July 9, 2017, 11:03 AM CDT), <https://www.citylab.com/transportation/2017/07/how-low-did-he-go/533019/> [<https://perma.cc/4Y3Z-M6CB>].

78. Matthew Noah Smith, *Reliance Structures: How Urban Public Policy Shapes Human Agency*, in *THE PALGRAVE HANDBOOK OF PHILOSOPHY AND PUBLIC POLICY* 809, 812 (David Boonin ed., 2018) (quoting Campanella, *supra* note 77).

embodiment of a norm of exclusion authored by the state.”<sup>79</sup>

*A. Killing Two Birds with One Stone:  
The Highway as a Tool for Removal*

Although many local, state, and federal highway builders had a racial agenda, they often hid their intent behind nominally race-neutral criteria. The language of urban renewal—the promise to clear “blighted” areas and “slums”—was the most common criterion. Urban renewal funds were frequently used to attract commercial development by demolishing aging homes and replacing them with high-end housing, hotels, and shops.<sup>80</sup> The federal government’s urban renewal effort empowered local governments and private developers to use eminent domain to seize the homes of poor people of color with little payment and no relocation assistance.<sup>81</sup> During this period, nearly “90 percent of low-income housing destroyed by urban renewal was not replaced.”<sup>82</sup> This “slum clearance” was a way to keep Black communities “away from downtown business districts so that white commuters, shoppers, and business elites would not be exposed to black people.”<sup>83</sup> “By the mid-twentieth century, ‘slums’ and ‘blight’ were widely understood euphemisms for African American neighborhoods”<sup>84</sup> and “‘urban

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79. *Id.* at 813.

80. See FOTSCH, *supra* note 14, at 170 (noting that “less than 20 percent of all urban renewal land went to housing” and “over 80 percent went for developing commercial, industrial, and public infrastructure” (quoting JOHN R. LOGAN & HARVEY L. MOLOTCH, *URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE* 168 (20th ed. 2007)); LOGAN & MOLOTCH, *supra*, at 168 (“[L]ess than 20 percent of all urban renewal land went for housing; over 80 percent went for developing commercial, industrial, and public infrastructures.”); Audrey G. McFarlane, *Race, Space, and Place: The Geography of Economic Development*, 36 SAN DIEGO L. REV. 295, 332 (1999) (“[U]rban renewal often eliminated poor and working class neighborhoods and replaced them with high-rise, luxury structures for the more affluent while concentrating public housing sites within black neighborhoods.”).

81. See Fulwood III, *supra* note 39 (“During the 1950s and 1960s, the federal government’s urban renewal effort empowered local governments and private developers to develop downtowns and displace the mostly poor residents of color through practices such as eminent domain . . .”).

82. FOTSCH, *supra* note 14, at 170 (quoting LOGAN & MOLOTCH, *supra* note 80, at 169).

83. ROTHSTEIN, *supra* note 15, at 127.

84. *Id.* Similar euphemisms are still used today in discussing majority-Black neighborhoods. For example, President Trump’s social media attack on Congressman Elijah Cummings included denigrating comments about Congressman Cummings’s district in Baltimore—calling it “a disgusting, rat and rodent infested mess.” David Zurawik, *Trump’s Twitter Attack on Cummings and Baltimore: Undiluted Racism and Hate*, *BALT. SUN* (July 27, 2019), <https://www.baltimoresun.com/opinion/columnists/zurawik/bs-ed-zontv-trump-cummings-baltimore-20190727-wyixr7em7bfl5ifwialdo5exty-story.html> [https://perma.cc/9R9R-CLLE] (pointing out President Trump’s persistent use of the word “infested” when referring to people of color).

renewal' became a euphemism for 'Negro removal.' ”<sup>85</sup>

Highway development followed a similar pattern. Even before the passage of the Interstate Highway Act, business and political leaders around the country touted the future interstate highway system as a powerful tool for clearing slums and aging neighborhoods.<sup>86</sup> In 1938, when the federal government was first exploring the idea of funding the interstate highway system, Henry Wallace, then-secretary of agriculture and soon-to-be vice president, “proposed to President Roosevelt that highways routed through cities could also accomplish ‘the elimination of unsightly and unsanitary districts.’ ”<sup>87</sup> Over the next few decades, highway builders often appropriated the language of urban renewal to gain support for targeting and removing low-income minority communities that officials considered “undesirable,” whether or not they were in urban renewal areas.<sup>88</sup> Highway engineers came to speak of “killing two birds with one stone” to improve traffic conditions and remove undesirable populations.<sup>89</sup>

The idea of linking the building of inner-city expressways and the destruction of urban housing was popularized by Thomas H. MacDonald, founding director of the Bureau of Public Roads, and Robert Moses.<sup>90</sup> In the 1950s, Moses and MacDonald promoted their ideas around the country.<sup>91</sup> In a 1954 statement to the President’s Advisory Committee on a National Highway Program, Robert Moses

85. FOTSCH, *supra* note 14, at 170; *see also* ROTHSTEIN, *supra* note 15, at 127 (“That ‘urban renewal means Negro removal’ was a frequent twentieth century slogan of civil rights groups protesting such displacement.”).

86. *See* Biles et al., *supra* note 16, at 827 (“Whether as public spectacle or as dry government report authored by road engineers, the future Interstate emerged as a valued key to speeding up traffic and arresting urban ‘blight.’”). As early as 1939, the Bureau of Public Roads (“BPR”) released a report asserting that planning of highway building could be done in a way to facilitate slum clearance. *See* BUREAU OF PUB. RDS., U.S. DEP’T OF AGRIC., TOLL ROADS AND FREE ROADS, H.R. Doc. No. 272, at 94 (1939) (arguing that the federal government’s increased acquisitions of land through slum-clearance projects is reason to not delay highway building because these acquisitions provide space in which to build); *see also* Biles et al., *supra* note 16, at 828:

The leading idea among growth coalition proponents in each city was to make the central business district attractive once again to the affluent shopper. In order to win her business, starting before 1956, freeway engineers and politicians used local and state funds to route freeways through minority neighborhoods. Thousands of urban residents were dislocated . . . .

Raymond A. Mohl, *Stop the Road: Freeway Revolts in American Cities*, 30 J. URB. HIST. 674, 677 (2004) (noting that the 1939 report written by the BPR “contended that proper planning of highways would facilitate slum clearance and rebuilding along modern lines”).

87. ROTHSTEIN, *supra* note 15, at 127.

88. *See id.* at 128–30 (discussing the language used to describe the Black and Latinx neighborhoods targeted and destroyed by the highways built during this period).

89. Biles et al., *supra* note 16, at 828.

90. Mohl, *supra* note 19, at 229.

91. *Id.* at 229, 234.

“argued that new urban expressways ‘must go right through cities and not around them’ if they were to accomplish their purpose” of removing Black communities.<sup>92</sup> Moses became a leading advocate for displacing Black communities to build the highway system, and his ideas were widely adopted around the country.<sup>93</sup>

Talk of urban renewal allowed highway builders to gain some initial support, including in predominantly Black communities.<sup>94</sup> Shortly following the adoption of the Interstate Highway Act, however, highway builders began to drop the pretense of urban renewal and vocally embraced their racial agenda as thriving Black communities were destroyed and removed. In many states, highway builders went out of their way to avoid white homes and community institutions but also went out of their way to route the highway right through the heart of Black communities.<sup>95</sup> With federal funding in hand, “[t]he bulldozer and the wrecker’s ball went to work” on Black America.<sup>96</sup> The destruction of a Black community to make way for Interstate 95 in Miami, Florida, provides an example of how construction of the interstate highway system was used to actualize a racial agenda to destroy vibrant Black communities.

### 1. Miami, Florida

Interstate 95 is a major component of the interstate highway system, stretching from Maine to Florida.<sup>97</sup> In Florida, it tore through the center of Overtown, a large and vibrant Black community considered to be the center of economic and cultural life for Black people living in Miami.<sup>98</sup> “[A] single massive interchange” took up forty square

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92. *Id.* at 234 (quoting *Hearing Before the President's Advisory Comm. on a Nat'l Highway Program* 48 (Oct. 7, 1954) (statement of Robert Moses, City Construction Co-ordinator of New York City)).

93. *See* Mohl, *supra* note 20, at 101 (“Combatting blight with highways was also the policy of New York’s influential builder of public works projects, Robert Moses. Highway builders and downtown redevelopers had a common interest in eliminating low-income housing and, as one redeveloper put it in 1959, freeing ‘blighted’ areas ‘for higher and better uses.’”).

94. *See id.* at 118 (noting that even the Miami Urban League, whose mission was to seek economic and social advancement for Blacks, agreed that highway construction plans in Miami were “necessary for the continued progress of [the] city and commend[ed] the plan,” despite their potential to displace scores of Black citizens).

95. *Id.* at 117 (writing that road builders not only disregarded citizens’ comments about the potentially negative effects that the Miami expressway construction might have on “racial housing patterns,” but that “the elimination of black housing” was in fact an express goal of the project).

96. *Id.* at 100.

97. *Id.* at 102.

98. *Id.*

blocks, devoured the Black business district, and took the homes of about ten thousand people.<sup>99</sup>

The destruction of Overtown was the realization of a decades-long campaign by white business leaders to remove Black residents and claim that land to expand Miami's central business district. By 1930, much of Miami's Black population was segregated by local policies of racial zoning into Overtown, originally called Colored Town, and a handful of other racially segregated neighborhoods.<sup>100</sup> At this time, Miami's white business leaders were keenly interested in expanding the boundaries of the small downtown business district into nearby Overtown, but first needed to get rid of the Black residents and businesses.<sup>101</sup> The first attempt was made when Miami's white elites conceived of using undeveloped land five miles outside of the central business district to build a New Deal public housing project for Black residents called Liberty Square.<sup>102</sup> The city's white elites hoped that this new housing development would replace Overtown as the center of the Black community.<sup>103</sup>

In 1936, the Dade County Planning Board proposed a "negro resettlement plan."<sup>104</sup> It called for the city of Miami to remove the residents of Overtown and resettle them on the agricultural fringes of Miami.<sup>105</sup> Then, in a 1937 speech to the Miami Realty Board, George Merrick, a prominent local developer, proposed "a complete slum clearance effectively removing every negro family from the present city limits."<sup>106</sup> This plan never materialized. But, as late as 1961, the *Miami Herald* continued to report on new and evolving plans to remove the Black residents of Overtown to facilitate the expansion of the downtown business district.<sup>107</sup> The passage of the Federal Highway Act provided

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99. *Id.*; Mohl, *supra* note 64, at 196 ("In Miami, a single massive interstate interchange of Interstate-95 took up forty square blocks and demolished the black business district and the homes of some 10,000 people.").

100. Raymond A. Mohl, *Making the Second Ghetto in Metropolitan Miami, 1940-1960*, 21 *J. URB. HIST.* 395, 397-98 (1995); Mohl, *supra* note 20, at 103.

101. See ROTHSTEIN, *supra* note 15, at 129 ("In 1956, the Florida State Road Department routed I-95 to do what Miami's unconstitutional zoning ordinance had intended but failed to accomplish two decades earlier: clear African Americans from an area adjacent to downtown."); Mohl, *supra* note 100, at 398 (explaining the Miami "white civic elite[s]" interest in and plan to drive out Black residents from Overtown in order to expand the downtown business district); Mohl, *supra* note 20, at 103.

102. Mohl, *supra* note 100, at 398.

103. See *id.* ("The city's white civic elite conceived of this project as the nucleus of a new black community that might siphon off the population of Overtown and permit downtown business expansion.").

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

the opportunity Miami's leaders needed to seize Overtown and push out Black residents.<sup>108</sup>

In 1957, the Miami Slum Clearance Department estimated that fifty-seven hundred people would be displaced from their homes to build the highway.<sup>109</sup> "By 1959, the Dade County manager's office had increased that estimate to ten thousand people . . ."<sup>110</sup> Yet, the City ignored questions about where the dislocated Black people would live.<sup>111</sup> Long before they started building the highway through Overtown, Black housing density was rising and there was increasing pressure to build new housing for Black people.<sup>112</sup> With the building of the highway, the Greater Miami Urban League raised concerns about housing for displaced Blacks and urged the government and state road department to plan for the dislocation and resulting social consequences of expanding I-95 through Miami.<sup>113</sup> No such relocation program ever materialized. Very few housing units were built to replace demolished homes, and the displaced received little relocation assistance.<sup>114</sup>

By the late 1960s, Overtown was dominated by the highway.<sup>115</sup> There was no evidence of why it was once called the Harlem of the South.<sup>116</sup> The *Miami Times* observed that no corner of Overtown "seemed to have escaped the angered wrath of the bulldozers and wrecking cranes that have been busy at work demolishing homes, churches, apartment houses and business places."<sup>117</sup> The eight-lane highway interchange destroyed eighty-seven acres of housing and commercial property in Overtown.<sup>118</sup> In addition to the highway, large parcels of land in Overtown were taken for parking lots, garages, and city and county office buildings.<sup>119</sup> Although nearly forty thousand Black people lived in Overtown before the highway expansion, only about eight thousand remained after the highway was built.<sup>120</sup>

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108. See *infra* note 316 and accompanying text (explaining the Federal-Aid Highway Act of 1962 and the impetus for its passage).

109. Mohl, *supra* note 20, at 119.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 119–20. Many other groups who represented or worked with the Black community also urged the development of relocation assistance programs, construction of new public and private housing, and federal mortgage programs to help displaced Black households. *Id.*

114. *Id.* at 102.

115. Mohl, *supra* note 19, at 237.

116. *Id.*

117. Mohl, *supra* note 20, at 134.

118. *Id.*

119. *Id.* at 102.

120. ROTHSTEIN, *supra* note 15, at 129; Mohl, *supra* note 20, at 139.

### B. The Highway as a Post–Jim Crow Racial Boundary Line

Instead of going through Black communities, some interstate highways encircled them in an attempt to contain and confine Black residents and skirt constitutional prohibitions on racial zoning. Assisted by existing racial segregation patterns and the racial zoning laws that were rampant in the South, highway builders were able to build highways on informal boundary lines between white and Black neighborhoods, “turning what was formerly a potentially passable social barrier into an impassable concrete wall.”<sup>121</sup> In this way, the highway system was a tool of a segregationist agenda, becoming a “protective maze of freeways, moats, concrete parapets, and asphalt no-man’s lands” that separated white communities from Black communities and protected white people from Black migration.<sup>122</sup> Birmingham, Alabama, and Atlanta, Georgia, are two examples of how “[f]reeways became moats.”<sup>123</sup>

#### 1. Birmingham, Alabama

In Birmingham, Alabama, city and state officials used the interstate highway system to help maintain residential segregation. In 1926, Birmingham adopted a racial zoning ordinance dividing the city into racial districts that required the legal separation of Black and white neighborhoods.<sup>124</sup> It would turn out to be the South’s “longest-standing racial zoning law.”<sup>125</sup> Although the United States Supreme Court struck down racial zoning in 1917 in *Buchanan v. Warley*,<sup>126</sup> Birmingham flouted the Court’s ruling.<sup>127</sup> City officials believed they were justified in ignoring the *Buchanan* decision in part because the

121. Gordon Fellman, Barbara Brandt & Roger Rosenblatt, *Dagger in the Heart of Town: Mass. Planners and Cambridge Workers*, 7 SOC’Y 38, 43 (1970).

122. FOTSCH, *supra* note 14, at 170 (“[L]ocal authorities planned freeways so they would create a barrier between the downtown of corporate headquarters and nearby racially mixed neighborhoods.”); Mike Davis, *Urban Renaissance and the Spirit of Postmodernism*, in POSTMODERNISM AND ITS DISCONTENTS: THEORIES, PRACTICES 86 (E. Ann Kaplan ed., 1988).

123. Fulwood III, *supra* note 39 (quoting a historian’s view of how planners used freeway-building in the 1960s).

124. See CHARLES E. CONNERLY, THE MOST SEGREGATED CITY IN AMERICA: CITY PLANNING AND CIVIL RIGHTS IN BIRMINGHAM, 1920–1980, at 47–48 (2005) (explaining that in 1926, Birmingham’s city commission approved its first zoning ordinance restricting occupancy by Blacks and whites in the same residential districts); Walker Mason Beauchamp, *The Legacy of Racial Zoning in Birmingham, Alabama*, 48 CUMB. L. REV. 359, 359–60 (2018) (describing the 1926 racial zoning ordinance as one that “compel[led] race-based residential segregation”).

125. CONNERLY, *supra* note 124, at 3.

126. 245 U.S. 60 (1917) (holding that racial zoning ordinances unconstitutionally interfered with the rights of property owners).

127. ROTHSTEIN, *supra* note 15, at 47.

“threats to peace were so imminent and severe if African Americans and whites lived in the same neighborhoods . . . .”<sup>128</sup>

The zoning ordinance designated a single Black neighborhood for single-family housing and restricted opportunities to build new housing for Black people.<sup>129</sup> Moreover, Black neighborhoods were more likely than white neighborhoods to be located in or near flood zones, to contain environmental hazards, and to house industrial facilities.<sup>130</sup> By the mid-1940s, neighborhoods zoned for Blacks could no longer accommodate the growing Black population.<sup>131</sup>

In the late 1940s and early 1950s, Black people began to challenge the racial zoning law by moving into white neighborhoods.<sup>132</sup> In 1947, a lower federal court banned Birmingham’s ordinance.<sup>133</sup> But Birmingham again resisted, claiming that the ruling only applied to the particular piece of property at issue in the case.<sup>134</sup> It was not until 1950 that a federal appeals court struck down Birmingham’s racial zoning law.<sup>135</sup>

Despite the legal setback, Birmingham officials—led by notorious segregationist Eugene “Bull” Connor, Birmingham’s public safety commissioner—remained committed to maintaining racial segregation in the city. City and state highway planners used the construction of Interstate 59 and Interstate 65 to advance their segregationist agenda, wielding the interstate highway system in the same way they had previously used racial zoning.<sup>136</sup>

For example, the Highway Department constructed Interstate 59 to serve as a boundary between College Hills, a white neighborhood,

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128. *Id.*

129. CONNERLY, *supra* note 124, at 53–55, 76–77 (noting that the Enon Ridge neighborhood was the only Black neighborhood “designated for predominantly single-family occupancy” and also that there was nowhere for Black families to build where they would not be surrounded by industrial and commercial areas that were growing in size).

130. *Id.* at 28–29, 55 (explaining that racial zoning “meant that predominantly black neighborhoods in Birmingham were much more likely than white neighborhoods to be located near areas zoned for heavy industrial uses” and that several Black neighborhoods, because of their proximity to Village Creek, experienced flooding issues).

131. *See id.* at 76–77, 99 (noting an increase in the Black population of Birmingham between 1926 and 1950 and a stagnation in the housing stock available to Blacks during the same period).

132. *See id.* at 76–83 (explaining that the Black population of Birmingham experienced a nearly twenty percent increase between 1940 and 1950, that some of this population was absorbed by majority-white districts, and that the NAACP began filing test cases challenging the ordinance in the 1940s).

133. ROTHSTEIN, *supra* note 15, at 47.

134. *Id.*

135. *Id.*

136. *See* Connerly, *supra* note 33, at 104 (demonstrating how the highways cutting across Birmingham were created to mirror its racial zoning boundaries).



and nearby Black neighborhoods.<sup>137</sup> Under Birmingham's racial zoning ordinance, 11th Avenue served as the boundary line between College Hills and the Black neighborhoods to the north.<sup>138</sup> After the racial zoning law was struck down, College Hills residents feared that Black people would seek to move into their neighborhood.<sup>139</sup> And, in 1957, College Hills residents petitioned Birmingham's city commissioners to adopt new neighborhood demarcations.<sup>140</sup> In response, Mayor James Morgan and members of the City Commission acknowledged the limitations caused by the Supreme Court's rulings and pledged to "‘explore all possible routes’ to aid white property owners in the preservation of the character of their neighborhood."<sup>141</sup> Interstate 59 was ultimately built along 11th Avenue with a route that precisely mirrors the racial zoning boundary that was included in the old racial zoning ordinance, creating a buffer between white and Black communities.<sup>142</sup>

The planning and construction of Interstate 65 followed a similar path, with the highway ultimately built along historic racial boundaries.<sup>143</sup> Fountain Heights was a historically white neighborhood. From 1950 to 1960, however, the neighborhood was undergoing a racial transformation. The Black population increased from 1,374 in 1950 to 2,219 in 1960.<sup>144</sup> White residents resisted their new Black neighbors, often with violence.<sup>145</sup> From 1956 to 1958, the homes of seven Black families were bombed.<sup>146</sup> Bull Connor, the Birmingham Commissioner of Public Safety, blamed the bombings on the "firms and salesmen who sell homes to Negroes in white sections."<sup>147</sup> White Fountain Heights residents found more durable protection in Interstate 65, which

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137. *See id.* (noting that the decision to align Interstate 59 in a way that physically separated College Hills from Black neighborhoods coincided with concerns voiced by white College Hills residents of "black occupancy" increasing in their neighborhood).

138. *See id.* ("The 11th Avenue coincides exactly with the racial zoning boundary that had been drawn prior to the demise of racial zoning.").

139. *See id.* ("With the demise of racial zoning, the potential for black occupancy in College Hills increased, and by 1957, white residents of College Hills petitioned Birmingham's city commissioners to create a new racial dividing line.").

140. *Id.*

141. *Id.* (quoting BIRMINGHAM POST-HERALD, Feb. 14, 1957).

142. *Id.*

143. *See id.* ("In the area just north of I-65's intersection with I-59, I-65 aligns almost exactly with the 1926 zoning map racial boundary that separated the black Enon Ridge neighborhood lying to the west of I-65 and the white Fountain Heights neighborhood lying just to the east of I-65.").

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

followed the boundaries drawn by the racial zoning maps.<sup>148</sup> In some spots, Interstate 65 “aligns almost exactly with the 1926 zoning map racial boundary” by separating Enon Ridge, a Black neighborhood, and Fountain Heights.<sup>149</sup> The highway stood as both a monument to past segregation and a tool for its perpetuation.

## 2. Atlanta, Georgia

Like Birmingham, Atlanta, Georgia, used racial zoning laws to enforce the legal separation of Black and white neighborhoods and then replaced the zoning laws with roads and highways. Atlanta adopted its first racial segregation ordinance in 1913 and subsequently passed zoning segregation laws in 1916, 1922, 1929, and 1931.<sup>150</sup> The post-1916 adoptions were attempts to skirt the U.S. Supreme Court’s 1917 ruling that struck down segregation ordinances using zoning regulations.<sup>151</sup> Atlanta’s racial zoning ordinances were designed to protect white property owners from “the encroachment of the colored race.”<sup>152</sup> City officials asserted that “race zoning [was] essential in the interest of the public peace, order and security and will promote the welfare and prosperity of both the white and colored race.”<sup>153</sup> Under the racial zoning scheme, Black zones were given less land than white people and were confined to neighborhoods classified as industrial.<sup>154</sup> Atlanta ceased enforcing its ordinance only after the Georgia Supreme Court struck it down in 1924.<sup>155</sup>

As the U.S. Supreme Court was striking racial zoning laws, Atlantans began exploring the possibility of using roads and highways to contain Black migration and create buffers between Black and white residents. In 1917, city officials proposed building a 180-foot-wide parkway that would separate Black and white neighborhoods.<sup>156</sup> The parkway, called the Grand Boulevard, would allow city officials to designate the area east of the parkway for Black people and the west side, adjacent to the business district and access to its economic

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148. *Id.*

149. *Id.*

150. Ronald H. Bayor, *Roads to Racial Segregation: Atlanta in the Twentieth Century*, 15 J. URB. HIST. 3, 4 (1988).

151. *See id.* (“When the U.S. Supreme Court declared segregation ordinances unconstitutional in 1917, the city moved to the tactic of citywide comprehensive zoning in 1922 that included separation of the races.”).

152. ROTHSTEIN, *supra* note 15, at 46 (quoting city planner Robert Whitten).

153. *Id.*

154. Bayor, *supra* note 150, at 4.

155. *Buchanan v. Warley*, 245 U.S. 60 (1917) (holding that racial zoning ordinances unconstitutionally interfered with the rights of property owners).

156. BAYOR, *supra* note 15, at 55.

opportunities, for white people.<sup>157</sup> The Grand Boulevard was never built, but the proposal planted a seed in the mind of city planners that germinated as Black people migrated through the city, unconstrained by the vacated racial zoning laws.<sup>158</sup>

During the 1950s and 1960s, Atlanta completed extensive highway building, frequently using the highway as a barrier to confine Black residents.<sup>159</sup> Although the interstate highway system was generally built in a manner that would facilitate commercial activity and neighborhood development, “wherever the highway[ ] system could possibly serve a racial function, it was developed with that in mind also.”<sup>160</sup> Indeed, white Atlanta residents regularly called on the mayor and city officials to use the highway system as a series of racial barriers.<sup>161</sup> The City’s white leaders did not hide this purpose.<sup>162</sup>

An example is Interstate 20, also called the West Expressway, which was built as a wall between Black neighborhoods to the north and white neighborhoods to the south.<sup>163</sup> The City did not hide its segregationist agenda: to protect the white community of Adamsville from Black residents. In a 1960 report, the Atlanta Bureau of Planning acknowledged that “approximately two to three years ago, there was an ‘understanding’ that the proposed route of [I-20] would be the boundary between the White and Negro communities.”<sup>164</sup> Black developers, who sought the planning bureau’s permission to build low-to-moderate-income housing south of the planned I-20, were denied permission.<sup>165</sup> The planning bureau refused, explaining that the city had “obligations to the Adamsville citizens to adhere to the expressway route boundary.”<sup>166</sup>

157. *Id.* at 55–58.

158. *See id.* at 58 (discussing similar plans intended to keep Blacks and whites apart).

159. *See id.* at 61–62 (“In various areas, this highway was used to form a racial wall between black neighborhoods to the north and white ones to the south.”).

160. *Id.* at 61; *see also* Bayor, *supra* note 150, at 5 (noting that, in Atlanta, “highway construction was used to remove blacks from certain sections surrounding the central business district, set up racial buffers, and allow the city to redevelop the [downtown area] commercially”).

161. BAYOR, *supra* note 15, at 62.

162. *See id.* (“And these requests were encouraged when the city’s white leaders acknowledged the use of roads, as well as urban renewal, housing projects, and industrial developments, in this way.”).

163. *Id.* at 61–62. I-20 also destroyed Black neighborhoods in its path. *See* GERALD J. MILLER, THE MARTA RELOCATION APPEALS PANEL 2 (1986) (noting that the I-20 “sliced through the heart of many black neighborhoods just south of the center of the city” and that “[p]roject administrators relocated several thousand black families”).

164. BAYOR, *supra* note 15, at 61.

165. *Id.*

166. *Id.*

## II. THE LASTING IMPACT OF HIGHWAY DEVELOPMENT

Robert Moses wrote: "This new highway program will affect our entire economic and social structure. The appearance of the new arteries and their adjacent areas will leave a permanent imprint on our communities and people. They will constitute the framework within which we must live."<sup>167</sup> Indeed, communities of color around the country still bear the scars. The interstate highway system changed the physical, social, and economic characteristics of urban communities. Those who built it often targeted neighborhoods that were already struggling with racial discrimination and segregation, economic disinvestment, inadequate schools, and deteriorating property values, further entrenching those challenges. The interstate highway system did not cause all the problems facing urban communities. However, its construction compounded discrimination and exploitation and triggered a process that weakened urban neighborhoods, from which they have never fully recovered.<sup>168</sup> Although a full exploration of the ways the interstate highway system shaped our modern cities is beyond the scope of this Article, there are some impacts that warrant deeper attention here. Those impacts include helping to cement hyper-racial segregation in housing and schools; concentrating poverty and excluding low-income, inner-city residents from communities of opportunity; and entrenching the physical, psychological and economic division of communities.

*A. Hyper-Racial Segregation and Concentrated Poverty*

The demolition of Black neighborhoods to build the interstate highway system intensified patterns of racial segregation and the concentration of poverty by forcing dislocated Black people deeper into inner-city ghettos. Housing displacement was particularly difficult for inner-city Black residents because the housing supply was already inadequate prior to demolition for the highway, and the boundaries of the ghetto were vigilantly policed and constrained by racial

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167. Robert Moses, *The New Super-Highways: Blessing or Blight?*, HARPER'S MAG., Dec. 1956, at 31.

168. Among the harms to the people and the community are: the disruption of established social and economic relationships, economic losses from the taking of property, the costs of seeking and securing new housing, the physical deterioration of neighborhoods immediately following the announcement of highway construction in the community, plummeting land values prior to state purchase as a result of the announcement of highway construction, and the loss of employment opportunities in the community. See KATHERINE L. BRADBURY, ANTHONY DOWNS & KENNETH A. SMALL, *URBAN DECLINE AND THE FUTURE OF AMERICAN CITIES* 69-77 (1982); ANTHONY DOWNS, *URBAN PROBLEMS AND PROSPECTS* (Rand McNally & Co. 1976).

segregation.<sup>169</sup> The federal government seldom provided relocation assistance to displaced Black people.<sup>170</sup> In addition, significant time would often elapse between condemnation orders and actual demolition, leading to deteriorating neighborhood conditions and making it even harder for the property owners to sell their homes or businesses and move to a new community.<sup>171</sup> Some remained there, feeling stuck.

When possible, some dislocated residents found housing as close to their old, fractured neighborhoods as possible.<sup>172</sup> But, the destruction of Black homes to build the highway depleted the overall housing stock in Black communities, increasing overcrowding and homelessness.<sup>173</sup> For most displaced people, the only housing options were in other racially segregated, economically struggling communities, either in emerging “second ghettos”<sup>174</sup> or in “transitioning” neighborhoods with working-class whites.<sup>175</sup> The massive influx of displaced people

169. See Mohl, *supra* note 86, at 680 (quoting an urban planner making these observations); Mohl, *supra* note 19, at 229.

170. See ROTHSTEIN, *supra* note 15, at 131 (“In few of these cases did federal or local agencies provide assistance to displaced African Americans in finding adequate and safe new housing.”). The original interstate highway program did not impose any obligations on federal or state governments to provide assistance to residents whose homes were being torn down. *Id.* Arthur Burns, chairman of the Council on Economic Advisors, warned members of the Eisenhower Administration that compensating people for the loss of their home would be too costly as the highway program was predicted to evict nearly one hundred thousand people a year. *Id.* at 131–32.

171. See Roger Biles, *Expressways Before the Interstates: The Case of Detroit, 1945-1956*, 40 J. URB. HIST. 843, 850 (2014) (noting that many property owners in Detroit sold their properties at “considerable losses” because of the effects of condemnation announcements).

172. HÉBERT, *supra* note 27, at 20.

173. See Paul Mason Fotsch, *Contesting Urban Freeway Stories: Racial Politics and the O.J. Chase*, 13 CULTURAL STUD. 110, 120 (1999) (“[F]reeway construction, like urban renewal in general, by depleting the housing stock and in particular the amount of low-income housing, increased overcrowding and homelessness.”).

174. “Second ghetto” is the term used to describe the expansion and entrenchment of low-income, Black neighborhoods after World War II through conscious, racist efforts made by local governments and private entities that had the government’s support. See ARNOLD R. HIRSCH, *MAKING THE SECOND GHETTO: RACE AND HOUSING IN CHICAGO, 1940-1960* at 1–31 (Univ. of Chi. Press 1998) (defining the “second ghetto” and explaining how it came about in Chicago).

175. Mohl, *supra* note 19, at 229; see also HIRSCH, *supra* note 174, at 5, 16–18 (noting that, in the 1940s and 1950s, Blacks in Chicago were increasingly forced to live in “mixed” neighborhoods because of the lack of available housing in Black neighborhoods); see, e.g., MOHL, *PRRAC*, *supra* note 19, at 25 (observing that “[f]reeway construction in Pasadena, California displaced over 4,000 black and Mexican-American residents, most of whom were forced back into inner-city Los Angeles ghettos”); Connerly, *supra* note 33, at 100 (“[T]he rapid white flight and neighborhood racial change that eventually resulted in the city’s becoming majority black by 1980 began in the 1960s as federal highway projects, along with urban renewal, forced many black households to find new neighborhoods in which to live.”); Mohl, *supra* note 20, at 130–31 (noting that Black people forced out of the Overtown community in Miami, Florida were forced to move to racially segregated Liberty City).

aggravated overcrowding, further strained limited public services, and reinforced racial segregation.<sup>176</sup>

White flight and suburbanization<sup>177</sup> also contributed to racial segregation and concentrated poverty in these inner-city communities. One study found a direct link between highway construction and suburbanization, finding highway construction responsible for “about one-third of the change in aggregate central city population relative to metropolitan area population as a whole.”<sup>178</sup> The study also concluded that each “ray” sprouting from the city—meaning each road leading out of the city—“causes approximately a 9 percent decline in central city population.”<sup>179</sup> While displaced Black residents moved to other segregated urban neighborhoods, white residents—aided by the new highway system—fled to the suburbs.<sup>180</sup> It was not so easy for Black people to take advantage of this increased mobility and seek housing in the suburbs. The federal government denied home loans to Black people looking to live in white suburban communities,<sup>181</sup> and racially

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176. HÉBERT, *supra* note 27, at 20.

177. The term suburbanization refers to the process through which wealthier people move out of neighborhoods near the city center (where highways were historically built) into more exclusive, difficult-to-reach neighborhoods outside of the city. See Nathaniel Baum-Snow, *Did Highways Cause Suburbanization?*, 122 Q.J. ECON. 775, 775 (2007) (referring to suburbanization as the process by which people move out of central cities and into the suburbs).

178. *Id.* See also *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2515 (2015) (“Rapid urbanization, concomitant with the rise of suburban developments accessible by car, led many white families to leave the inner cities.”).

179. Baum-Snow, *supra* note 177, at 789.

180. See BRADBURY ET AL., *supra* note 168, at 10:

Nearly all new housing is built on the urban periphery in accordance with high quality standards legally required there. Such housing can initially be occupied only by high- and middle-income households, since it is too costly for most lower-income households . . . [I]t also compels most poor urban households to live in older neighborhoods close to the historic center of large cities, and their concentration aggravates many social problems associated with extreme poverty;

LEWIS, *supra* note 5, at xiv (“The Interstate made long-distance commuting possible, thereby contributing to the ‘white flight’ that separated races and classes from each other.”); Kuswa, *supra* note 65, at 32 (arguing that wealthy suburban families “found their living and transportation needs subsidized by the federal treasury”).

181. See *Tex. Dep’t of Hous. & Cmty. Affairs*, 135 S. Ct. at 2525–26 (holding that disparate impact claims are cognizable under the Fair Housing Act where plaintiffs allege that a state’s allocation of tax credits creates racial segregation); ROTHSTEIN, *supra* note 15, at 65–66 (explaining that the Federal Housing Administration would decide its rating and approval of mortgages based on whether there would be “infiltration of inharmonious racial or nationality groups”). The Federal Housing Administration employed racial segregation as an official requirement for its federal mortgage insurance, believing properties in Black neighborhoods, racially mixed neighborhoods, or white neighborhoods too close to Black ones were too risky for insurance. *Id.* at 65. Highways facilitated this process:

The FHA favored mortgages in areas where boulevards or highways served to separate African American families from whites, stating that “[n]atural or artificially established barriers will prove effective in protecting a neighborhood and the locations within it

restrictive covenants prevented some homeowners from selling their homes to Black people.<sup>182</sup> Moreover, even if they were able to overcome the hurdles of racial discrimination, displaced Black people often lacked the financial resources to improve their housing conditions. Black people were regularly denied access to well-paying jobs, and, in many cases, the highway demolition claimed the only asset many Black families owned—their homes—as they were forced to sell below market value.<sup>183</sup> In the end, this web of restrictions left Black people crowded into small, poor neighborhoods because they were not allowed or able to live anywhere else.

Highway building also gutted the economic core in many of these communities. The elimination of Black-owned businesses through displacement deeply impacted segregated communities that were already starved for economic investment.<sup>184</sup> North Nashville, Tennessee, was the home of eighty percent of all Black-owned businesses in the city, and they were largely lost when North Nashville was demolished.<sup>185</sup> In Richmond, Virginia, the highway plowed through the middle of a stable Black community, devastating its business community.<sup>186</sup>

The migration of people to the suburbs is also closely connected to the movement of jobs away from city centers.<sup>187</sup> Studies have noted the strong correlation between people moving to the suburbs and employers moving out of cities; an even stronger causal relationship was found in employers moving to follow workers than in workers

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from adverse influences, . . . includ[ing] prevention of the infiltration of . . . lower class occupancy, and inharmonious racial groups.

*Id.* (alterations in original).

182. *See id.* at 78 (noting that “one commonplace commitment” in restrictive covenants “was a promise never to sell or rent to an African American”).

183. *See* Brief for Ohio Conference of the NAACP and the National Institute for Urban Entrepreneurship as Amici Curiae Supporting Appellants at 9, *City of Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006) (Nos. 2005–0227, 2005–0228, 2005–1210, 2005–1211) (noting that “[t]he fact that particular property is identified and designated for ‘redevelopment,’ . . . almost certainly means that the market is currently undervaluing that property or that the property has some ‘trapped’ value that the market is not currently recognizing”); Kuswa, *supra* note 65, at 44, 53–54 (noting that people of color and low income neighborhoods “were excluded from the suburbification of America,” that “minority communities” were torn apart by the highways, and that “a governing apparatus operating through housing and the highway machine implemented policies to segregate and maintain the isolation of poor, minority, and otherwise outcast populations”).

184. JOHN E. SELEY, *THE POLITICS OF PUBLIC-FACILITY PLANNING* 59 (1983).

185. *Id.*; Mohl, *supra* note 20, at 134.

186. Mohl, *supra* note 20, at 134.

187. *See, e.g.*, LEWIS, *supra* note 5, at 249 (“Since the 1950s, businesses, too, had followed people in their exodus to the country . . . [A]bout thirty-eight major corporations over two decades had fled [New York] city.”).

moving to follow jobs.<sup>188</sup> In addition, moving to the suburbs provided opportunities for employers to have more space and cheaper production costs.<sup>189</sup> Whatever the reason, “even controlling for other factors, both population and job loss in large cities tended to reduce [remaining residents’] average incomes.”<sup>190</sup> Moreover, as jobs moved to the suburbs, residents remaining in city centers struggled to find jobs because of racism, further perpetuating a cycle of poverty.<sup>191</sup>

Finally, the migration of people into the suburbs is closely related to disinvestment in necessary public works in the neighborhoods left behind. The same people who devised and built the highway systems also underfunded existing infrastructure in the areas decimated by the highways.<sup>192</sup> And the migration of large numbers of taxpayers out of city centers significantly decreased the tax base available to support public services. “[A]s men like Robert Moses had held control of most of the transportation dollars, which they put into road construction, both the railroads and subways had been allowed to decline. Equipment was broken or worn out, service was inefficient and often delayed.”<sup>193</sup> Thus, the only means available for the remaining, low-income residents to commute to jobs and shopping were unreliable

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188. BRADBURY ET AL., *supra* note 168, at 94; *see also* LEWIS, *supra* note 5, at 250 (noting that not all employees followed their companies to the suburbs, thus creating job openings that “were taken by suburban women, a well-educated group who wanted to work”).

189. *See* Baum-Snow, *supra* note 177, at 801 (“In addition to chasing suburbanizing workers, firms may have relocated because highways free manufacturing firms from shipping through a port or downtown rail hub or because highways allow local agglomeration economies to operate over longer distances.”).

190. BRADBURY ET AL., *supra* note 168, at 107.

191. *See, e.g.*, Alana Semuels, *How to Decimate a City*, ATLANTIC (Nov. 20, 2015), <https://www.theatlantic.com/business/archive/2015/11/syracuse-slums/416892/> [<https://perma.cc/D2XX-5G8Y>]:

Racism prevented black residents from buying homes and from getting good jobs: Dunham remembers a family friend who was one of the first African Americans to graduate from Syracuse University’s law school; he couldn’t find a job in law because no firms would hire a black lawyer. Another family friend applied to go to medical school in the 1950s and was rejected everywhere, despite top grades.

192. The cancellation of Baltimore’s Red Line light rail system is a notable recent example. In June 2015, Larry Hogan, the then-Governor of Maryland, effectively canceled the Red Line, a planned light rail that would have improved east-west mass transit in the city, when he announced that he would not authorize state funding for the project. Michael Dresser & Luke Broadwater, *Hogan Says No to Red Line, Yes to Purple*, BALT. SUN (June 25, 2015), <https://www.baltimoresun.com/politics/bs-md-hogan-transportation-20150624-story.html> [<https://perma.cc/2H56-S9KJ>]. Instead, the state funding originally earmarked for the Red Line was redirected to a transportation initiative in rural and suburban areas outside of Baltimore. *Id.* This decision had a disparate impact on Black residents of Baltimore. Complaint, Baltimore Regional Initiative Developing Genuine Equality, Inc., U.S. Department of Transportation, Departmental Office of Civil Rights 3, <https://www.naacpldf.org/wp-content/uploads/Baltimore-Red-Line-Complaint.pdf> [<https://perma.cc/59NS-KQUS>] (administrative complaint challenging the racially disparate impact of the funding decision).

193. LEWIS, *supra* note 5, at 250.



and inadequate. Some of the services that had to be reduced included commuter railways, subways, bus systems, public education, health care, and museums and other cultural offerings.<sup>194</sup> The lack of funding for public services further aggravated the hardships residents in these neighborhoods faced.

What followed in these communities was hyper-racial segregation<sup>195</sup> and concentrated poverty that trapped people in a web of discrimination, exploitation, and lack of opportunity.<sup>196</sup> The link between this lingering impact and the destruction of communities of color to make way for highways is clear. In a 2016 Dear Colleague Letter, the then-secretaries of the United States Departments of Housing and Urban Development, Education, and Transportation acknowledged that the intersection of transportation, housing, and education policy helped to create and sustain concentrated poverty and racial segregation that continues to impede economic mobility and access to opportunity.<sup>197</sup> They further recognized that “children raised in concentrated poverty or in communities segregated by socioeconomic status or race or ethnicity have significantly lower social and economic mobility than those growing up in integrated communities.”<sup>198</sup> They also noted that “[r]ising economic segregation means that an increasing

194. BRADBURY ET AL., *supra* note 168, at 26–27.

195. Hyper-racial segregation is a “more intense form of racial segregation . . . imposed by violence and maintained by private institutional practices and government action.” CARTER A. WILSON, *RACISM: FROM SLAVERY TO ADVANCED CAPITALISM* 160 (1996).

196. See PATRICK SHARKEY, *STUCK IN PLACE: URBAN NEIGHBORHOODS AND THE END OF PROGRESS TOWARD RACIAL EQUALITY* 180 (2013) (“The association between race and neighborhood deterioration is not inevitable. It is a result of decades of public policies that have served to strengthen and reinforce the walls of the ghetto while systematically disinvesting in black urban communities.”); Evelyn Blumenberg, *Social Equity and Urban Transportation*, in *THE GEOGRAPHY OF URBAN TRANSPORTATION* 332, 332–33 (Genevieve Giuliano & Susan Hanson eds., 4th ed. 2017) (noting that race-based housing discrimination and limited access to automobiles contributed to the segregation in inner-city neighborhoods, with this segregation contributing to the lack of economic opportunity); Raj Chetty, Nathaniel Hendren & Lawrence F. Katz, *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, 106 AM. ECON. REV. 855, 855 (2015) (“Individuals who live in high-poverty areas fare worse than those who live in lower-poverty neighborhoods on a wide range of economic, health, and educational outcomes.”); Desmond, *supra* note 44, at 3, 8 (noting the “clustering of different kinds of disadvantage across multiple dimensions (psychological, social, material) and institutions (work, family, prison)” and the generational effects inflicted by racist policies); Kuswa, *supra* note 65, at 44 (noting that many “minority and lower income neighborhoods” unable to benefit from suburbanization were trapped in inner-city communities on “limited land replete with collapsing infrastructure and urban pollution”).

197. See Julián Castro, John B. King & Anthony R. Foxx, *Dear Colleagues Letter Regarding Mobility via Education and Socioeconomic Opportunity*, U.S. DEP’T OF EDUC. 1 (June 3, 2016), <https://www2.ed.gov/documents/press-releases/06032016-dear-colleagues-letter.pdf> [<https://perma.cc/YPW5-KXLC>] (calling on the three agencies “to work together . . . in helping to guarantee full access of opportunity across the country”).

198. *Id.*

number of low-income households are located in distressed neighborhoods where they face challenges such as failing schools, high rates of crime, and inadequate access to services and jobs, making it harder for individuals and families to escape poverty.”<sup>199</sup>

Charlotte, North Carolina, is one of these communities. Despite thriving development in the city and its rank as the country’s second largest banking center, in a 2014 analysis by economist Raj Chetty, Charlotte ranked last in its ability to lift poor children out of poverty.<sup>200</sup> In Charlotte, there are large swaths of affluent white communities where children generally grow up to do well, duplicating or exceeding their parents’ economic success.<sup>201</sup> Nearby there is a “crescent” of predominantly Black neighborhoods facing generational poverty and low educational and economic prospects.<sup>202</sup> Charlotte’s racial segregation and concentration of poverty can be linked directly to the interaction of redlining and housing segregation with highway development in the 1940s, 1960s, and 1970s, which displaced, destroyed, and divided thriving Black communities.<sup>203</sup> As one commentator said: “It’s common to hear that something has gone wrong in parts of Charlotte, but the more honest reading is that Charlotte is working as it was designed to.”<sup>204</sup>

Syracuse, New York, provides another example of the segregative impact that development of the interstate highway system had on many urban communities. When Interstate 81 was built in Syracuse, it cut through the City’s urban center, decimating a primarily Black and Jewish neighborhood called the 15th Ward in the name of slum clearance and redevelopment.<sup>205</sup> When the displaced Black

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199. *Id.*

200. See Raj Chetty, Nathaniel Hendren, Patrick Kline & Emmanuel Saez, *Where is the Land of Opportunity? The Geography of Intergenerational Mobility in the United States*, 129 Q.J. ECON. 1553, 1556 (2014) (finding, in a study of fifty metro areas, that children in Charlotte had the smallest probability of reaching the top fifth of the income distribution); Gareth Cook, *The Economist Who Would Fix the American Dream*, ATLANTIC, <https://www.theatlantic.com/magazine/archive/2019/08/raj-chettys-american-dream/592804/> (last updated July 17, 2019, 3:47 PM ET) [<https://perma.cc/6LVT-QKYN>] (“Charlotte is in a dead heat with San Francisco to be the nation’s second-largest banking center.”). Chetty’s study found that only 4.4 percent of Charlotte’s kids moved from the bottom quintile of household income to the top and that children born to low-income families remained at or near the poverty line as adults. Chetty et al., *supra*, at 1556–57.

201. Cook, *supra* note 200 (discussing the socioeconomic layout of families in Charlotte).

202. *Id.* (discussing the prospects of children who grow up in “the crescent”).

203. See *id.* (noting the different policies that have caused the circumstances that are “holding kids back” in Charlotte).

204. *Id.*

205. See ANTHONY ARMSTRONG, POVERTY & RACE RESEARCH ACTION COUNCIL, DECONSTRUCTING SEGREGATION IN SYRACUSE? 3–4 (2018) (“When construction started, the path of the expressway decimated a primarily black and Jewish neighborhood—the 15th Ward—and

residents from the 15th Ward moved to other city neighborhoods, white residents fled to the suburbs.<sup>206</sup> As middle- and upper-class residents moved to the suburbs, the low-income people of color remained trapped in the city.<sup>207</sup>

The cycle is self-perpetuating: people who live in poverty have a harder time succeeding *because* they are surrounded by others in poverty.<sup>208</sup> Today, Syracuse has the highest rate of Black concentrations of poverty in the nation and bears all the hallmarks of generational poverty—few businesses, lack of economic opportunity, poor-quality schools, and violence.<sup>209</sup> Housing for poor families remains crowded around I-81’s elevated overpass, and nearly two-thirds of poor Black people in Syracuse live in high-poverty neighborhoods.<sup>210</sup> Approximately sixty-two percent of Latinxs live in high-poverty neighborhoods. Only about thirty percent of Black people in the Syracuse metro area own their own homes, while seventy-one percent of white people do.<sup>211</sup>

In addition to high concentrations of poverty, Syracuse is also intensely racially segregated,<sup>212</sup> with I-81 serving as a “line of demarcation.”<sup>213</sup> The highway separates the city’s most vibrant neighborhoods with up to six lanes of traffic, feeder ramps, and access roads.<sup>214</sup> Notably, I-81 separates University Hill (which includes

spurred white flight to the suburbs.”); DiMento, *supra* note 70, at 145–46 (discussing Syracuse’s efforts to demolish the 15th Ward).

206. See ARMSTRONG, *supra* note 205, at 4 (noting that construction of I-81 “spurred white flight to the suburbs”); Semuels, *supra* note 191 (“Black residents moved to the South Side when the 15th Ward was demolished, which in turn motivated white residents to move to the suburbs.”).

207. See Semuels, *supra* note 191 (“As upper- and middle-class residents moved to the suburbs, the very poor remained in the city, and increasingly saw themselves surrounded by more poor people.”).

208. See, e.g., Raj Chetty & Nathaniel Hendren, *The Impacts of Neighborhoods on Intergenerational Mobility I: Childhood Exposure Effects*, 133 Q.J. ECON. 1107, 1159–60 (2018) (“Neighborhoods affect children’s long-term outcomes through childhood exposure effects: every extra year a child spends growing up in an area where permanent residents’ incomes are higher increases his or her income.”); see also Chetty et al., *supra* note 196, at 858 (finding, in an experiment, a correlation between children’s improved long-term outcomes and their exposure to a lower-poverty environment).

209. See Semuels, *supra* note 191 (noting that people who stayed in “high-poverty” neighborhoods in Syracuse often were “exposed to more and more poverty” along with all the problems associated with it).

210. See *id.* (discussing the current state of housing and demographics in Syracuse).

211. *Id.*

212. Tim Knauss, *Report: Syracuse and Onondaga County Suffer from ‘Hyper-Segregation,’* SYRACUSE, [https://www.syracuse.com/news/2014/11/report\\_syracuse\\_and\\_onondaga\\_county\\_suffer\\_from\\_hyper-segregation.html](https://www.syracuse.com/news/2014/11/report_syracuse_and_onondaga_county_suffer_from_hyper-segregation.html) (last updated Mar. 22, 2019) [<https://perma.cc/9LWM-X9KM>] (“[D]emographer[s] ranked the Syracuse metropolitan area as the ninth most segregated city in the country in a 2010 analysis.”).

213. Vock, *supra* note 45, at 52.

214. *Id.* at 52.

several hospitals), Syracuse University, and some schools within the State University of New York's system from a low-income neighborhood.<sup>215</sup> Some have compared I-81 to the Berlin Wall, separating "the haves and the have-nots."<sup>216</sup> "For blocks in either direction of the interstate, parking garages and surface lots dominate the landscape. The aging highway cuts off many streets on the city's grid. . . . 'tak[ing] an incredibly important piece of this city off of the development map.'"<sup>217</sup>

Syracuse and Charlotte are not alone. We see similar statistics on racial segregation and concentrated poverty in other highway-impacted communities.<sup>218</sup>

### *B. The Destructive and Psychological Impact of Division*

Urban communities also bear the scars of being split by highways that erected barriers through formerly close-knit

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215. See *id.* at 53 (noting that several schools on University Hill border the I-81); Patrick Lohmann, *Syracuse Housing Authority Plan Uses I-81 Project to Resurrect City Center, Combat Poverty*, SYRACUSE, [https://www.syracuse.com/news/2016/12/syracuse\\_housing\\_authority\\_plan\\_uns\\_i-81\\_project\\_to\\_resurrect\\_city\\_center.html](https://www.syracuse.com/news/2016/12/syracuse_housing_authority_plan_uns_i-81_project_to_resurrect_city_center.html) (last updated Mar. 21, 2019) [<https://perma.cc/4Q8N-9WD3>] (noting that a low-income neighborhood "has existed for decades" in the shadow of Interstate 81).

216. Angie Schmitt, *Building Highways Made Racial Segregation Worse. Can Removing Them Undo That Legacy?*, STREETS BLOG USA (June 7, 2018), <https://usa.streetsblog.org/2018/06/07/building-highways-made-racial-segregation-worse-can-removing-them-undo-that-legacy/> [<https://perma.cc/3NVK-QJ97>] (quoting former city council president Van Robinson).

217. Vock, *supra* note 45, at 52.

218. See Johnny Miller, *Roads to Nowhere: How Infrastructure Built on American Inequality*, GUARDIAN (Feb. 21, 2018), <https://www.theguardian.com/cities/2018/feb/21/roads-nowhere-infrastructure-american-inequality> [<https://perma.cc/Y8SK-A8XD>] (discussing how highway construction in the mid-1900s in places like Los Angeles, Detroit, and Virginia walled off low-income, Black communities that remain segregated to this day); Alan Pyke, *Top Infrastructure Official Explains How America Used Highways to Destroy Black Neighborhoods*, THINKPROGRESS (Mar. 31, 2016), <https://thinkprogress.org/top-infrastructure-official-explains-how-america-used-highways-to-destroy-black-neighborhoods-96c1460d1962/> [<https://perma.cc/KQD4-NFWB>] (noting that several communities were destroyed when highways were built and that poverty clings to the freeways "like a shadow"); Alana Semuels, *Highways Destroyed America's Cities*, ATLANTIC (Nov. 25, 2015), <https://www.theatlantic.com/business/archive/2015/11/highways-destroyed-americas-cities/417789/> [<https://perma.cc/N7BN-LEQ2>] (noting that highways "created problems, some of which have become much worse in the years since" and that these problems included displacing communities, creating air and noise pollution, and "creating physical and psychological rifts" that are extremely difficult to bridge); Semuels, *supra* note 191 (noting that the suburbs created with the help of highway continue to make sure that only wealthy people can live there through means like zoning rules); see also William H. Frey, *Black-White Segregation Edges Downward Since 2000, Census Shows*, BROOKINGS: THE AVENUE (Dec. 17, 2018), <https://www.brookings.edu/blog/the-avenue/2018/12/17/black-white-segregation-edges-downward-since-2000-census-shows/> [<https://perma.cc/U5QM-FEYR>] (noting that Black-white segregation remained high in many metro areas between 2000 and 2013).

neighborhoods.<sup>219</sup> In many cities, the highway blocked pedestrian movement and cut off social interactions.<sup>220</sup> More than just homes were lost: churches, schools, businesses, and parks were demolished to make room for the highways, tearing through the social fabric of these once-vibrant communities and robbing them of their sense of community and connection.<sup>221</sup>

In Nashville, Interstate 40 either destroyed or prevented the expansion of multiple cultural institutions. I-40 was built right through the main Black business district, which had been home to 128 Black-owned businesses.<sup>222</sup> In addition to destroying most of those businesses, six Black churches were destroyed and fifty local streets were dead-ended.<sup>223</sup> Interstate 40 “separated children from their playgrounds and schools [and] parishioners from their churches.”<sup>224</sup> Fisk University, Meharry Medical College, and Tennessee A. & I. University (later Tennessee State University), three historically Black institutions of higher education, were walled off from each other and the communities they served.<sup>225</sup> The highway also physically constrained the future growth of the three institutions.<sup>226</sup> Moreover, construction of the six-lane highway meant that many of the almost twenty thousand people served by a hospital associated with Meharry Medical College, and who did not own cars, would be forced to cross the highway on foot to get to the hospital or seek care elsewhere.<sup>227</sup>

219. See FOTSCH, *supra* note 14, at 170 (“What made freeways especially damaging was not just their destruction of housing but also their creation of enormous concrete barriers within formerly close-knit neighborhoods.”).

220. See, e.g., *id.* (explaining that these freeways “had consequences for small businesses” that were no longer accessible to pedestrians and that Black and Latinx communities were “disproportionately affected” by renewal projects); VOCK, *supra* note 45, at 53 (noting that merchants located near Interstate 81 in downtown Syracuse suffered from manufacturers—aided by the highway—moving their operations from the city to the suburbs).

221. See David C. Hodge, *My Fair Share: Equity Issues in Urban Transportation*, in THE GEOGRAPHY OF URBAN TRANSPORTATION 359, 359–61 (Susan Hanson ed., 2d ed. 1995) (discussing the impacts felt by the “losers” of transportation and land use changes); FOTSCH, *supra* note 173, at 120 (arguing that neighborhoods through which freeways were built could often experience negative effects to their local economies and a damaged “sense of community”); MOHL, *supra* note 86, at 674 (“Pushing expressways through the social and physical fabric of American cities inevitably resulted in housing demolition on a large scale, the destruction of entire communities, severe relocation problems, and subsequent environmental damage.”); MOHL, PRRAC, *supra* note 19, at 25 (noting that the plans for Century Freeway in Los Angeles, California, were known to include dislocating “3,550 families, 117 businesses and numerous parks, schools, and churches” mainly in Black Watts and Willowbrook).

222. Mohl, *supra* note 70, at 880.

223. *Id.*

224. *Id.*

225. *Id.*

226. See *id.* (citing a city planner who argued that the I-40 corridor cutting through Nashville restricts the growth of the three historically Black schools).

227. SELEY, *supra* note 184, at 60.

The psychological impact to residents stemmed, in part, from the personal sense of loss that members of the community experienced. Although many of these communities were poor, they were still vibrant. For many of the people who lived in these targeted communities, their world was bounded by their familiar surroundings: “Most of their . . . entire lives and economic well-being [were] centered around the property of neighborhoods which were uprooted.”<sup>228</sup>

In St. Paul, Minnesota, a Black community called Rondo was destroyed to make room for Interstate 94.<sup>229</sup> A resident of the neighborhood powerfully described the lingering impact:

As a community we had a geographical bond. Rondo was the thoroughfare, the main drag, the main contributory, the focal point, the center, the epic center, the nexus . . . When you walked down that street you walked past people you knew, places you ate, places you partied at, and everybody knew you. A common thread ran through everyone and when they tore that street up, it was like ripping your arm off. People were floundering. We were castaways. Where was our Rondo?<sup>230</sup>

Residents of communities cordoned off by highways also live with the stigma<sup>231</sup> of what amounted to state-imposed racial segregation. Stigmatization assaults one’s self respect and dignity, labeling an individual with signs of an inferior status.<sup>232</sup> Living in a segregated community can impose a sense of “otherness” for the segregated group,<sup>233</sup> resulting in a detrimental impact on physical and mental health.<sup>234</sup> Over time, federal courts have come to recognize the

228. MILLER, *supra* note 163, at 2 (quoting an observer commenting on the effects that the construction of I-20 had on Black communities in Atlanta).

229. See FOTSCH, *supra* note 14, at 170 (noting that 650 families were removed from their homes in order to make way for Interstate 94); see also Vikki Sanders & Remember Rondo Committee, *Profile of a Visionary: Interview with Roger Anderson*, in REMEMBER RONDO: A TRADITION OF EXCELLENCE 25, 26–27 (1995) (recalling the tight-knit community that Rondo was and the crucial role it played in many people’s lives).

230. FOTSCH, *supra* note 14, at 170–71; Sanders & Remember Rondo Committee, *supra* note 229, at 26.

231. Stigma can be defined as having a “dishonorable meaning [ ] socially inscribed” on one’s identity or “becoming a disfavored or dishonored individual in the eyes of society.” R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 809 (2004).

232. Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 351 (1987). Stigma both undermines one’s own self-esteem as well as the respect afforded by others. *Id.*

233. See Douglas S. Massey & Brandon Wagner, *Segregation, Stigma, and Stratification: A Biosocial Model*, in THE OXFORD HANDBOOK OF STIGMA, DISCRIMINATION, AND HEALTH 147, 148–49 (Brenda Major, John F. Dovidio & Bruce G. Link eds., 2018) (reviewing the impact of segregation on the creation and perpetuation of stigma); Christopher J. Tyson, *Municipal Identity as Property*, 118 PENN. ST. L. REV. 647, 664–65 (2014) (discussing the stigma attached to racialized municipal boundaries).

234. See, e.g., Dayna Bowen Matthew, *Equitable Community Development for Good Mental Health: A Discussion of Economic and Racial Equity in Housing*, 13 COMMUNITY DEV. INNOVATION REV. 61, 64 (2018) (discussing findings that actual and perceived racial discrimination can “broadly

stigma victims of racial segregation experience. The Court moved, for example, from *Plessy v. Ferguson*'s rejection of the idea that segregation marks Black people with "a badge of inferiority,"<sup>235</sup> to *Brown v. Board of Education*'s acknowledgment of the stigma of racial segregation and the recognition that this stigma "is greater when it has the sanction of the law."<sup>236</sup> Racial segregation, by whatever means, is seen as denoting the inferiority of people of color.<sup>237</sup>

The erection of highways between Black and White communities, or structures that encircled Black communities, sent a clear message of racial hierarchy. This government-imposed segregation was a show of the power of White people over the lives of Black people, ensuring that Black people understood "their place."<sup>238</sup> Justice Thurgood Marshall's dissent in *Memphis v. Greene* encapsulates the way that government-erected physical barriers may reinforce racial hierarchy and the resulting stigma.<sup>239</sup> The case involved the city of Memphis, Tennessee's decision to block and close a main thoroughfare between a historically all-White community and a predominantly Black community, at the request of White property owners. Although the majority characterized the street's closure and erection of a physical barrier to prevent residents from the Black community traveling

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impact mental health" producing psychological distress); Aidean Maguire, Declan French & Dermot O'Reilly, *Residential Segregation, Dividing Walls and Mental Health: A Population-Based Record Linkage Study*, 70 J. EPIDEMIOLOGY & COMMUNITY HEALTH 845, 845–46 (2016) (exploring the impact of "physical manifestations of segregation" on mental health).

235. 163 U.S. 537, 551 (1896) ("We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is . . . solely because the colored race chooses to put that construction upon it.").

236. 347 U.S. 483, 494 (1954) ("To separate them from others . . . solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone . . . [T]his finding is amply supported by modern authority."); see also Harris, *supra* note 52, at 1750 ("[T]he evil of state-mandated segregation was the conveyance of a sense of unworthiness and inferiority.").

237. *Brown*, 347 U.S. at 494 (citing the district court).

238. Ankur J. Goel, Willie J. Lovett, Jr., Robert Patten & Robert L. Wilkins, *Black Neighborhoods Becoming Black Cities: Group Empowerment, Local Control and the Implications of Being Darker than Brown*, 23 HARV. C.R.-C.L. L. REV. 415, 473 (1988) (arguing that State-imposed segregation stigmatized Blacks because "[it was] set up and continued for the very purpose of keeping [blacks] in an inferior station" (quoting Charles L. Black Jr., *The Lawfulness of the Segregation Decisions*, 69 Yale L.J. 421, 424 (1960))).

239. 451 U.S. 100, 135–55 (1981) (Marshall, J., dissenting). The case also exemplifies the limits on the Court's recognition of the many faces of racial discrimination and the impact of stigma. Although courts have recognized the existence of stigma, the legal implications of this recognition have been far from adequate. See Alex Geisinger, *Nothing But Fear Itself: A Social-Psychological Model of Stigma Harms and Its Legal Implications*, 76 NEB. L. REV. 452, 454 (1997) (arguing that courts misunderstand the process that causes stigma harm and thus have fashioned a jurisprudence that is unresponsive to the problem); Lenhardt, *supra* note 231, at 878–96 (proposing a framework for judicial analysis of racially stigmatic harm).

through the White community as a “slight inconvenience to Black motorists,”<sup>240</sup> Justice Marshall pointed out that such an analysis “ignores the plain and powerful symbolic message” the barrier sends to members of both communities.<sup>241</sup> Justice Marshall noted that the barrier was erected at the precise point where the all-White neighborhood ended and the predominantly Black neighborhood began, sending a “clear, though sophisticated, message.”<sup>242</sup> He wrote: “[A]s should be clear . . . the problem is less the closing of [the street] in particular than the establishment of racially determined districts which the closing effects,”<sup>243</sup> especially when the street closing was “one more of the many humiliations which society has historically visited” on Black people.<sup>244</sup>

### III. THE CHALLENGES, OPPORTUNITIES, AND RISKS OF MODERN HIGHWAY REDEVELOPMENT PROJECTS

The United States is paying increased attention to the nation’s aging infrastructure, including the interstate highway system.<sup>245</sup> Segments of the interstate highway system built in the 1950s and 1960s are either past or approaching the end of their useful life and need to be replaced.<sup>246</sup> Many of those highway segments are in urban neighborhoods, surrounded by communities of color that are still fighting to overcome the harms caused by the highways when they were built. And, as federal, state, and local governments plan, rebuild, and replace the aging highway system, the risks of expanded harm remain. Racism is still woven deeply into the fabric of American society, and the politics of race, class, and infrastructure development remain deeply intertwined.

In order to mitigate the damage to Black communities and other communities of color inflicted during the original construction of the

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240. *Greene*, 451 U.S. at 119.

241. *Id.* at 138 (Marshall, J., dissenting).

242. *Id.* at 147.

243. *Id.*

244. *Id.* (quoting *Greene v. Memphis*, 610 F.2d 395, 404 (6th Cir. 1979)).

245. See Ross-Brown, *supra* note 23 (noting that former U.S. Secretary of Transportation Anthony Foxx focused on “overhaul[ing] the country’s aging transportation assets” and “made repairing the damage caused by decades of urban highway construction” a federal priority).

246. See Vock, *supra* note 45, at 53 (“Roads built in the 1960s—particularly elevated spans that travel across a series of bridges—are nearing the end of their useful life, which means they may need to be replaced entirely.”). For an in-depth description of what a “structurally deficient” highway looks like, see Satoshi Sugiyama, *Slowly Crumbling*, DAILY ORANGE (Mar. 9, 2017), <http://dailyorange.com/2017/03/slowly-crumbling-with-changes-pending-i-81-continues-to-deteriorate/> [<https://perma.cc/528V-UW4Q>] (describing the state of the sections of I-81 that run through Syracuse).



interstate highway system—and to prevent further entrenchment of racial inequality, segregation, and economic isolation—highway builders should seize the opportunity to redress the racially disproportionate impact of the interstate highway system. This Part explores the old and new racial equity<sup>247</sup> concerns raised by the potential redevelopment of the aging highway system, and explains why government officials at all levels must ensure that racial equity is a central consideration in future decisionmaking processes.

The Interstate Highway System “is aging, its bridges collapsing, and its maintenance long deferred. Traffic everywhere overwhelms capacity. Residents of sprawling outer suburbs have been clamoring for more, better, and bigger highways to get to work and to shopping.”<sup>248</sup> Some states have responded to the looming crisis<sup>249</sup> with plans to double down on their investment in highways by building new interstate highway links that improve accessibility for growing metropolitan areas and support tourism in their states.<sup>250</sup> Dozens of other cities have explored tearing down the highways that run through their inner-city communities.<sup>251</sup> Many of these jurisdictions acknowledge that highways

247. Redeveloping or tearing down aging highways raises a host of racial equity, civil rights, and economic justice concerns beyond the scope of this Article. Those concerns include the threat of gentrification making communities unaffordable and inhospitable to long-term residents, temporary and permanent housing dislocation further entrenching housing and educational segregation or increasing the incidence of homelessness, impacts on voting rights and political participation as a result of temporary and permanent dislocation, and environmental justice concerns.

248. Mohl, *supra* note 45, at 89; *see also* Bayles, *supra* note 45 (noting that the Federal Highway Administration found that traffic on the nation’s interstates would increase forty-two percent over two decades).

249. The American Society of Civil Engineers’ 2017 report card gave U.S. infrastructure a grade of “D+,” with the nation’s roads receiving a “D” grade. *2017 Infrastructure Report Card*, AM. SOC’Y CIVIL ENGRS 5, 76 (2017), <https://www.infrastructurereportcard.org/wp-content/uploads/2019/02/Full-2017-Report-Card-FINAL.pdf> [<https://perma.cc/HT3S-L83J>]. They found that “America’s roads are often crowded, frequently in poor condition, chronically underfunded, and are becoming more dangerous. . . . One out of every five miles of highway pavement is in poor condition and our roads have a significant and increasing backlog of rehabilitation needs.” *Id.* at 76.

250. *See* Mohl, *supra* note 45, at 90 (listing Maine, Georgia, Alabama, Arizona, Arkansas, and Nevada as states that have proposed expanding their highway system); Sean Holstege, *2050 Vision for Valley: 400 Miles of New Highways*, ARIZ. REPUBLIC (Sept. 27, 2009), <http://archive.azcentral.com/arizonarepublic/news/articles/2009/09/27/20090927futurefreeways.html> [<https://perma.cc/M6G6-2KWX>] (laying out the “far-reaching network of new freeways and highways” that Arizona sketched out in order to deal with anticipated population growth). *See generally* JAMES A. DUNN JR., *DRIVING FORCES: THE AUTOMOBILE, ITS ENEMIES, AND THE POLITICS OF MOBILITY* (1998) (arguing that the popularity of automobiles makes any policy that restricts automobile usage difficult to pass or implement).

251. Mohl, *supra* note 45, at 91–96 (discussing several cities’ considerations in deciding whether to tear down their highways); *see also* Vock, *supra* note 45, at 52–54 (discussing the debate in Syracuse over whether to replace or repair sections of I-81); sources cited *infra* note 271 (discussing Rhode Island’s decision to demolish parts of Interstate 195).

are visually unappealing and environmentally damaging to the communities that host them.<sup>252</sup> For some, tearing down the highway presents an opportunity to “knit[ ] back together the many neighborhoods that were ripped apart” when the highways originally destroyed and divided those communities.<sup>253</sup> Yet, few of these people view highway redevelopment as an opportunity to affirmatively advance racial justice.

Whether a state or city is tearing down or rebuilding their highways, these infrastructure projects raise serious racial justice and civil rights concerns for the communities forced to host these highways for decades. As was true in the 1950s and 1960s, the displacement of Black communities will be particularly harmful because the supply of affordable housing is both inadequate and limited by racial discrimination and segregation.<sup>254</sup> In addition, the physical and economic dislocation of families to build highways may impact education, employment, and political participation, as well as spur gentrification. As property is acquired for redevelopment projects, communities should be deeply concerned about the specter of dislocation for families, community organizations, churches, and businesses. While government officials may laud the potential for “economic revitalization” of urban communities, “revitalization” has historically brought significant risk to current residents.<sup>255</sup>

Historically, urban planners, government officials, and business elites have not demonstrated sensitivity to these concerns and do not have a laudable track record of integrating concepts of racial justice into their work. As one scholar noted, “[w]here public policy has been constructed to limit the opportunity and development of African Americans and other people of color, planning [professionals] ha[ve] provided the rationale, supportive data and information, and plans of

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252. Mohl, *supra* note 45, at 90.

253. *Id.*

254. See Mohl, *supra* note 86, at 680 (“Displacement will be particularly serious in the big city black ghettos where the supply of housing is inadequate and relocation beyond the confines of the ghetto is severely limited by racial segregation.”); LIZA GETSINGER, LILY POSEY, GRAHAM MACDONALD & JOSH LEOPOLD, URBAN INST., *THE HOUSING AFFORDABILITY GAP FOR EXTREMELY LOW-INCOME RENTERS IN 2014*, at 1–2 (2017), [http://www.urban.org/sites/default/files/publication/89921/gap\\_map\\_report.pdf](http://www.urban.org/sites/default/files/publication/89921/gap_map_report.pdf) [<https://perma.cc/VUK5-SM2K>] (noting that there is a nationwide “lack of adequate and affordable housing for poor renters” and that the lack of affordable housing is especially challenging for extremely low-income households); Tanvi Misra, *Every U.S. County Has an Affordable Housing Crisis*, CITYLAB (Apr. 27, 2017), <https://www.citylab.com/equity/2017/04/every-us-county-has-an-affordable-housing-crisis/524628/> [<https://perma.cc/8LN7-SWKA>] (“The affordable housing crisis has spared no county—rural or urban.”).

255. See *supra* Section I.A. (discussing how urban highways were used as a tool to destroy Black communities).

action.”<sup>256</sup> The act of public works planning is “an exercise of [ ]social, economic, and political[ ] power.”<sup>257</sup> Unfortunately, Black communities have been ill-served by planners who fail to holistically consider the impact of public works programs on education, housing, economic development, and health in these communities.<sup>258</sup> Rather than embracing the potential to improve the quality of life in Black communities or putting equity at the forefront of siting and infrastructure development projects, planners have regularly given in to the forces of racism, classism, and tradition.<sup>259</sup>

Building the interstate highway system disproportionately impacted poor communities of color, and redressing these racial injustices should be a priority as the interstate highway system is rebuilt, repaired, and expanded. This effort will involve far more than simply removing the highways that brought the damage in the first place. Indeed, the highways triggered decades of neglect and disinvestment.<sup>260</sup> “The impact of this disinvestment cannot be reversed with anything but a similar commitment, in scale and duration, to America’s urban neighborhoods.”<sup>261</sup>

Race continues to be a powerful and frequently used tool to sort physical space, guide public policy, and distribute public benefits and burdens.<sup>262</sup> The impact of race is independent of class and socioeconomic

256. Robert W. Collin, Timothy Beatley & William Harris, *Environmental Racism: A Challenge to Community Development*, 25 J. BLACK STUD. 354, 356 (1995).

257. *Id.*

258. *See id.* at 357–58 (discussing the gaps in the American Planning Association’s Code of Professional Conduct that allow planners to poorly serve Black communities).

259. *See id.* at 359 (“[T]he role of the planner is that of social change agent. The social change agent is an advocate for a group that will benefit from the agent’s involvement. . . . Few White planners have shown an immediate interest in improving the quality of life for Blacks through environmental policy initiatives.”).

260. *See* SHARKEY, *supra* note 196, at 180 (“The association between race and neighborhood deterioration is not inevitable. It is a result of decades of public policies that have served to strengthen and reinforce the walls of the ghetto while systematically disinvesting in black urban communities.”).

261. *Id.*

262. *See, e.g.*, CATHY Y. KIM, DAMON T. HEWITT & DANIEL J. LOSEN, *THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM 2* (2010) (“As in the case with school suspensions, children of color are disproportionately impacted by School-to-Prison Pipeline policies that lead to court involvement.”); KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* (2010) (chronicling the history of the idea of Black criminality in the United States); DEVAH PAGER, *MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 98* (2007) (“Blacks are less than half as likely to receive consideration by employers than equally qualified whites, and black nonoffenders fare no better than even those whites with prior felony convictions.”); ROTHSTEIN, *supra* note 15, at vii–viii (“Today’s residential segregation in the North, South, Midwest, and West is not the unintended consequence of individual choices and of otherwise well-meaning law or regulation but of unhidden public policy that explicitly segregated every metropolitan area in the United States.”); Blumenberg, *supra* note 196, at 332–54 (discussing the effect transportation has in contributing to income and racial

status,<sup>263</sup> although class deepens the reach and impact of the discrimination. Transportation policy is not exempt from the pernicious influence of race.<sup>264</sup> Although transportation racism<sup>265</sup> is no longer marked by explicit racial divisions, the country's transportation system was planned—and is operated—to provide unequal access along race and class lines, limit access to jobs, education, and opportunity, and force communities of color to bear a disproportionate share of environmental harms.<sup>266</sup> While we see heavy investments in highways and suburban commuter rail systems, communities of color are

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inequality, and how targeted transportation policies can help increase access to opportunities and improve environmental quality in minority neighborhoods); Elise C. Boddie, *Adaptive Discrimination*, 94 N.C. L. REV. 1235, 1239 (2016) (arguing that racial discrimination “adapts to the legal and social environment by mutating to evade prohibitions against intentional discrimination”); Devon W. Carbado, *Blue-On-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1489 (2016) (discussing how poverty and race intersect to create a pathway to criminalization); Valerie Schneider, *The Prison to Homelessness Pipeline: Criminal Record Checks, Race, and Disparate Impact*, 93 IND. L.J. 421, 423–24 (2018) (providing statistics that demonstrate that Black and Latino people are incarcerated at disproportionate rates when compared to White people); William H. Frey, *Census Shows Modest Declines in Black-White Segregation*, BROOKINGS: THE AVENUE (Dec. 8, 2015), <https://www.brookings.edu/blog/the-avenue/2015/12/08/census-shows-modest-declines-in-black-white-segregation/> [<https://perma.cc/ZAJ9-4A57>] (finding that census data from 2010 to 2014 identified “continued high levels” of segregation, but also some decline in select parts of the country).

263. See, e.g., Emily Badger, Claire Cain Miller, Adam Pearce & Kevin Quealy, *Extensive Data Shows Punishing Reach of Racism for Black Boys*, N.Y. TIMES: THE UPSHOT (Mar. 19, 2018), <https://www.nytimes.com/interactive/2018/03/19/upshot/race-class-white-and-black-men.html> [<https://perma.cc/PCQ3-GSXU>] (reporting on data that shows that Black boys raised in even the wealthiest families earn less than similarly situated white boys); Henry Grabar, *Black Space, White Blindness*, SLATE (Sept. 18, 2018), <https://slate.com/business/2018/09/black-neighborhoods-white-racism.html> [<https://perma.cc/Z282-7VT5>] (reporting on studies that found that white Americans hold preconceived, racist notions about Black neighborhoods, often valuing a home less if it is located in a Black neighborhood); Richard D. Kahlenberg & Kimberly Quick, *The Government Created Housing Segregation. Here's How the Government Can End It*, AM. PROSPECT (July 2, 2019), <https://prospect.org/civil-rights/government-created-housing-segregation-government-can-end-it/> [<https://perma.cc/ZKD9-P5B5>] (noting that, because of racial segregation, middle-class Black children are more likely to be sent to high-poverty schools than low-income whites and that middle-income Black families live in the same neighborhoods as low-income white families).

264. See Blumenberg, *supra* note 196, at 332–33 (discussing the ways in which people of color have been negatively affected by transportation policy, including the racial segregation of rail cars and the routing of interstate highways through communities of color).

265. “Transportation racism” refers to racist policies and practices that negatively affect the ability of communities of color to interact, move, maintain, and sustain themselves. See Bullard, *supra* note 16, at 1–2 (“It is time to refocus attention on the role transportation plays in shaping human interaction, economic mobility, and sustainability . . . [P]eople of color are banding together to challenge unfair, unjust, and illegal transportation policies and practices that relegate them to the back of the bus.”).

266. See Corinne Ramey, *America's Unfair Rules of the Road*, SLATE (Feb. 27, 2015, 3:33 AM), <https://slate.com/news-and-politics/2015/02/americas-transportation-system-discriminates-against-minorities-and-poor-federal-funding-for-roads-buses-and-mass-transit-still-segregates-americans.html> [<https://perma.cc/F5CV-26BS>] (noting the different ways in which race and transportation continue to be intertwined today, including by cutting out communities of color from decisions regarding transportation planning).

underserved by chronically underfunded public transportation systems.<sup>267</sup> Even an examination of the routes that residents of low-income communities of color must take to reach their buses and trains reveals communities lacking sidewalks and crosswalks.<sup>268</sup>

There is reason to believe that the racism that infiltrates our public policy and transportation policy, and which guided the initial building of the interstate highway system, will similarly infiltrate new highway redevelopment projects.<sup>269</sup> One cause for extra vigilance: the language used by public officials when discussing the benefits of these rebuilding efforts is reminiscent of the arguments used to support the initial highway construction in the 1950s and 1960s, when “‘slum prevention’ became a broad blanket underneath which . . . planning [officials] . . . could hide.”<sup>270</sup> The facially race-neutral, and seemingly universally beneficial, goals of “improving transportation” and “spurring economic investment” can lull communities into blindly trusting the good faith of public officials.<sup>271</sup> But these phrases are

267. See Bullard, *supra* note 19, at 19–20 (noting that White racism shapes transportation decisions and has consequently created a system that denies Black Americans the same benefits offered to White Americans).

268. See Bullard, *supra* note 16, at 8 (“Many of the roads in the black community did not have street signs, sidewalks, or streetlights.”); BRIDGING THE GAP, INCOME DISPARITIES IN STREET FEATURES THAT ENCOURAGE WALKING 1 (2012), [http://www.bridgingthegapresearch.org/\\_asset/02fpi3/btg\\_street\\_walkability\\_FINAL\\_03-09-12.pdf](http://www.bridgingthegapresearch.org/_asset/02fpi3/btg_street_walkability_FINAL_03-09-12.pdf) [<https://perma.cc/8AQE-9BTJ>] (“This study shows that people living in low-income communities are less likely to encounter sidewalks, street/sidewalk lighting, marked crosswalks and traffic calming measures . . . .”); Jay Walljasper, *A Good Place for Everyone to Walk*, AMERICA WALKS, <https://americawalks.org/a-good-place-for-everyone-to-walk/> [<https://perma.cc/TES4-DNPX>] (noting that “African Americans are 60 percent more likely to be killed by cars while walking, and Latinos 43 percent” than pedestrians in other neighborhoods).

269. See Bullard, *supra* note 19, at 18 (warning that “[m]any racist acts and practices are institutionalized informally—and in some cases become standard public policy”).

270. See Connerly, *supra* note 33, at 112 (discussing how “slum prevention” was used by planning officials and the city commissioner in Birmingham, Alabama, as a way to defend racial segregation). President Trump uses similar euphemisms to refer to Black communities. See, e.g., Zurawik, *supra* note 84 (pointing out President Trump’s persistent use of the word “infested” when referring to communities of color).

271. For example, officials in Rhode Island relocated a segment of Interstate 195 as part of an “effort to promote a ‘knowledge-based economy,’” but the now-empty land has taken center-place in a disagreement over what should be constructed and who should decide what can be built. See Mohl, *supra* note 45, at 94 (explaining that the I-195 was relocated); Eli Sherman, *RI Lawmakers Move to Control I-195 Land, in Blow to Elorza*, WPRI (June 15, 2019), <https://www.wpri.com/news/politics/ri-lawmakers-move-to-control-i-195-land-in-blow-to-elorza/> [<https://perma.cc/N43N-4MFC>] (explaining the disagreements between lawmakers, advocates, locals, and investors over what should be done with the now-vacant land). Similar problems could threaten Nashville, where officials want to “tear down eight miles of inner-city expressway segments in an effort to redevelop the central city and restore vitality to Nashville’s civic life.” Mohl, *supra* note 45, at 94–95. Likewise, Milwaukee tore down an expressway in an effort to “pave[] the way for redevelopment of the downtown freeway corridor for residential, business, entertainment, and cultural uses.” *Id.* at 92; cf. JAMES C. SCOTT, SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED 1–6 (1998) (describing

imbued with race and class judgments and often obscure the negative impact that redevelopment projects can have on long-term residents.

To unearth and address the racism deeply embedded in transportation policy and redress the decades of harm, isolation, and neglect of communities of color, stakeholders need an analytical framework that embraces principles of racial equity, encourages meaningful community access to decisionmaking, and advances community reparations, improvement, and preservation.<sup>272</sup> There should also be a focus on distributive equality—ensuring that “low-income and minority communities do not accrue fewer benefits and bear greater costs” than other communities—and a “proactive mandate” requiring agencies to affirmatively guard against harm to communities of color as highway redevelopment projects proceed.<sup>273</sup> Each of these elements is central to harnessing the opportunity to invest in these often resource-starved communities, particularly given the many layers and decades of harm the communities have experienced.

#### IV. THE INADEQUACY OF CURRENT LAWS AND ANALYTICAL FRAMEWORKS

Current laws, standing alone, are inadequate to ensure that advancing racial equity is the paramount consideration as communities embark on new development projects. By the 1960s, rising concerns about the destructive impact of the interstate highway system led Congress to adopt targeted legislation to curtail some of the worst practices of state highway departments.<sup>274</sup> In addition, after most of the interstate highway system had already been constructed, Congress passed a host of civil rights legislation with the potential to shape future highway development projects. These laws, however, are most helpful in challenging decisions that have already been made and momentum is behind the project or challenging limited aspects of the problem. To

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the global trend of efforts to improve human living conditions going wrong and making the problem worse).

272. Peter L. Reich, *Greening the Ghetto: A Theory of Environmental Race Discrimination*, 41 U. KAN. L. REV. 271, 289–90 (1992).

273. Blumenberg, *supra* note 196, at 350.

274. See Richard F. Weingroff, *Highway History: The Greatest Decade 1956-1966*, U.S. DEPT TRANSP. (last updated June 27, 2017), <https://www.fhwa.dot.gov/infrastructure/50interstate.cfm> [<https://perma.cc/9SED-ANFL>] (discussing some of the concerns brought up by locals about planned freeways).

protect and revitalize marginalized communities, racial equity considerations must be central from the beginning of the process.

### *A. Traditional Civil Rights Laws*

Traditional legal tools are insufficient to redress the structural racism that shaped the interstate highway system and continues to threaten communities of color as the highways are rebuilt. Several current statutory requirements and causes of action under traditional civil rights laws have the potential to improve aspects of the decisionmaking process and challenge decisions that result in significant racial disparities or were motivated by intentional racial bias.<sup>275</sup> These traditional civil rights laws, however, have primarily been interpreted by courts to apply to discriminatory decisions after they have been made, place the burden of proof on members of the impacted community rather than on government agencies, and are applied against a legal backdrop that focuses on intent and ignores structural and systemic concerns.<sup>276</sup> In addition, many of these statutes place the burden of enforcement on individual victims of injustice who may not have the resources to enforce their rights. Moreover, they are insufficiently multidimensional to effectively unravel the racism that has woven itself into the fabric, systems, and structures of these communities over time or to proactively guard against the ongoing influence of racial bias. As states and communities tear down and replace aging highways, an important aspect of their work should be to determine “what we must do if destruction of our urban environment—not simply its air and water, but also its people and its sidewalks, its economy, its institutions of learning and culture, its diversity, and its social vitality—is to be reversed.”<sup>277</sup>

A prime example of a traditional, though insufficient, tool is Title VI of the Civil Rights Act of 1964. Title VI states that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving

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275. See, e.g., Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-7 (2012) (prohibiting discrimination on the basis of race, color, and national origin in programs receiving federal financial assistance); Title VIII of the Civil Rights Act of 1968 (Fair Housing Act), 42 U.S.C. §§ 3604-3606 (2012) (prohibiting discrimination in the sale, rental, and financing of dwellings on the basis of race, color, religion, sex, familial status, national origin, and disability).

276. See Sarah Schindler, *Architectural Exclusion: Discrimination and Segregation Through Physical Design of the Public Environment*, 124 *YALE L.J.* 1934, 2014–20 (2015) (discussing the failure of courts to address discriminatory effects of neighborhood design and construction and proposing that effective solutions lie in legislation).

277. HÉBERT, *supra* note 27, at xvii.

Federal financial assistance.”<sup>278</sup> The reach of Title VI is broad, including enforcement through courts and administrative agencies, and is applicable to discrimination in a wide range of areas.<sup>279</sup> Due to its breadth, scholars have noted that Title VI holds the potential to be the nation’s “most powerful civil rights statute.”<sup>280</sup> Yet, it has also been called the “sleeping giant.”<sup>281</sup> The reach and potential of Title VI has been limited by federal court decisions ruling that the statute is coextensive with the Equal Protection Clause<sup>282</sup> and provides no private right of action to enforce disparate impact regulations.<sup>283</sup> Decisions curtailing judicial review of an agency’s failure to enforce the statute have further limited Title VI.<sup>284</sup> In the context of challenges to infrastructure and other construction projects under Title VI, courts have repeatedly found the influence of race on development projects insufficient to prove intentional discrimination.<sup>285</sup>

As currently interpreted and applied by the courts, traditional civil rights tools frequently leave “the white privilege and Black subordination fostered by systems of interlocking private and public power” untouched.<sup>286</sup> Therefore, although the Supreme Court has rejected the notion of explicit, “officially sanctioned”<sup>287</sup> racial inequality,

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278. 42 U.S.C. § 2000d.

279. Olatunde C.A. Johnson, *Lawyering That Has No Name: Title VI and the Meaning of Private Enforcement*, 66 STAN. L. REV. 1293, 1294 (2014).

280. *Id.*

281. *Id.*

282. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 283–85, 287 (1978) (finding that Title VI, like the Equal Protection Clause, requires a showing of intentional discrimination).

283. *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001); *see also* Johnson, *supra* note 279, at 1296 (“[*Sandoval*] held that . . . no private right of action existed to enforce [Title VI]’s disparate impact regulations, shutting down much of the statute’s litigation promise.”); Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 198 (2002) (discussing the *Sandoval* Court’s analysis of Title VI to find a lack of congressional intent to allow for private attorneys general); Philip Tegeler, *Title VI Enforcement in the Post-Sandoval Era*, POVERTY & RACE, Sept.-Oct. 2010, at 5 (discussing the lack of recognition for disparate impact claims brought by private parties post-*Sandoval*).

284. *Women’s Equity Action League v. Cavazos*, 906 F.2d 742, 748 (D.C. Cir. 1990).

285. *See, e.g.*, *Nashville I-40 Steering Comm. v. Ellington*, 387 F.2d 179, 185 (6th Cir. 1968) (rejecting intentional discrimination claim and concluding that “routing of highways is the prerogative of the executive department of government, not the judiciary” despite substantial evidence of intentional racial discrimination); *Erie CPR v. Pa. Dep’t of Transp.*, 343 F. Supp. 3d 531, 555 (W.D. Pa. 2018) (finding no plausible evidence of intentional racial discrimination in challenge to alleged discrimination in plan to demolish aging viaduct in Black community); *Coal. for Advancement of Reg’l Transp. v. Fed. Highway Admin.*, 959 F. Supp. 2d 982, 1021 (W.D. Ky. 2013), *aff’d*, 576 F. App’x 477 (6th Cir. 2014) (rejecting allegations of racial discrimination in the construction of bridges as “vague, unsupported, and speculative”); *Franks v. Ross*, 293 F. Supp. 2d 599, 607–08 (E.D.N.C. 2003) (rejecting evidence of intentional discrimination in challenge to proposed landfill in a Black community).

286. Harris, *supra* note 52, at 1757.

287. *Id.* at 1750.



the Court has interpreted civil rights laws in a way that strips them of their potential to dismantle the tools of institutionalized privilege and structural racism.<sup>288</sup>

Advancing racial equity in highway redevelopment projects requires mechanisms that are comprehensive and expansive; this necessitates an avenue to redress the inequalities in resources, power, and opportunity that were the product of the segregation, deprivation, and destruction brought by the highways. The framework should confront the racial and economic impact of highway construction before decisions are made, more effectively challenge the links between race and systemic racism, and address the mingling of state and private action. Finally, the framework must commit to dismantling the institutional protections that perpetuate white privilege and to rejecting existing inequality as a neutral baseline.<sup>289</sup>

### *B. Traditional Analytic Framework*

Because of the failure of current civil rights laws to adequately address racial inequity in highway redevelopment, impacted communities need to find alternative means to compel government actors to engage in a structural analysis. A structural analysis, or structuralism, can help illuminate how government entities can perpetuate racial inequality or facilitate private discrimination.<sup>290</sup> Racial inequality is “the product of systematic past and current, formal and informal, mechanisms of racial subordination.”<sup>291</sup> A structural analysis can unearth these mechanisms and “emphasize[] the cumulative effect of institutional structures and systems on outcomes

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288. *Id.* at 1751.

289. *Id.* at 1753.

290. Lenhardt, *supra* note 56, at 1541 (“[S]tructuralism provides an avenue for beginning to understand how government entities could, intentionally or unintentionally, become involved in perpetuating racial inequality or supporting private discrimination.”); *see also* McFarlane, *supra* note 80, at 299 (arguing that “economic development is not a neutral policy that government can advance without addressing significant structural issues”); John A. Powell, *Structural Racism: Building upon the Insights of John Calmore*, 86 N.C. L. REV. 791, 794 (2008) (noting that an “individual framing” of racism “does not account for the ways in which policies produce foreseeable, even if unintended, racial harms”).

291. Harris, *supra* note 52, at 1753.

for institutions, groups, and individuals,”<sup>292</sup> helping to identify the macro-level dynamics that lead to micro-level consequences.<sup>293</sup>

Structural analysis is a critical lens through which the institutional interactions that produce racialized outcomes should be analyzed. Professor John Powell, a leading thinker in structural analysis, defines racialized structures as “the set of practices, cultural norms, and institutional arrangements that both reflect and help to create and maintain race-based outcomes in society”<sup>294</sup> as well as the “process and practices of inter-institutional arrangement that continue to distribute racialized outcomes in part because of our different situatedness.”<sup>295</sup> The focus is on “relationships and processes,” not on identifying a single, direct cause.<sup>296</sup> A racialized structural analysis questions the “‘naturalness’ of racial disparities or the inevitability of racially segregative choices.”<sup>297</sup> Policymakers must attend to the specific situations of people and communities at issue, and how they came to be so situated, to reveal the many ways in which “whiteness was the predicate for attaining a host of societal privileges, in both public and private spheres.”<sup>298</sup>

Two prominent hurdles to engaging in a structural analysis are the code of race blindness,<sup>299</sup> embraced by most government entities,

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292. Lenhardt, *supra* note 56, at 1540; *see also* Powell, *supra* note 290, at 796 (“Structural racism shifts our attention from the single, intra-institutional setting to inter-institutional arrangements and interactions.”).

293. *See* Powell, *supra* note 290, at 792 (“A structural racism lens will help us identify macro-level dynamics that have micro-level consequences for all American citizens and the policy areas that we can tap to rebuild our failing structures.”).

294. JOHN A. POWELL, RACING TO JUSTICE: TRANSFORMING OUR CONCEPTIONS OF SELF AND OTHER TO BUILD AN INCLUSIVE SOCIETY 4 (reprint ed. 2015).

295. John A. Powell, *Post-racialism or Targeted Universalism?*, 86 DENV. L. REV. 785, 801 (2009).

296. *See* Powell, *supra* note 294, at 27, 79 (“Addressing such bias is a collective and structural project more than an individual and psychological one. To this extent, personal culpability inhering in the indictment ‘racist’ is reduced, though it does not make the individual innocent.”); William Kennedy, Gillian Sonnad & Sharon Hing, *Putting Race Back on the Table: Racial Impact Statements*, 47 CLEARINGHOUSE REV. 154, 155 (2013) (discussing the constraints of successfully addressing discrimination through a legal framework focused on having to demonstrate “intent” and “animus” in a system where officials can hide behind a code of “color blindness”); Lenhardt, *supra* note 56, at 1527 (introducing race audits as a tool that “eschews a singular focus on intentional discrimination” and instead “seeks to uncover the specific structural mechanisms that create cumulative racial disadvantage across domains, time, and generations”); Powell, *supra* note 290, at 796 (“Systems theory is a model that focuses on relationships and processes and not on singular, linear causation.”).

297. Lenhardt, *supra* note 56, at 1541; *see also* Powell, *supra* note 290, at 793 (“[T]he structural model helps us analyze how housing, education, employment, transportation, health care, and other systems interact to produce racialized outcomes.”).

298. Harris, *supra* note 52, at 1745.

299. Race blindness, like color-blindness, “proposes that racial categories do not matter and should not be considered when making decisions.” Jennifer A. Richeson & Richard J. Nussbaum,

and the near-exclusive focus on rooting out acts of intentional discrimination. First, an inflexible commitment to race blindness can seep into every aspect of decisionmaking and can limit the ability of government entities to meaningfully address racial inequality.<sup>300</sup> Moreover, public officials often cloak themselves in race blindness to avoid the difficult, yet necessary, discussions about the role of race in our society and how to address stark racial disparities.<sup>301</sup>

Proponents of [color blindness] apparently are most interested in neutrality in the design of policies and programs. They pay less attention to the administration or implementation of what they design and, more importantly, often ignore the effects of the policies and procedures they create. Although a policy that is neutral in design is not necessarily neutral in effect, the courts and the public seem all but obsessed with the design and, even more narrowly, with the *intent* of the design, rather than the results. Fairness is not advanced by treating those who are situated differently as if they were the same, however. For example, it would make little sense to provide the same protections against hurricanes to mid-western communities as to coastal communities . . . . If the institutions managing and distributing resources in such contexts are merely neutral, the effects of their work may not be, given that the intended beneficiaries are differently situated.<sup>302</sup>

The focus on intent is especially problematic when considering the nature of structural bias. The focus on intent presumes that, by eliminating the aberrant behavior of a few bad apples, we are rooting out and eliminating bias within our systems.<sup>303</sup> But this is not how structural bias works.<sup>304</sup> One or two bad apples, making a few discrete racially motivated decisions, did not lead to the interstate highway

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*The Impact of Multiculturalism Versus Color-Blindness on Racial Bias*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 417, 417 (2004).

300. See Lenhardt, *supra* note 56, at 1532 (discussing how the Supreme Court's commitment to colorblindness and the application of judicially created standards has limited "its ability to conceive of a constructive role for local governments to play in addressing racial inequality"); see also Powell, *supra* note 295, at 794 (arguing that most "universal" programs, meaning those consisting of state intervention without any consideration of race, will likely exacerbate racial inequalities).

301. See Harris, *supra* note 52, at 1768 ("[P]rotection of the property interest in whiteness is achieved by embracing the norm of colorblindness."); Kennedy et al., *supra* note 296, at 155 ("Public officials and decision makers are quick to hide behind this code [of color blindness]; they use it as a defense when accused of discrimination."); Powell, *supra* note 295, at 789 ("To post-racialists, white Americans' support of President Obama is proof positive that we are in, or rapidly approaching, a new, post-racial era. They argue that young people do not even see race, and that only those persons over forty are still likely to think in racial terms.").

302. POWELL, *supra* note 294, at 9.

303. See Kennedy et al., *supra* note 296, at 155 ("The intent doctrine is simply outdated. It presumes that racial prejudice is an aberration perpetuated by those who possess an animus and intend to visit it upon others. This view implies that bias is not normal and by eliminating that aberrational behavior of the few, we are eliminating bias."); Powell, *supra* note 290, at 795 ("Racism need not be either intentional or individualist. Institutional practices and cultural patterns can perpetuate racial inequity without relying on racist actors.").

304. See Powell, *supra* note 290, at 795 ("Racism need not be either intentional or individualist. Institutional practices and cultural patterns can perpetuate racial inequity without relying on racist actors.").

system's devastation of Black communities. Refusing to move "beyond the traditional analytical dichotomy of a perpetrator and a victim"<sup>305</sup> will do little to challenge systemic inequality. As structural analysis suggests, to challenge systemic inequality, we must begin by moving our focus from the intent or language of specific decisions and decisionmakers to analyzing the outcomes of those policies and decisions.<sup>306</sup> In the context of highways, what began as intentional acts of racial discrimination have evolved into facially race-neutral policies that continue to have a racially disproportionate impact. Here, a structural analysis would help decisionmakers acknowledge the historic and current-day links between race and infrastructure and better understand the ways in which racial inequality continues to be "deployed, dispersed, and entrenched."<sup>307</sup>

### *C. Laws Adopted in Response to the Freeway Revolts*

By the early 1960s, many Americans began to push back against the negative consequences of rapid highway construction and questioned whether the environmental damage and destruction of parks, historic sites, and entire communities were justified by improvements to access and mobility for some.<sup>308</sup> As the nation geared up for an acceleration in highway construction, "freeway revolts" caught steam and began to spread across the country.<sup>309</sup> Freeway revolts ultimately led to state highway departments abandoning plans to build highways through parks, including Overton Park in Memphis, Tennessee; Fairmont Park in Philadelphia, Pennsylvania; and the waterfront in San Francisco, California.<sup>310</sup> They were also successful in protecting historic neighborhoods in Baltimore, Maryland; New Orleans, Louisiana; New York, New York; and Washington, D.C.<sup>311</sup>

In the anti-highway resistance movement that developed, communities were often more successful if they linked their battles to environmental protection efforts and less successful when they raised issues of racial justice and equity. For example, in the Overton Park neighborhood in Memphis, Tennessee, the freeway revolt focused on the

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305. Kennedy et al., *supra* note 296, at 156.

306. See Powell, *supra* note 290, at 796 ("Institutional racism shifts our focus from the motives of individual people to practices and procedures within an institution.").

307. *Id.* at 795.

308. See Mohl, *supra* note 86, at 674–75 (summarizing the antifreeway movement that "accelerated nationally" as expressways were built, communities destroyed, and environmental damage caused).

309. *Id.* at 674.

310. Biles et al., *supra* note 16, at 828.

311. *Id.*

environmental costs of building a planned highway. After years of environmental activism, the freeway was defeated.<sup>312</sup> In contrast, in the Black communities of Nashville, Tennessee, residents' attempts to halt a highway slated to destroy their neighborhood focused on its racially discriminatory impact.<sup>313</sup> Their racial justice advocacy—backed by the NAACP Legal Defense and Educational Fund—was unsuccessful.<sup>314</sup> A federal court rejected evidence of intentional racial discrimination and found the undeniable targeting and disproportionate impact on the Black community to be beyond its concern: “In the absence of proof of racial discrimination, we do not consider this matter to be a justiciable issue. The routing of highways is the prerogative of the executive department of government, not the judiciary.”<sup>315</sup>

In response to the freeway revolts, between 1962 and 1970, Congress enacted a range of legislation to moderate the impact of highway construction. In many respects, this collection of legislation reflected the power imbalance of the freeway revolts, with most legislation responding to environmental concerns and calls for coordinated planning, but not directly addressing the destruction of Black communities. The primary legislation required regional transportation planning for transportation projects that received federal aid;<sup>316</sup> sought to protect parks, historic districts, and other

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312. See Mohl, *supra* note 70, at 878:

Only in 1981 did the Tennessee DOT “throw in the towel,” and request that planned expressway funding—about \$300 million—be transferred to other transportation needs in Memphis. *Citizens to Preserve Overton Park v. Volpe* became a landmark case in environmental and administrative law, setting important precedents still applied decades later.

313. See *id.* (“In Nashville, the freeway revolt was all about the racial impact of road building.”).

314. See *id.* at 883–84 (detailing the life of the ultimately unsuccessful lawsuit and appeals filed by opponents of I-40 and the NAACP Legal Defense Fund). Similarly, despite sustained protests in the Mexican-American community of Boyle Heights in California, six freeways were built through the Boyle Heights community. See Biles et al., *supra* note 16, at 828 (“State and federal officials tore down large parts of the Boyle Heights barrio, in stark contrast to the successful resistance that stopped freeways cold in fashionable and politically connected Beverly Hills.”).

315. *Nashville I-40 Steering Comm. v. Ellington*, 387 F.2d 179, 185 (6th Cir. 1968).

316. See Federal-Aid Highway Act of 1962, Pub. L. No. 87-866, 76 Stat. 1145 (1962) (current version at 23 U.S.C. § 101 (2012)) (requiring states and localities to work together in developing a cooperative, comprehensive, and continuing urban transportation planning process).

environmentally sensitive places;<sup>317</sup> and required efforts to secure relocation housing for people displaced by road construction.<sup>318</sup>

Concern for preserving historic sites and neighborhoods, rather than concern for protecting marginalized communities, was the primary motivation behind most of the legislation. For example, in an April 1966 Senate speech Pennsylvania senator Joseph S. Clark said:

It is time that Congress took a look at the highway program, because it is presently being operated by barbarians, and we ought to have some civilized understanding of just what we do to spots of historic interest and great beauty by the building of eight-lane highways through the middle of our cities.<sup>319</sup>

Similarly, after discovering that a highway was planned through Brackenridge Park in San Antonio, Texas, an outraged Senator Ralph Yarborough led the effort to include a prohibition on construction of “federally assisted highways through parks and historic sites unless all possible alternatives had been considered” in the Federal-Aid Highway Act of 1966.<sup>320</sup> This additional provision came to be known as the Yarborough Amendment.<sup>321</sup>

Curbing racial bias and advancing racial equity were not the primary motivations behind these laws. Although these statutes are helpful in constraining highway builders by requiring more careful and coordinated planning, the laws stop far short of remedying racial disparities, restricting the placement of highways through Black communities, or offering tools to challenge racial disparities. For example, although some of the legislation required states to provide assistance with relocation, the legislation did not take affirmative steps

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317. See Federal-Aid Highway Act of 1966, Pub. L. No. 89-574, § 15, 72 Stat. 891 (1966) (“[T]he Secretary shall use maximum effort to preserve Federal, State, and local government parklands and historic sites and the beauty and historic value of such lands and sites.”); National Historic Preservation Act of 1966, Pub. L. No. 89-665, § 201, 80 Stat. 915 (1966) (establishing a federal council to help agencies act as stewards of natural resources).

318. See § 5, 76 Stat. 1145 (requiring assurances from state highway departments of relocation of families displaced by clearance of rights-of-way for Federal-aid highways); Federal-Aid Highway Act of 1968, Pub. L. No. 90-495, § 5, 82 Stat. 815 (1968) (requiring relocation payments and advisory assistance be provided to people, businesses, farmers, and nonprofit organizations displaced by federal highway programs); Uniform Relocation Assistance and Land Acquisition Policies Act of 1970, Pub. L. No. 91-646, 84 Stat. 1894 (1970) (providing “for uniform and equitable treatment of persons displaced from their homes, businesses, or farms by Federal and federally assisted programs”). In addition, beginning in 1966, the newly formed U.S. Department of Transportation—which itself was formed to help curb some of the destructive practices of highway construction—issued rules and procedures designed to stop many of the worst practices of state highway departments. See Mohl, *supra* note 64, at 194 (discussing ways in which “the federal highway bureaucracy responded to the Freeway revolt and charted new directions on controversial highway matters”).

319. Mohl, *supra* note 64, at 198.

320. *Id.*

321. See *id.* (noting that the Yarborough Amendment was Congress’s response “to rumbles of discontent among constituents about the urban interstates”).

to halt the destruction of Black communities in the way they did to halt the destruction of parks and historic districts. While laws such as the Uniform Relocation Act make it harder and more costly for highway departments to destroy homes without any relocation assistance, it does not stop them from destroying those homes.<sup>322</sup> Furthermore, relocation assistance for displaced homeowners or renters does not address the harms caused to displaced businesses, churches, or other community institutions, let alone the people who rely on them. Finally, these laws also bumped up against the realities of racial discrimination. States may be required to provide funding for relocation, but that assistance is of limited help if there is a shortage of housing in the community or if racial discrimination bars displaced Black families from their preferred neighborhoods. Their lives are still disrupted, and their connections to important community institutions, work, school, and networks are still lost.

The laws enacted after the highway revolts also did not resolve how officials should balance competing interests in transportation policy, other than to make clear that environmental concerns would be paramount. Even after the freeway revolts and growing awareness of the damage that highways were having on urban communities and communities of color, the work of highway builders was complicated by the large and diverse group of advocates engaging in an “often-contentious discourse over the details and direction of the nation’s transportation policy.”<sup>323</sup> This chorus included citizens, consumers, and community groups that challenged transportation policy on grounds such as highway safety, roadside beautification, environmental protection, housing demolition, historic district protection, neighborhood integrity, protection of parks, protecting the public fisc, and regulating the speed on the highways.<sup>324</sup> These often-disparate interests are still competing for priority. There is no reason to believe that, without additional protections, racial justice considerations or the perspectives of poor people of color will prevail today any more than they did in the past.<sup>325</sup>

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322. See, e.g., Connerly, *supra* note 33, at 112 (noting that the completion of certain interstates in Birmingham—which displaced many Black residents—came after the adoption of the Uniform Relocation Act).

323. Mohl, *supra* note 64, at 195.

324. See *id.* at 194–95 (discussing the interest groups involved in “interstate highway policy, financing, and implementation”).

325. See Blumenberg, *supra* note 196, at 332 (“Throughout U.S. history, low-income families and minorities have faced numerous inequities related to the provision of transportation infrastructure and services.”); Bullard, *supra* note 19, at 18–20 (noting that racism is still combining with classism in our public policy and infiltrating infrastructure development practices).

*D. The National Environmental Policy Act*

Although not exclusively tied to infrastructure development projects, environmental impact studies under the National Environmental Policy Act of 1969 (“NEPA”)<sup>326</sup> are a useful tool to help inject racial equity considerations as new highways are built and aging highways are repaired. NEPA requires all federal agencies to identify and evaluate environmental impacts of major agency actions during their planning and decisionmaking process. But NEPA falls short of being a fully effective tool for racial equity in several important respects.

NEPA, sometimes referred to as the Magna Carta of environmental legislation, was the vanguard of a collection of legislation enacted in the 1970s in response to increasing public pressure on the federal government to address pollution, air quality, and other signs of environmental degradation.<sup>327</sup> NEPA requires all federal agencies to assess the environmental impacts of any major federal agency action before the action is undertaken.<sup>328</sup> Because all projects funded with federal tax dollars fall under NEPA, it has a broad reach and its mandates apply to many state and local government projects, including highway development projects.<sup>329</sup>

At the heart of the NEPA assessment process is the requirement that agencies complete detailed environmental impact statements (“EISs”). EISs are required whenever a major federal action is proposed

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326. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370h (2012).

327. See COUNCIL ON ENVTL. QUALITY, A CITIZEN’S GUIDE TO NEPA: HAVING YOUR VOICE HEARD 2 (2007), [https://ceq.doe.gov/docs/get-involved/Citizens\\_Guide\\_Dec07.pdf](https://ceq.doe.gov/docs/get-involved/Citizens_Guide_Dec07.pdf) [<https://perma.cc/VQ9G-B9B8>] (noting that NEPA is often called the “Magna Carta” of environmental laws); NATIONAL ENVIRONMENTAL POLICY ACT OF 1969, S. REP. NO. 91-296, at 4 (1969) (“It is the unanimous view of the members of the Interior and Insular Affairs Committee that our Nation’s present state of knowledge, our established public policies, and our existing governmental institutions are not adequate to deal with the growing environmental problems and crises the Nation faces.”).

328. *Summary of the National Environmental Policy Act*, U.S. ENVTL. PROTECTION AGENCY, <https://www.epa.gov/laws-regulations/summary-national-environmental-policy-act> (last visited Sept. 9, 2020) [<https://perma.cc/K7C3-QLZN>].

329. See Evan J. Ringquist & David H. Clark, *Local Risks, States’ Rights, and Federal Mandates: Remediating Environmental Inequities in the U.S. Federal System*, 29 *PUBLIUS* 73, 87–89 (1999) (discussing the reach of NEPA). A small sampling of actions covered under NEPA includes relocating military bases; building highways; preserving historic infrastructure; logging; erecting affordable housing units; and granting operating licenses to energy facilities. See ENVTL. LAW INST., *NEPA SUCCESS STORIES: CELEBRATING 40 YEARS OF TRANSPARENCY AND OPEN GOVERNMENT* 9, 16, 25, 28 (2010), <https://www.eli.org/sites/default/files/eli-pubs/d20-03.pdf> [<https://perma.cc/2M7Q-7SJR>]. Twenty states have passed their own versions of NEPA, establishing environmental review processes for state government action. *States and Local Jurisdictions with NEPA-like Environmental Planning Requirements*, NEPA.GOV, <https://ceq.doe.gov/laws-regulations/states.html> (last visited Sept. 9, 2020) [<https://perma.cc/7H8R-SJBT>] (listing states and local environmental review requirements).



that would significantly alter the quality of “the human environment.”<sup>330</sup> The analysis in the EIS must include the environmental effects of the proposed action, of reasonable alternatives to the action, and of taking no action.<sup>331</sup> Nothing in the statute, however, prevents the agency from taking the desired action, even when a disparate impact is identified.

In requiring an agency to prepare an EIS, Congress sought to “ensure[ ] that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts.”<sup>332</sup> Moreover, NEPA seeks to “guarantee[ ] that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.”<sup>333</sup> NEPA’s regulations make clear that the effects on the human environment<sup>334</sup> that must be considered “include[ ] ecological, . . . aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative.”<sup>335</sup> As further clarified in the regulations, “[w]hen an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.”<sup>336</sup> Although race is not explicitly included in the list of considerations, there is support for the conclusion that examining “social” effects requires “[e]xplicit consideration of potential effects on minority and low-income populations.”<sup>337</sup>

330. 42 U.S.C. § 4332(C).

331. *Id.* § 4332(C)(iii). The NEPA regulations specify that an agency preparing an EIS must “[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.” 40 C.F.R. § 1502.14(a) (2019).

332. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

333. *Id.*

334. NEPA regulations state that “[h]uman environment shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment.” 40 C.F.R. § 1508.14 (2019).

335. 40 C.F.R. § 1508.8.

336. 40 C.F.R. § 1508.14. The Council on Environmental Quality’s guidance goes further, directing agencies to engage in a broad analysis “recogniz[ing] the interrelated cultural, social, occupational, historical, or economic factors that may amplify the natural and physical environmental effects of the proposed agency action.” COUNCIL ON ENVTL. QUALITY, ENVIRONMENTAL JUSTICE: GUIDANCE UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT 9 (1997), [https://www.epa.gov/sites/production/files/2015-02/documents/ej\\_guidance\\_nepa\\_ceq1297.pdf](https://www.epa.gov/sites/production/files/2015-02/documents/ej_guidance_nepa_ceq1297.pdf) [<https://perma.cc/FZ5P-2X5M>].

337. U.S. DEP’T OF TRANSP., FED. HIGHWAY ADMIN., GUIDANCE ON ENVIRONMENTAL JUSTICE AND NEPA (2011), [https://www.environment.fhwa.dot.gov/env\\_topics/ej/guidance\\_ejustice-nepa.aspx](https://www.environment.fhwa.dot.gov/env_topics/ej/guidance_ejustice-nepa.aspx) [<https://perma.cc/C5T6-22YG>].

On their face, NEPA and its implementing regulations could provide a mechanism for multidimensional analysis and affirmative engagement on the racially disparate impact of highway and infrastructure projects. Social justice advocates have seized on this potential and have deployed NEPA to challenge the indirect social justice impacts of infrastructure projects to mixed success.<sup>338</sup> For example, in *Milwaukee Inner-City Congregations Allied for Hope (MICAH) v. Gottlieb*,<sup>339</sup> a federal district court heard a NEPA challenge to the adverse social and economic impacts stemming from expansion and improvement of a federal highway. In *MICAH*, organizational plaintiffs representing inner-city residents in Milwaukee challenged the Federal Highway Administration's ("FHWA's") and the Wisconsin

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338. See, e.g., *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152 (10th Cir. 2002) (in a challenge to expansion of federal highway, the court rejected NEPA claims concerning the feasibility of expanding mass transit and the agency's failure to consider the social and economic impacts of increased congestion in certain areas of the city); *Karlen v. Harris*, 590 F.2d 39 (2d Cir. 1978) (finding that the "social environmental impact" of concentrating low-income housing in one area was significant), *rev'd sub nom. Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980) (per curiam); *Indigenous Env'tl. Network v. U.S. Dep't of State*, 347 F. Supp. 3d 561 (D. Mont. 2018) (finding that the agency failed to adequately analyze the impacts to cultural resources and ordering additional analysis); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 301 F. Supp. 3d 50 (D.D.C. 2018) (dismissing all claims brought under NEPA concerning the validity of the agency's EIS and granting summary judgment to the defendant). Although this type of litigation has been mainly unsuccessful in securing the relief requested, several lawsuits have delayed proceedings, highlighted the voices of community members, and ensured that agency actions are transparent. In the Milwaukee case, although the plaintiffs did not win the legal challenge, the litigation operated as a bargaining tool for the organizational plaintiffs and the communities they represented. After the court's initial ruling, the parties went into mediation. Eventually, the parties settled, with the Wisconsin Department of Transportation providing \$13.5 million in transit funding to be used to establish multiple bus lines to the inner-city area in question. Angie Schmitt, *How 3 Communities Fought Discriminatory Transportation Policies*, STREETS BLOG USA (July 3, 2014), <https://usa.streetsblog.org/2014/07/03/how-3-communities-fought-discriminatory-transportation-policies> [https://perma.cc/5ANX-BFVW].

339. 944 F. Supp. 2d 656 (W.D. Mich. 2013). Significantly, the Trump Administration has vowed to curtail NEPA's application in cases involving significant infrastructure projects. In speaking about NEPA, President Trump said, "[i]nstead of rebuilding our country, Washington has spent decades building a dense thicket of rules, regulations and red tape." *Remarks by President Trump on Regulatory Relief*, WHITE HOUSE (June 9, 2017, 11:40 AM), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-regulatory-relief/> [https://perma.cc/7BAK-CQRG]. Also, in 2017, the Department of Homeland Security waived portions of NEPA to build sections of President Trump's "wall" along the southern U.S. border and threatened additional roll back of protections. Patrice Simms & Angelo Logan, *Trump Chips Away at the Shield Against Environmental Racism*, EARTHJUSTICE (Apr. 1, 2019), <https://earthjustice.org/from-the-experts/2019-april/trump-chips-away-at-the-shield-against-environmental-racism> [https://perma.cc/G8HE-QYM2]. The White House Office of Management and Budget and the Counsel on Environmental Quality issued a memo on February 26, 2019 to clarify President Trump's August 15, 2017 executive order aimed at streamlining the process for large infrastructure projects. Memorandum from Russel T. Vought, Acting Dir. of the Office of Mgmt. & Budget & Mary Neumayr, Chairman of the Council of Env'tl. Quality, to the Sec'y of Transp. (Feb. 26, 2019), <https://www.whitehouse.gov/wp-content/uploads/2017/11/20190226OMB-CEQ327.pdf> [https://perma.cc/RE65-7J7B]. There has also been broad pushback on reading NEPA broadly in the context of infrastructure projects. *Id.*

Department of Transportation's ("WisDOT's") planned improvements to a highway interchange in Milwaukee.<sup>340</sup> Using NEPA, plaintiffs alleged that the agencies failed to adequately consider several kinds of environmental impacts, including the social and economic impacts on inner-city residents of expanding highway capacity while transit capacity was declining and the cumulative impact of encouraging suburban sprawl.<sup>341</sup> The plaintiffs also alleged that FHWA and WisDOT failed to adequately explore the alternative of expanding public transportation in addition to or in lieu of expanding the highway at the interchange.<sup>342</sup>

In a decision on a motion for a preliminary injunction, the district court held that the plaintiffs were unlikely to succeed on their claim that FHWA and WisDOT failed to adequately consider the alternative of expanding public transportation in addition to or in lieu of expanding the highway because there was evidence that the agencies did consider, but rejected, that alternative.<sup>343</sup> Unlike most decisions challenging EISs, however, the district court found the agencies' EIS was likely deficient *because* of inadequate exploration of social and economic impacts.<sup>344</sup> On the claim that the agencies failed to consider the social and economic impacts of expanding highway capacity while transit capacity declined on suburban sprawl, the district court concluded that the EIS was likely deficient because it did not address these cumulative impacts of expanding the highway's capacity.<sup>345</sup> Although the opinion echoes Supreme Court precedent holding that "NEPA merely prohibits uninformed—rather than unwise—agency action,"<sup>346</sup> the district court did endorse a very expansive understanding of NEPA's reach to encompass consideration of the broader societal impacts of highway development projects.

The Supreme Court's interpretations of NEPA have not been so expansive. Instead, the Court has repeatedly interpreted NEPA in a way that has maintained the statute's vast reach but limited its substantive power.<sup>347</sup> The Court has effectively held that NEPA does

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340. *MICAH*, 944 F. Supp. 2d at 659–60.

341. *Id.* at 662.

342. *Id.*

343. *Id.* at 664–68.

344. *Id.* at 668–70.

345. *Id.* at 670.

346. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989).

347. *See* *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97–98 (1983) (holding that the role of the court is "simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary and capricious"); *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227–28 (1980) (*per curiam*) ("Once an agency has made a decision subject to NEPA's procedural requirements, the

not mandate that federal agencies promote environmental goals and has interpreted NEPA as a procedural mechanism only. Once an agency has conducted a NEPA assessment process, the agency's substantive decisions are rarely, if ever, overturned.<sup>348</sup> Indeed, largely due to the Supreme Court's narrow interpretations, NEPA has been called "the most successful environmental law in the world and the most disappointing."<sup>349</sup>

For example, in *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, the Supreme Court heard a NEPA challenge to the placement of low-income housing in New York City.<sup>350</sup> The U.S. Court of Appeals for the Second Circuit held that the Department of Housing and Urban Development ("HUD") violated NEPA when alternative sites for low-income housing projects were considered and dismissed.<sup>351</sup> HUD conceded that there were possible alternative sites that would reduce the concentration of low-income housing, but the agency rejected these alternatives because switching to a different site would delay the project for two years or more.<sup>352</sup> The court had determined that concentrating low-income housing projects within one neighborhood created significant "social environmental impacts" and HUD violated NEPA when it dismissed alternative sites because of the delay it would cause the project.<sup>353</sup>

Significantly, in reviewing the Second Circuit's decision, the Supreme Court did not reject the appropriateness of considering the concentration of low-income housing as a relevant impact under NEPA, nor did it reject the appropriateness of exploring other sites as a

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only role for a court is to insure that the agency has considered the environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken.' " (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)); *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978) (holding that NEPA mandates are "essentially procedural"); *Kleppe*, 427 U.S. at 410, n.21 (1976) (holding that under NEPA a court cannot "interject itself within the area of discretion of the executive as to the choice of the action to be taken").

348. See *Strycker's Bay*, 444 U.S. at 227-28; *Vt. Yankee Nuclear Power Corp.*, 435 U.S. at 558 (noting that NEPA is intended to "insure a fully informed and well-considered decision, not necessarily a decision the judges of the Court of Appeals or of this Court would have reached had they been members of the decisionmaking unit of the agency").

349. Oliver A. Houck, *Is That All? A Review of The National Environmental Policy Act, An Agenda for the Future* by *Lynton Keith Caldwell*, 11 DUKE ENVTL. L. & POL'Y F. 173, 173 (2000) (reviewing LYNTON KEITH CALDWELL, *THE NATIONAL ENVIRONMENTAL POLICY ACT, AN AGENDA FOR THE FUTURE* (1998)).

350. 444 U.S. 223 (1980).

351. *Karlen v. Harris*, 590 F.2d 39, 44 (2d Cir. 1978).

352. *Id.* (quoting the HUD Secretary's concern that a transfer would "only cause additional unnecessary delay").

353. *Id.* at 42-44.

reasonable alternative.<sup>354</sup> The Court did, however, reverse the Second Circuit’s decision, holding that NEPA did not require HUD to give determinate weight to environmental considerations.<sup>355</sup> The Court rejected the Second Circuit’s conclusion and held that NEPA does not require federal agencies to prioritize environmental concerns over other reasonable considerations.<sup>356</sup> Instead, “once an agency has made a decision subject to NEPA’s procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences.”<sup>357</sup>

Even without the limitations created by the Supreme Court’s narrow interpretation of NEPA, the Act itself would be limited as a racial equity tool. First and foremost, NEPA does not explicitly require jurisdictions to consider the racial equity impacts of federally funded projects and, therefore, does not require reviewing agencies to center or elevate racial equity concerns in relation to other relevant considerations. It is understandable that achieving broad racial equity—beyond environmental justice—would not be a motivating consideration in reviewing government decisions under the Act. Race and highway construction have a long and unique relationship that calls for racial equity to be given special consideration in redevelopment decisions. While NEPA requires government agencies to consider the impact of their proposed action and reasonable alternatives, it does not mandate that federal agencies take any action to mitigate those

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354. Federal agencies retain significant discretion in shaping the course of the EIS by how they define the purpose. NEPA mandates that the EIS “briefly specify the underlying purpose and need to which [it] is responding in proposing the alternatives including the proposed action.” 40 C.F.R. § 1502.13 (2019). Importantly, the Purpose and Need Statement dictates the reasonable range of alternatives the agency must consider. *Stop the Pipeline v. White*, 233 F. Supp. 2d 957, 971 (S.D. Ohio 2002) (“The purpose and need statement simply defines the goals of the project to allow for the review of an appropriate range of alternatives.”). Agencies have considerable discretion in defining the proposed action’s purpose and need. *Friends of Se.’s Future v. Morrison*, 153 F.3d 1059, 1066–67 (9th Cir. 1998) (holding that courts should evaluate the Purpose and Need Statement under a reasonableness standard). In turn, the Purpose and Need Statement will guide consideration of reasonable alternatives. *See Milwaukee Inner-City Congregations Allied for Hope (MICAH) v. Gottlieb*, 944 F. Supp 2d 656 (W.D. Mich. 2013) (rejecting the claim that the agency failed to adequately consider expanding public transportation as an alternative to repairing an aging highway where that alternative was not responsive to the agency’s goals of modernizing and repairing the aging road); *see also Coal. for the Advancement of Reg’l Transp. v. Fed. Highway Admin.*, 959 F. Supp. 2d 982, 1001–02 (W.D. Ky. 2013), *aff’d*, 576 F. App’x 477 (6th Cir. 2014) (alleging defendants formulated a deceptively narrow Purpose and Need Statement under NEPA to avoid full consideration of alternative transit models, economic dislocation, and disproportionate economic consequences of several bridges).

355. *Strycker’s Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 228 (1980) (“[T]here is no doubt that HUD considered the environmental consequences of its decision . . . NEPA requires no more.”).

356. *Id.* at 228 n.2.

357. *Id.* at 227 n.1.

identified harms. In contrast, California's version of NEPA, the California Environmental Quality Act, explicitly requires agencies to "mitigate or avoid the significant effects on the environment" identified through the environmental impact study.<sup>358</sup> Similarly, New York's Environmental Quality Review Act requires that the government agency "make an explicit finding that . . . consistent with social, economic and other essential considerations, to the maximum extent practicable, adverse environmental effects revealed in the [EIS] process will be minimized or avoided."<sup>359</sup> Absent such a mandate, NEPA's environmental impact statement runs the risk of being "a mere disclosure statement."<sup>360</sup> It diminishes the possibility that the covered agency will take concrete steps to advance the substantive goals of NEPA, much less pursue the structural changes and remedial actions necessary for systemic racial equality or make reparations for decades of past harm.

Second, NEPA's procedural requirements target the initial decisions involved in planning major infrastructure projects, such as site location and design. It is not evident that NEPA would similarly apply to the myriad steps involved with implementation of those plans and holistically consider the impact on education, housing, economic development, and health in these communities at all subsequent stages. Application of a racial equity lens to all stages of infrastructure projects is required to guard against the potential destruction of a community's social and economic vitality and to prevent adverse impacts, isolation, and exclusion of minority or low-income communities.

Finally, NEPA does not go far enough in assessing the full extent of the impact highway development or redevelopment projects will have on surrounding communities. In advancing racial equity with highway and infrastructure development projects, a foundational question must be whether the benefits and burdens of the highway are equally distributed across racial groups.<sup>361</sup> Ideally, this analysis should

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358. CAL. PUB. RES. CODE § 21081(a)(1) (2020).

359. N.Y. ENVT'L CONSERV. LAW § 8-0109(8) (McKinney 2020); *but see* ADALENE MINELLI, FRANK J. GUARINI CTR. ON ENVT'L, ENERGY & LAND USE AT N.Y.U. SCH. OF LAW, REFORMING CEQR: IMPROVING MITIGATION UNDER THE CITY ENVIRONMENTAL QUALITY REVIEW PROCESS (2020) (discussing criticisms of accountability measures under New York City's City Environmental Quality Review).

360. *Town of Henrietta v. Dep't. of Env'tl. Conservation*, 430 N.Y.S.2d 440, 446 App. Div. 1980).

361. *See* Blumenberg, *supra* note 196, at 350 (discussing the U.S. Department of Transportation's efforts to make environmental justice part of its mission, which included, as part of its guiding principles, ensuring "that low-income and minority communities do not accrue fewer benefits and bear greater costs than higher-income, white communities"); Bullard, *supra* note 19, at 28 ("State DOTs and MPOs have a major responsibility to ensure that their programs, policies, and practices do not discriminate against or adversely and disproportionately impact people of color and the poor.").

consider both the current and historical distribution of the benefits and burdens, and explore opportunities to redress the damage to the community inflicted by the original build. How we define the goal will influence the breadth and depth of the analysis and determine how we measure success.

In the end, neither NEPA nor the array of laws adopted following the Freeway Revolts are capable of achieving broad racial equality in new highway redevelopment projects.

## V. RACIAL EQUITY IMPACT STUDIES

To fill the enforcement void discussed in Part III, policymakers embarking on highway development and redevelopment projects should engage in a systematic, comprehensive, and holistic review of how racial and ethnic groups will be impacted by the project. This Part proposes that states and localities planning highway redevelopment projects complete multi-agency, multi-domain, and regionally focused racial equity impact studies (“REIS”) prior to developing and implementing their plans. Racial equity impact studies systematically analyze how racial and ethnic groups will be affected by a proposed action, policy, or practice.<sup>362</sup> They are used in a wide variety of contexts in recognition that racialized harm has been, and continues to be, systemic and pervasive. Although they have been most frequently proposed and adopted in the context of reforming the criminal legal system, a range of jurisdictions have adopted racial impact study requirements in a range of contexts to help them unearth racial inequities before harm is inflicted on communities of color. This Part argues that adopting an REIS requirement would allow jurisdictions to think creatively and broadly about the harms impacted communities confront in the face of highway redevelopment projects, as well as the range of interventions available to resolve them equitably. REISs also have the potential to help jurisdictions account for the racially disproportionate harm highways have already caused, equitably distribute the benefits and

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362. See Kennedy et al., *supra* note 296, at 157 (defining racial equity studies); see also Lenhardt, *supra* note 56, at 1527 (introducing race audits as a tool that “eschews a singular focus on intentional discrimination” and instead “seeks to uncover the specific structural mechanisms that create cumulative racial disadvantage across domains, time, and generations”); Powell, *supra* note 290, at 793 (“[T]he structural model helps us analyze how housing, education, employment, transportation, health care, and other systems interact to produce racialized outcomes.”).

burdens of new highway redevelopment projects, and be guided by the values of transportation justice as they move forward.

*A. Current Federal, State, and Local  
Mandates to Study Racial Impact*

Racial impact studies include a broad array of tools and approaches, ranging from those that focus on policy development, implementation, and decisionmaking, to those that mandate a general duty to combat and eliminate racial discrimination.<sup>363</sup> Racial impact studies are intended to support the development of fair and equitable governmental action by analyzing how racial and ethnic groups will be differentially impacted by proposed governmental actions, policies, or practices.<sup>364</sup> As a racial equity tool, racial impact studies can help reduce racial discrimination through consideration of the “often invisible and unintentional[] production of inequitable social opportunities and outcomes.”<sup>365</sup> The goal is to root out the unintended consequences of a new government initiative prior to its adoption.<sup>366</sup>

Racial impact studies not only identify potential racial disparities, but can also identify the often-invisible historical influences, systemic inequalities, structures, and institutions that interact to create those disparities.<sup>367</sup> These studies can help move decisionmakers beyond their traditional focus on intentional racial bias by discrete actors to a more productive focus on identifying, alleviating, and eliminating all sources of structural and systemic racial

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363. See Kennedy et al., *supra* note 296, at 154 (noting that racial impact statements focus on the impact policies have on communities of color and “put officials on formal notice that the community has documented the disproportionate impact of the policies”).

364. *Id.* at 157; see also Lenhardt, *supra* note 56, at 1527 (introducing race audits as a tool that “eschews a singular focus on intentional discrimination” and instead “seeks to uncover the specific structural mechanisms that create cumulative racial disadvantage across domains, time, and generations”); Marc Mauer, *Racial Impact Statements: Changing Policies to Address Disparities*, 23 CRIM. JUST. 16, 17 (2009) (arguing that “[t]he premise behind racial impact statements is that policies often have unintended consequences that would be best addressed prior to adoption of new initiatives”); powell, *supra* note 290, at 793 (“[T]he structural model helps us analyze how housing, education, employment, transportation, health care, and other systems interact to produce racialized outcomes.”).

365. TERRY KELEHER, APPLIED RESEARCH CTR., RACIAL EQUITY IMPACT ASSESSMENTS: AN OVERVIEW 1 (2009), [http://www.raceforward.org/images/racial\\_equity\\_toolkit.pdf?arc=1](http://www.raceforward.org/images/racial_equity_toolkit.pdf?arc=1) [<https://perma.cc/9RMV-M3GR>].

366. See Mauer, *supra* note 364, at 17.

367. See Kennedy, et al., *supra* note 296, at 156 (“A racial impact statement can help reveal the situatedness of different communities and help in identifying targeted strategies which could be used to alleviate the disparities.”); Mauer, *supra* note 364, at 17, 20 (arguing that racial impact statements “offer one means by which policy makers can begin to engage in a proactive assessment of how to address” racial and ethnic disparities that result due to a complex combination of factors); KELEHER, *supra* note 365 (discussing the factors a racial impact assessment considers).



inequality.<sup>368</sup> Moreover, racial impact studies can unearth the source of “cumulative racial disadvantage across domains, time, and generations.”<sup>369</sup> When adopted by state and local governments, racial impact studies can be a powerful tool for understanding how past, present, and proposed systems and procedures contribute to racial inequality.<sup>370</sup>

Policy makers and advocates have embraced the broad concept of racial impact studies in numerous contexts. The push began in the criminal legal sphere to respond to staggering racial disparities in the criminal legal system.<sup>371</sup> In response to a study indicating that its prisons led the country in racial disparities, Iowa became the first state to require a racial impact statement for proposed legislation that affects sentencing, probation, or parole policies.<sup>372</sup> Recognizing that “criminal

368. See Kennedy et al., *supra* note 296, at 155 (arguing that an exclusive focus on intentional discrimination is outdated because it “implies that bias is not normal and [that] by eliminating the aberrational behavior of the few, we are eliminating bias”); Lenhardt, *supra* note 56, at 1527 (introducing race audits as a tool that “eschews a singular focus on intentional discrimination” and instead “seeks to uncover the specific structural mechanisms that create cumulative racial disadvantage across domains, time, and generations”).

369. Lenhardt, *supra* note 56, at 1527.

370. See *id.* at 1552–56 (discussing some of the ways audit mechanisms have been used by both local and federal governments “to uncover racially exclusionary practices”).

371. See, e.g., Barkow, *supra* note 56, at 27 (“Iowa was the first state in the country to pass legislation requiring a ‘Minority Impact Statement’ for any proposed criminal law.”); William Y. Chin, *Racial Cumulative Disadvantage: The Cumulative Effects of Racial Bias at Multiple Decision Points in the Criminal Justice System*, 6 WAKE FOREST J.L. & POL’Y 441, 454 (2016) (“Increasingly, states are requiring racial impact statements. In April 2008, Iowa became the first state to require racial impact statements for proposed legislation affecting sentencing, probation, or parole policies.”); Davis, *supra* note 56, at 16–19 (discussing the difficulty of challenging discretionary prosecutorial decisions and the subsequent need for racial impact studies in prosecution offices in order “to advance the responsible, nondiscriminatory exercise of prosecutorial discretion”); Jessica Erickson, *Racial Impact Statements: Considering the Consequences of Racial Disproportionalities in the Criminal Justice System*, 89 WASH. L. REV. 1425, 1426 (2014) (discussing racial impact statements as “one way to reduce racially discriminatory effects of criminal justice laws”); Catherine London, *Racial Impact Statements: A Proactive Approach to Addressing Racial Disparities in Prison Populations*, 29 LAW & INEQ. 211, 212 (2011) (discussing racial impact statements as “[o]ne approach” that states started to use in order to “identify[ ] the racial effects of proposed legislation”); Mauer, *supra* note 364, at 17 (noting the use of racial impact statements in the criminal justice system); Leah Sakala, *Can Racial and Ethnic Impact Statements Address Inequity in Criminal Justice Policy?*, URB. INST. (Feb. 23, 2018), <https://www.urban.org/urban-wire/can-racial-and-ethnic-impact-statements-address-inequity-criminal-justice-policy> [<https://perma.cc/VP7X-SAB3>] (discussing racial impact statement requirements in several states).

372. H.F. 2393, 82d Gen. Assemb., Reg. Sess. (Iowa 2008); Mauer, *supra* note 364, at 18 (discussing how Iowa’s racial impact statement requirement came about because of criticism over its Black vs. white incarceration rates). Initial studies of the Iowa racial impact statement requirement found that bills with impact evaluations producing neutral or reductions in disparity were more likely to pass than were bills predicting disparate outcomes. Sakala, *supra* note 371; *Racial-Impact Law Has Modest Effect in Iowa*, DES MOINES REGISTER (Jan. 21, 2015), <https://www.desmoinesregister.com/story/news/politics/2015/01/21/racial-impact-law-effect-iowa-legislature/22138465/> [<https://perma.cc/8D6F-TZT8>] (“A review by the Associated Press shows that

justice policies, while neutral on their face, often adversely affect minority communities”<sup>373</sup> and that “these unintended consequences could be more adequately addressed prior to adoption of a new initiative, particularly since such initiatives, once adopted, often are difficult to reverse,”<sup>374</sup> several states have followed Iowa’s lead by adopting mandatory or voluntary racial impact statements for criminal legal system related legislation.<sup>375</sup>

Today, racial impact studies have spread beyond assessing racial and ethnic disparities in the criminal legal system. The federal government requires recipients of certain federal funds to affirmatively assess the impact of their policies and actions on racial and ethnic groups, including decisions related to public transportation.<sup>376</sup> There is a growing body of statewide legislative mandates and local ordinances

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the first-in-the-nation law appears to be having a modest effect, helping to defeat some legislation that could have exacerbated disparities and providing a smoother path to passage for measures deemed neutral or beneficial to minorities.”). Following Iowa’s adoption of this requirement, legislation with a disproportionate racial impact was twice as likely to fail as laws that were found to be racially neutral. Rachel E. Barkow, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* 183 (2019).

373. S.B. 677, 217 Leg. (N.J. 2017).

374. *Id.*

375. See CONN. GEN. STAT. § 2-24b (2019) (requiring racial and ethnic impact statements to be prepared for “certain bills and amendments at the request of any member of the General Assembly”); S.B. 677, 217 Leg. (N.J. 2017) (requiring racial and ethnic impact statements to be prepared for “any criminal justice bill, resolution, or amendment . . . that would affect pretrial detention, sentencing, or parole policies”); S.B. 463, 77th Leg. Assemb., Reg. Sess. (Or. 2013) (allowing any lawmaker to request a study analyzing the impact of child welfare and criminal justice laws on racial and ethnic communities); Mauer, *supra* note 364, at 17 (noting that after Iowa signed the first law requiring racial impact statements for legislation affecting sentencing, probation, or parole policies, “Connecticut and Wisconsin took similar action”); Leah Sakala, *Oregon Passes Legislation to Rein in Racial Disparities in Criminal Law; Which State Will Be Next?*, PRISON POLY INITIATIVE (July 9, 2013), <https://www.prisonpolicy.org/blog/2013/07/09/or-sb463/> [<https://perma.cc/WS7Y-KQGZ>]; see also Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, 88 Stat. 1109 (1974) (codified as amended at 34 U.S.C. § 11101 (2012) (formerly cited as 42 U.S.C. § 5601)) (requiring states to focus on racial disparities in their juvenile justice systems). Minnesota does not require its sentencing guidelines commission to draft racial impact statements by law, but the commission routinely does so. Nicole D. Porter, *Racial Impact Statements*, THE SENT’G PROJECT (Sept. 30, 2019), <https://www.sentencingproject.org/publications/racial-impact-statements/> [<https://perma.cc/6LNE-274Q>].

376. See U.S. DEPT OF TRANSP., FED. TRANSIT ADMIN., FTCA C 4702.1B, TITLE VI REQUIREMENTS AND GUIDELINES FOR FEDERAL TRANSIT ADMINISTRATION RECIPIENTS (2012), [https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/FTA\\_Title\\_VI\\_FINAL.pdf](https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/FTA_Title_VI_FINAL.pdf) [<https://perma.cc/AYD5-ZAS4>] (requiring recipients of urban transfer funds to assess the impact of their public transportation programs on racial and ethnic groups, and to include such groups in their planning process). Public transportation is defined to include “buses, subways, light rail, commuter rail, monorail, passenger ferry boats, trolleys, inclined railways, people movers, and vans.” *Id.* See also Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 7 N.Y.U. L. REV. 1339 (2012) (discussing “equity directives” in federal civil rights laws).

requiring policymakers to assess the impact of a project on racial and ethnic communities across government initiatives.<sup>377</sup>

Two racial impact programs in Seattle, Washington, are instructive examples. First, since 2005, Seattle has required all city departments to use a racial equity analysis as a filter for policy development and budgeting. The Seattle Racial and Social Justice Initiative (“RSJI”) is a city-wide effort to combat institutional racism in city government, with the long term goal of “chang[ing] the underlying system that creates race-based disparities in [its] community and to achieve racial equity.”<sup>378</sup> The initiative also seeks to “[t]ransform the internal government culture of the city toward one rooted in racial justice, humanistic relationships, belonging and wellbeing”<sup>379</sup> and to end “individual racism, institutional racism and structural racism” in city government.<sup>380</sup>

The Seattle Office for Civil Rights and the RSJI Subcabinet, comprised of city department heads, oversee the RSJI process.<sup>381</sup> Every city department must submit an annual RSJI Work Plan to the mayor and city council. In completing the Work Plan, each department must outline its RSJI commitments and actions, including alignment with RSJI’s nine Equity Areas: “equitable development; housing; education; environmental justice and service equity; criminal justice; transportation; jobs [and] economic justice; health; arts & culture.”<sup>382</sup> To guide each department’s preparation of their Work Plan, the Seattle Office for Civil Rights provides a Racial Equity Toolkit. The Toolkit lays out a process and a set of questions to “guide the development, implementation and evaluation of policies, initiatives, programs, and budget issues to address the impacts on racial equity.”<sup>383</sup> Since Seattle

377. In 1989, New York City revised its charter and adopted a requirement that looked at race to ensure that certain neighborhoods were not overburdened by “undesirable facilities.” Lenhardt, *supra* note 56, at 1553.

378. *Race and Social Justice Initiative*, SEATTLE OFF. FOR C.R., <http://www.seattle.gov/civilrights/what-we-do/race-and-social-justice-initiative> (last visited Sept. 9, 2020) [<https://perma.cc/6CZZ-6PJE>].

379. *Race and Social Justice Initiative: 2019-2021 Strategy*, SEATTLE RACE & SOC. JUSTICE INITIATIVE, [https://www.seattle.gov/Documents/Departments/RSJI/18-21\\_RSJI\\_Strategic\\_Plan\\_4.6.19\\_FINAL.pdf](https://www.seattle.gov/Documents/Departments/RSJI/18-21_RSJI_Strategic_Plan_4.6.19_FINAL.pdf) (last visited Sept. 9, 2020) [<https://perma.cc/6Z3E-2TDE>].

380. *Racial Equity Toolkit*, SEATTLE RACE & SOC. JUSTICE INITIATIVE 1, [http://www.seattle.gov/Documents/Departments/RSJI/Racial%20Equity%20Toolkit\\_FINAL\\_August2012\\_with%20new%20encl%20districts\(0\).pdf](http://www.seattle.gov/Documents/Departments/RSJI/Racial%20Equity%20Toolkit_FINAL_August2012_with%20new%20encl%20districts(0).pdf) [<https://perma.cc/J6BK-XSG6>].

381. *Seattle, Washington*, GOV’T ALLIANCE ON RACE & EQUITY, <https://www.racialequityalliance.org/jurisdictions/seattle-washington/> (last visited Sept. 9, 2020) [<https://perma.cc/4THA-CCTQ>].

382. SEATTLE RACE & SOC. JUSTICE INITIATIVE, *supra* note 379.

383. SEATTLE RACE & SOC. JUSTICE INITIATIVE, *supra* note 380, at 1. The Racial Equity Toolkit lays out the six steps that departments should follow in completing their Work Plan: (1) set outcomes, focusing on key outcomes for racial equity to guide the analysis; (2) involve stakeholders

adopted its program, similar initiatives were adopted by cities in Minnesota, Wisconsin, and Oregon.<sup>384</sup>

An ambitious racial equity study requirement is workable.<sup>385</sup> In a separate effort, King County, Washington, which includes Seattle, passed an ordinance requiring the county to

consider equity and social justice impacts in all decision-making so that decisions increase fairness and opportunity for all people, particularly for people of color, low-income communities and people with limited English proficiency or, when decisions that have a negative impact on fairness and opportunity are unavoidable, steps are implemented that mitigate the negative impact.<sup>386</sup>

These mandates are achieved through the Equity Impact Review (“EIR”) tool. The EIR has been described as “both a process and a tool to identify, evaluate, and communicate the potential impact—both positive and negative—of a policy or program on equity.”<sup>387</sup> The EIR process consists of three stages: Stage One focuses on the impact of the proposal on determinants of equity, with the goal of determining whether the proposal will impact a targeted measure of equity; Stage Two asks who is likely to be adversely impacted by the proposal; Stage Three asks who will be impacted by the proposal from an equity perspective and then requires the development of a list of options to ensure that negative impacts are mitigated and positive impacts enhanced.<sup>388</sup>

### *B. Requiring Racial Equity Impact Studies for Highway Redevelopment Projects*

Adoption of an REIS requirement at the state level for all highway development or redevelopment projects within a state would advance the goal of rebuilding the nation’s aging infrastructure while also promoting racial equity and encouraging concrete action towards

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in analyzing data, gathering information from community and agency staff on how the issues being studied benefit or burden the community in terms of racial equity; (3) analyze the issue for impacts and alignment with racial equity outcomes; (4) develop strategies to advance opportunity, minimize harm, and create greater racial equity; (5) raise racial awareness and track impacts on communities of color over time; and (6) share all the information learned through the process and report unresolved issues. *Id.*

384. *See supra* note 375.

385. Some states with racial equity assessment requirements have experienced some challenges in implementation. In addition, although such a requirement may cause some delay for large projects like highway redevelopment projects, jurisdictions typically build this type of delay into their timeline in order to comply with statutory requirements such as NEPA.

386. *King County Equity Impact Review Tool*, KING COUNTY 2 (Oct. 2010), <https://www.kingcounty.gov/~media/elected/executive/equity-social-justice/documents/KingCountyEIRTool2010.ashx?la=en> [<https://perma.cc/9HK9-U74A>].

387. *Id.*

388. *Id.*

remediating the harms inflicted by the interstate highway system. An REIS requirement would also help states and localities unearth structural conditions that perpetuate racial inequality and understand how highway construction will impact transportation equity, racial segregation and concentrated poverty, economic opportunity and investment, access to quality education and affordable housing, and health outcomes. With an REIS requirement, policymakers will have access to the information they need to identify and implement goals and strategies that promote fairness and equity for marginalized communities. Importantly, it would also open up a community-wide conversation among various stakeholders about the reality of racial inequality in those communities and the structural conditions that are required to advance racial equity.<sup>389</sup>

Under this proposal, states would determine the specific elements required to be included in their own REIS. But to be most effective at advancing all the goals discussed earlier, the studies should include some foundational components. First and foremost, the REIS should require a comprehensive collection and analysis of demographic data and consideration of how racial and ethnic groups and communities will be affected by the proposed highway development or redevelopment project. This analysis should not only focus on the initial construction plans and siting decisions, but also endeavor to understand how racial and ethnic minority groups will be impacted by the actions, policies, and practices at every stage of the project. The analysis should also holistically consider the impact on education, housing, economic development, and health in these communities at all subsequent stages. This should include, for example, identifying the number of homes, businesses, and community institutions that would be dislocated in order to build or repair the highway. The impact that the loss will have on residential segregation, educational and employment continuity, and the economic core and social fabric of the community is another important consideration. Moreover, in thinking about the impact on communities of color, the REIS should address the impact that increased economic investment will have on long-term residents, including the threat of gentrification. States must seek to ensure that long-term residents of the community will be able to remain in their homes and enjoy the increased economic vitality.

Second, REIS requirements should be grounded in principles of transportation justice. Broadly, the movement for transportation

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389. See Lenhardt, *supra* note 56, at 1534 (describing the author's proposed race audit as one that would "create a counternarrative about race, a retelling of how race operates in the jurisdiction and how some members of the community came to be so disadvantaged").

justice seeks to merge elements of the environmental justice and civil rights movements, with a focus on racial justice, fairness, and equity.<sup>390</sup> A transportation justice framework provides a mechanism to “address disparate outcomes in planning, operation and maintenance, and infrastructure development” and redress inequalities in the distribution of the benefits and costs of the nation’s transportation systems.<sup>391</sup> Transportation equity also seeks to leverage opportunities to remove infrastructure that physically and symbolically isolates marginalized communities.<sup>392</sup> Each of these considerations is critically important to addressing the systemic and embedded racial inequality of the interstate highway system.

Third, a state’s REIS law should mandate a deeply collaborative, community-based process.<sup>393</sup> This requirement would harness the power of localism by meaningfully engaging local stakeholders in helping policymakers understand and evaluate the full impact the project will have on the community and more effectively adjust plans in response to the concerns raised.<sup>394</sup> Promoting meaningful community

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390. See Bullard, *supra* note 16, at 2 (defining the transportation equity movement as “a movement that is redefining transportation as an environmental, economic, civil, and human right”).

391. Bullard, *supra* note 19, at 26.

392. *Id.* Examples of these types of infrastructure include refueling facilities, airports, crumbling roads, and inadequate public transportation. *Id.*

393. See *id.* (emphasizing the breadth of impacts caused by transportation projects and the importance of properly defining and measuring the impact in order to properly evaluate it); Freilla, *supra* note 19, at 76 (crediting grassroots community groups for the progress made in New York City); Amy Menzer & Caroline Harmon, *The Baltimore Transit Riders League, in HIGHWAY ROBBERY: TRANSPORTATION RACISM AND NEW ROUTES TO EQUITY*, *supra* note 16, at 145 (explaining that a commitment to grassroots public participation was a central component of the Citizens Planning and Housing Association’s initiatives to improve quality of life).

394. Administrative law scholars have found that community input into agency decisionmaking “can counteract influential interests, provide overlooked data, and open the process to scrutiny of all affected individuals.” Reich, *supra* note 272, at 288–89; see also Cashin, *supra* note 15, at 1998–2000 (discussing why citizen participation is viewed as a normative justification for localism); Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1068–70 (1980) (arguing that individual participation is an important political value and such individual involvement can only occur in small political units); Clayton P. Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 MICH. L. REV. 930, 930 (1988) (“Participation is again in the air. Apparently fueled by current debates concerning decentralized power and republican versus pluralist traditions in our political and legal theory, those concerned with political decision making have turned their attention to calls for increased public involvement in the process.”); Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418–21 (1956) (positing the theory that people elect to live in the community that best provides the resources they desire and that once they are in such a community, they attempt to maintain the status quo of that community); Wilson, *supra* note 15, at 1425 (“[S]cholars also contend that political decentralization facilitates democracy and democratic values because smaller local governments are closer to citizens and more readily allow citizens to participate in the democracy.”). Localism scholars have similarly written about the potential of localism to build better and stronger communities and to more effectively address social justice challenges. See GERALD E. FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* 64 (1999)

participation may also increase community confidence in the equity of the process and outcome. In order to meaningfully share power with community members and organizations, members of the impacted community must not only be heard, but have a seat at the table and be involved in the substantive conversations and decisions that will shape the direction of the project after initial information and feedback have been gathered.<sup>395</sup>

Fourth, a state-mandated REIS should focus on the entire region, not just the community immediately surrounding the project. This will facilitate a deeper understanding of the challenges faced by these communities, particularly in the context of securing housing opportunities, providing educational continuity for temporarily and permanently dislocated people, and ensuring equitable distribution of the burdens and benefits. Requiring a regional lens acknowledges the broader context in which regional concerns, “federal policy, and local government fragmentation, as well as privatization of services” all impact conditions within inner cities.<sup>396</sup>

Finally, state REIS mandates should include sufficient monitoring and accountability systems to ensure equity throughout the process. They should also require relevant agencies to take concrete steps to mitigate the negative impacts on marginalized communities of color identified through the study process, pursue structural changes and remedial actions necessary to advance systemic racial equality, and make reparations for decades of past harm. Similar to the requirements embedded in the California Environmental Quality Act<sup>397</sup> and the New York Environmental Quality Review Act,<sup>398</sup> agencies should adjust their plans in order to address the racial equity disparities “to the

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(discussing localism); Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1115 (1996) (“Local government law enables people who live within these discrete areas to organize themselves into distinct political units and gives those units power to make decisions with respect to a range of public policies and services.”); Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 1 (1990) (“State legislatures, often criticized for excessive interference in local matters, have frequently conferred significant political, economic and regulatory authority on many localities.”); Cashin, *supra* note 15, at 1998–2001 (explaining that “the values of democratic participation, efficiency, and community” make localism popular in the United States); Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253, 257 (1993) (discussing the values of local control and decentralization); Lenhardt, *supra* note 56, at 1532 (“Outside the judicial context, there exists more freedom at least to imagine a productive role for localities.”).

395. See K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 101, 104–05 (2020) (discussing the need for true “democratizing reforms” that include the nature and moment of authority to redress “the complex interactions between law, power, structure, and inequality”).

396. McFarlane, *supra* note 80, at 334.

397. CAL. PUB. RES. CODE § 21081(a) (2020).

398. N.Y. ENVTL. CONSERV. LAW §§ 8-0101-8-0117 (McKinney 2020).

maximum extent practicable” and to minimize or avoid the enforceability problems of NEPA.

#### CONCLUSION

In his seminal book, *Faces at the Bottom of the Well: The Permanence of Racism*, Professor Derrick Bell wrote of how racism is permanently embedded in America’s “psychology, economy, society and culture.”<sup>399</sup> The national project of highway redevelopment brings to mind that permanence. The American highway system, and the physical barriers it erected between Black and White, those with opportunity and those without, continue to stand as a living example of that permanence. America’s highways are part of the racial architecture of our country, with barriers both visible and invisible. The question before the country is whether and how we will truly confront those barriers.

Professor Bell also spoke about the critical need for resistance to racism despite its persistence. America’s critical need to redevelop its highways presents a unique opportunity to confront the racial and economic barriers those highways perpetuated. Yet current legal tools may not be up to the task. The racial and economic legacy of the interstate highway system raises fundamental questions about the limits of our current arsenal of civil rights laws. To take advantage of the opportunity that highway redevelopment provides, we will need new tools capable of repairing the decades of accumulated disadvantage, unearthing the embedded systemic racism and institutional privilege, and ensuring that long-term residents have the ability to enjoy and benefit from the economic investment and community revitalization.

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399. BELL, *supra* note 40, at x.