

**Path Dependence:
The Legal Past, Present, and Futures of Urban Highways**

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Abstract

Promoted and shaped by the vision of the American auto industry, the Interstate Highway System helped shape the American urban landscape, society, and economy. It has enabled the contemporary car-dependent society we live in, as the supply of “free” roads fueled a demand for cars to use them. It also changed in the process the social fabric and economic logic of American downtowns: The urban segments of the system were designed to specifically follow “the path of political least resistance,” where the majority of the population was Black and low-income, leading to a mass displacement of approximately 1 million individuals. In the process, the system cemented the logic of car dependency into the downtown area, with the facilitation of the white (or capital) flight from American cities, the dwindling of their tax base, and the creation of shopping malls and shopping centers as the focal point of the late 20th-century urban economy. Today, American highways continue to have a relatively permanent effect on the American political economy. These urban freeways continue to be detrimental to American cities and their most vulnerable populations. A forming movement is seeking ways to mitigate the historic and ongoing harm caused by these freeways. This paper examines several instances and examples of such harm and several potential solutions/strategies. The case is made that in order not to prevent the occurrence of further displacement – in the form of gentrification or an uprooting due to massive construction work in the area – the projects targeting these urban freeways should work with a racial equity framework and community control institutional design. However, this paper argues, both approaches might prove inadequate if not considered within a broader framework of material redistribution. The case study of Providence, Rhode Island, shows that addressing only racial past harm – even with innovation such as a local reparations program – is insufficient without accounting for the mass displacement and the generational wealth gap that has been caused by the initial establishment of the urban highway through the city. Instead, it is suggested, a more holistic approach is needed to account for the totality of harm caused by the Interstate System, including suburbanization, car dependency, and displacements. The case of New Haven, Connecticut, illustrates that solely adhering to development logic without being cognizant of the racial and class harms caused by the system, exacerbates existing problems. A proposed zoning reform in the state is examined as an “imagined alternative” that could have been chosen in executing the local highway removal project. This state-wide reform also underscores certain flaws stemming from “community control,” and its mechanism of decentralization. The paper concludes with the possible federal legal futures of urban highways, with the *Reconnecting Communities* program under the Bipartisan Infrastructure Law of 2021.

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INTRODUCTION

On April 8, 2018, a bus carrying students on their way back from spring break drove into a low overpass on the Southern State Parkway in Long Island. Six passengers were seriously injured, and 37 others suffered lesser injuries.¹ Reacting to the accident, New York State Police Major David Candelaria said that the bus driver “obviously wasn’t aware of the parkway system” and its legal restriction on commercial vehicles.² This accident exposes how the “parkway system,” a century after it was designed and built, still serves its purpose: restricting bus transportation.³ Even more revealing is how the law followed the physical constraint posed by Long Island’s parkways, enforcing a legal restriction on their use by commercial vehicles. For Robert Moses, the famous architect of these

¹ Allyson Chiu, *Dozens injured on Long Island as Busload of Students Plows into Low Overpass, Mangling Roof*, WASH. POST, Apr. 9, 2018, <https://www.washingtonpost.com/news/morning-mix/wp/2018/04/09/dozens-injured-on-long-island-as-busload-of-students-plows-into-low-overpass-mangling-roof/> [https://perma.cc/U22C-9DRN].

² Ryan Bonner, *Long Island, Southern State Overpass Crash: Police ID Bus Driver*, PATCH, Apr. 8, 2018, <https://patch.com/new-york/rockvillecentre/coach-bus-carrying-teens-crashes-southern-state-overpass> [https://perma.cc/XXT5-MET7].

³ ROBERT A. CARO, *THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK* 318 (1974) (hereinafter: CARO, *THE POWER BROKER*) (“[Robert Moses] instructed Shapiro to build the bridges across his new parkways low – too low for buses to pass. Bus trips therefore had to be made on local roads, making the trips discouragingly long and arduous.”)

parkways, this arm-twisting between the law and physical infrastructure was a feature of the system rather than a bug. Sidney M. Shapiro, a close Moses associate and former chief engineer and general manager of the Long Island State Park Commission, has said that Moses knew that concrete infrastructure is stronger and more resistant than legislation, because “you could change the legislation. You can’t change a bridge after it’s up.”⁴

In this paper, I will look into the ways in which this logic was replicated on a nationwide scale with the Interstate Highway System. Following Langdon Winner’s seminal work about the ways artifacts – and specifically physical infrastructure – transmit the politics of their designers,⁵ I will show how the Interstate Highway System, a 41,000-mile network of highways across the U.S., was used to solidify specific political and economic agendas and ensured the dominance of the automobile and dependence on it in the American landscape. Similar to Moses’ early realization, the legal architects of the interstate system understood the long-lasting leverage physical infrastructure has on society, which is not easily altered.

Unlike Moses, whose idiosyncratic motives for excluding the working poor from “his” parks and parkways oscillated between aesthetic and racist, the interstate architects’ motivation was primarily economic. These legal “architects” were influenced, not to say captured, by the *Highway Lobby*, comprised of American auto, petrol, cement, and rubber manufacturers, who recognized the potential “free” roads could provide to their business for years to come. Similarly to Moses, they too used the state’s “infrastructural power” to

⁴ *Id.* at 952.

⁵ Langdon Winner, *Do Artifacts Have Politics*, 109(1) DAEDALUS 121, 123-24 (1980) (using the low-hanging parkways example to show how infrastructure designed to physically enforce race and class segregation).

implement systemic biases into the built environment.⁶

As Thomas Sugrue shows, capitalist means and racial ends are not mutually exclusive. According to Sugrue, “Capitalism generates economic inequality [and] African Americans have disproportionately borne the impact of that inequality.”⁷ The case of the Interstate Highway System clearly demonstrates this claim. To illustrate this, the paper will focus on the urban segments of this system, which I mostly refer to as “urban highways.”⁸ These urban highways were designed to follow “the geographical path of least political resistance,”⁹ dividing entire neighborhoods of marginalized communities, and displacing approximately million persons in the process.

In Part I of this paper I will delve into this past. The first section will provide a brief overview of the history of the contemporary American interstate system and demonstrate how capitalistic interests and racial biases converged in its construction. The *Highway Lobby* strategically pushed the vision of the interstate by tapping into widespread rationales of urban decay, employing the rhetoric of “blight” to align major cities with their agenda. The interstate was seen as part of an effort to “renew” urban downtowns, which primarily meant the reconstruction of urban ghettos, replacing them with major highways that would bring into town the new suburbanites, who “fled” cities in what is often called the “white

⁶ MICHAEL MANN, *THE SOURCES OF SOCIAL POWER: VOL. I* 170 (1986) (Mann termed the way infrastructure is used by the state to implement political decisions “infrastructural power.”)

⁷ THOMAS J. SUGRUE, *THE ORIGINS OF THE URBAN CRISIS* 5 (Rev. ed., 2005) (hereinafter: Sugrue).

⁸ I use the term “highway” colloquially, without necessarily distinguishing between the specific definitions of different types of roads such as expressways, motorways, or parkways. I also interchangeably use the terms “urban freeway” and “urban expressway” for the sake of readability in this paper. However, I suspect that these formal distinctions may have originated from a particular political decision in history. Unfortunately, delving into this debate is beyond the scope of this paper. However, *cf.* CARO, *THE POWER BROKER*, *supra* note 3, at 175 (“... the term ‘parkways’ was significant. The Legislature had specifically written into the State Highway Law provision that the supervisors of each county had veto power over the location of highways within its borders. But, because parkways hadn’t existed when the provision was written, the Highway Law didn’t mention parkways – and there was no local check over *their* location.”)

⁹ Schwartz, *infra* note 25, at 239 (citing ANTHONY DOWNS, *URBAN PROBLEMS AND PROSPECTS* 218 (1970), A. Q. MOWBRAY, *ROAD TO RUIN* 178-79 (1969)).

flight.” I will argue that while these massive investments in highway building indeed could not effectively “slow the decline of post-industrial cities,”¹⁰ this outcome was not coincidental but intentional: the investment in downtowns served as a pretext for developing suburbia.

This past’s effects still persist today. In the second section of the first Part, I will touch upon these effects and show that, not unlike Moses’ parkways, the impacts of urban highways on marginalized communities are still apparent almost a century later. As a result of these highways and the racialized difference in commuting they have created,¹¹ marginalized communities are less safe as pedestrians,¹² have worse access to health services,¹³ are more susceptible to being “stopped and frisked,”¹⁴ and more.¹⁵

In Part II, I will look into the possible futures of urban highways and how to mitigate the problems they still pose today. This discussion will present the often-suggested solution of removing urban highways. I will argue that simply removing highways may not be enough, without a more holistic approach that tracks the two parallel aspects of this highway system: its auto-focused and racist logics. First, in a reality where car ownership is essential for being a part of society and the workforce,¹⁶ mobility gaps need to be

¹⁰ Richard C. Schragger, *The Political Economy of City Power*, 44 FORDHAM URB. L. J. 91, 126 (2017) (hereinafter: Schragger, *The Political Economy of City Power*).

¹¹ Devin Michelle Bunten et al., *The Problem Has Existed over Endless Years: Racialized Difference in Commuting, 1980-2019*, J. URB. ECON. 103542 (2023).

¹² Nandi L. Taylor et al., *Structural Racism and Pedestrian Safety: Measuring the Association Between Historical Redlining and Contemporary Pedestrian Fatalities Across the United States, 2010-2019*, 113 AM. J. PUB. HEALTH 420 (2023).

¹³ Shadi O. Tehrani et al., *The Color of Health: Residential Segregation, Light Rail Transit Developments, and Gentrification in the United States*, 16(19) INT’L J. ENVIRON. PUB. HEALTH 3683 (2019).

¹⁴ Andrew Ross & Julie Livingston, *Once You See the Truth About Cars, You Can’t Unsee It*, N.Y. TIMES, Dec. 15, 2022, <https://www.nytimes.com/2022/12/15/opinion/car-ownership-inequality.html> [https://perma.cc/ARY4-XKH6].

¹⁵ These include pollution-related diseases (such as Asthma), mental health crises, and further – contemporary – displacements. See *infra* notes 211-216 and accompanying text.

¹⁶ E.g. Rosabeth Moss Kanter, *Public Transportation Could Be a Ride Out of Poverty*, BOSTON GLOBE, May 26, 2015, <https://www.bostonglobe.com/opinion/2015/05/25/public-transportation-can-ride-out->

addressed as part of the effort to mitigate past and present harm posed by urban freeways. Second, this mobility gap impacts specific, marginalized populations and communities. It is imperative then to account for this disparate impact when deciding on the future of such highways. For example, a mega-project such as highway removal might cause a new wave of displacement of the same populations that were harmed by this infrastructure in the first place: directly, due to the scale of the works, or indirectly, through gentrification.¹⁷ Thus, this Part will consider the desired legal design for removing these urban highways. I will argue that existing legal scholarly approaches in this context, Racial Equity Impact Studies (REIS) or a community control institutional design, albeit important, might not suffice to deal with the overall role and impact urban highways have had. As will be discussed at length below, while racial impact studies might prove to be too centralizing and relying on a process external to the needs of the community, a community control approach might be too decentralized in the sense that local parochialism and conceptual difficulties in authentically defining a community and its contours could impede its effectiveness.

Part III will contextualize this discussion using case studies of specific highway removal projects. The examples of New Haven, Connecticut, and Providence, Rhode Island, show that neither of the legal approaches abovementioned is sufficient by itself to ensure the desired outcomes of reconnecting communities and reviving downtowns. In both Providence and New Haven the highway removal projects were not attentive at first to the legal, social, and economic problems posed by urban highways as detected by this paper. Thus, in both examples, I will look into complementary steps taken either by the

poverty/KtzBMWfo1Xpsqks7NfbYxL/story.html [https://perma.cc/VXX5-VWY7]; see also Schleicher, *Stuck!*, *infra* note 412, and accompanying text.

¹⁷ See *infra* note 300 and accompanying text.

city or the state to account for these systemic economic and social features.

In Providence, the city initiated a variation of a REIS, in the form of a reparation committee. As will be explicated, addressing only *past* harms is not sufficient without tackling the persisting material impact on present communities. The case of New Haven will flesh out how the question of “community control” relies to a large extent on pre-determining who is that “community” and what are its needs. Thus, an expressway removal project conducted there, which focused solely on economic development and tax cuts to lure business into the city, did virtually nothing to address the local population’s needs and mainly resulted in more commuters’ cars pouring into the city. As an imagined alternative, I will discuss a currently debated zoning reform in Connecticut that could enable cities to receive discretionary infrastructure funding from the state if they zone in a manner that provides more affordable and transit-oriented housing. This follows what local government scholar Richard Schragger has called back to basics: “Instead of treating lagging [urban] areas as deficient because they do not provide jobs, we should treat them as deficient because they do not provide a sufficient baseline of welfare.”¹⁸

The state-led initiative in New Haven, promoted by the DesegregateCT organization, complexifies another facet of “community control”: Does it necessarily require *local* control? I will argue that funds allocated to removing urban highways could perhaps be used creatively to incentivize replacing highways with adequate and much-needed infrastructure, even if it means a limited centralized intervention. The Interstate Highway System is a rare instance in which the federal government directly funded a transportation

¹⁸ RICHARD SCHRAGGER, CITY POWER 217 (2016).

infrastructure.¹⁹ Thus, this context provides an apt opportunity to examine the benefits and downsides of such federal intervention. Hence, the paper will conclude with a possible legal future of urban highway removal using federal grants, as presented by the Bipartisan Infrastructure Law of 2021.

* * * *

The current U.S. Secretary of Transportation, Pete Buttigieg, has acknowledged on several occasions the dual social-shaping nature of physical infrastructure generally and of the Interstate Highway System specifically: It plays a role in both perpetuating past biases and creating new ones. Testifying before the House of Representatives Committee on Transportation and Infrastructure in 2021, Secretary Buttigieg used these past-present-future dynamics to declare that “just like those who summoned the will to build the transcontinental railroad in the 1800s and the Interstate Highway System in the 1950s, we, too, have the opportunity *now* to imagine and create a different *future* for American transportation.”²⁰

This paper will deploy this temporal dynamic as well. Borrowing Robert Cover’s seminal depiction of law as a “bridge linking a concept of a reality to an imagined alternative,”²¹ I will look into the ways in which the Interstate System bridged the continental U.S. from coast to coast and entrenched a specific “concept of a reality” in the process. However, while this reality has been with us for years on end, I wish to show that

¹⁹ DAVID SCHLEICHER, IN A BAD STATE: RESPONDING TO STATE AND LOCAL BUDGET CRISES 9 (2023) (hereinafter: SCHLEICHER, BAD STATE).

²⁰ The Administration’s Priorities for Transportation Infrastructure, Remote Hearing before the Committee on Transportation and Infrastructure, 117th Congress (117-10), p. 8, March 25, 2021 (emphasizes added) (“*now* is the time to finally address major inequities, including those caused by highways that were built through Black and Brown communities,” *Ibid*).

²¹ Robert M. Cover, *The Supreme Court 1982 Term, Foreword: Nomos and Narrative*, 97(4) HARV. L. REV. 4, 9 (1983).

an “imagined alternative” is possible. We do not have to stay on that highway forever.

I. HIGHWAYS AND HORIZONS

A. Background

Highways, and the legislation around them, have been in existence in America since at least the Colonial Era, with Virginia being the first colony to enact a highway act in 1632.²² In the 1890s, when the newly-widespread technology of bicycles attracted renewed attention to road adequacy, it incentivized New Jersey to become the first state to pass a highway “state-aid” plan in 1891.²³ An emergent, even newer, technology, the automobile, is what made this scheme federal.

The first highway planned particularly for cars, the Bronx River Parkway, opened in New York City in 1906.²⁴ But it took the proliferation of that technology to make Washington act. As Garry Schwartz put it, “in 1916, just 3 years after Henry Ford began mass producing the Model T, Congress approved the first program of continuing federal aid for highways.”²⁵

By the 1920s, influenced by the famous modernist architect Le Corbusier and his plans for future cities defined by broad highways and rigid separation of land uses, American architects started drafting their own versions of this vision of reconstructing the city.²⁶ The city had to be de- and reconstructed because of the notion that “blight”

²² John F. Hart, *Takings and Compensation in Early America: The Colonial Highway Acts in Social Context*, 40(3) AM. J. L. HIST 253, 258 (1996).

²³ Richard F. Weingroff, *Federal Aid Road Act of 1916: Building the Foundation*, 60(1) PUB. ROADS 2, 2 (1996).

²⁴ Keith Aoki, *Race, Space, and Place*, 20(4) FORDHAM URB. L. J. 699, 741 (1993) (hereinafter: Aoki) (However, it was not fully operating until 1924).

²⁵ Gary T. Schwartz, *Urban Freeways and the Interstate System*, 8 TRANSP. L. J. 168, 173 (1976) (hereinafter: Schwartz).

²⁶ JOSEPH F. DiMENTO & CLIFF ELLIS, *CHANGING LANES: VISIONS AND HISTORIES OF URBAN FREEWAYS 17* (2013) (hereinafter: DiMento & Ellis).

metastasized within American cities.²⁷ Many professionals thought the solution to this “blight” was rooting it out altogether.²⁸ The conventional wisdom was that “in order to save downtown, it was going to be necessary to destroy it.”²⁹ This notion of “blight” was a result of the intersection of two aspects in early twentieth American cities: one social and the other economic.

First, the Great Migration. Around the end of World War I, different factors stemming mainly from the decline in southern agriculture markets and the demand for labor in the industrial north, drove many Black workers to Northeastern and Midwest cities, often lured by recruiting agents from northern factories.³⁰ Within their new cities of residence, Black migrants found themselves restricted by “the color line.”³¹ Borrowing Sugrue’s words, “Blackness and whiteness assumed a spatial definition” in American cities.³² This definition manifested itself in a vicious cycle: “Blacks were poorer than whites and they had to pay more for housing. ... they were confined to the city’s oldest housing stock, in most need of ongoing maintenance, repair, and rehabilitation. But they

²⁷ To some extent, it is still relevant in American land-use discourse, *see*, Matthew Haag & Patrick McGeehan, *Why New York State Insists That the Penn Station Area Is ‘Blighted’*, N.Y. TIMES, Dec. 29, 2022, <https://www.nytimes.com/2022/12/29/nyregion/nyc-penn-station-construction-project.html> [https://perma.cc/KU99-9582].

²⁸ DiMento & Ellis, *supra* note 26, at 3.

²⁹ BERNARD J. FRIEDEN & LYNN B. SAGALYN, *DOWNTOWN, INC.: HOW AMERICA REBUILDS CITIES* 16 (1991) (hereinafter: Frieden & Sagalyn).

³⁰ Aoki, *Supra* note 24, at 751 (“Recruiting agents from northern factories and mills spread out across the southern states, offering free northward transportation and enticing their targets with visions of glowing job prospects in northern factories.”)

³¹ *See generally* RICHARD ROTHSTEIN, *THE COLOR OF LAW* (2017) (hereinafter: Rothstein). In 1935, the Federal Housing Agency published the first *Underwriting Manual*, to provide real estate agents with property-appraisal guidelines for federal mortgage insurance, with the following instruction: “A change in social or racial occupancy generally leads to instability and a reduction in [property] values.” (*Id.* at 65). Rothstein also adds that “The FHA favored mortgages in areas where boulevards or highways served to separate African American families from whites, stating that ‘natural or artificially established barriers will prove effective in protecting a neighborhood and the locations within it from adverse influences ... including prevention of the infiltration of ... lower class occupancy, and inharmonious racial groups’.” (*Ibid.*)

³² Sugrue, *supra* note 7, at 9. *See also* DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID* 39 (1993) (hereinafter: Massey & Denton).

could not get loans to improve their properties. As a result, their houses deteriorated.”³³ This vicious cycle entrapped Black communities within the “blighted” parts of American cities while enabling what was labeled “white flight.”³⁴ To use Richard T. Ford’s words, the term carries “the none-too-subtle implication ... that whites are fleeing black-dominated cities and the problems that black dominance has wrought.”³⁵ For cities, this “white flight” meant a dwindling tax base;³⁶ for suburbs it presented potent possibilities and brought with it the collective-illusion that Americans “all belonged to one big middle class, with technology carrying the entire population forward into a new world of affluence and freedom.”³⁷

Thus, the second aspect that changed American cities at the time was car production. While in 1905, there were approximately 78,000 vehicles registered in the U.S., in 1910 the numbers already neared half a million registered cars; by the end of the 1920s, there were 23 million cars registered.³⁸ This influx of car ownership enabled different residential patterns to emerge, with less dependence on proximity to rail tracks.³⁹ The gradual denaturalization and internationalization of the economy have led to new occupational patterns that were no longer reliant on downtown business districts; it was a move from the

³³ Sugrue, *supra* note 7, at 34-35.

³⁴ Others have suggested “capital flight,” to emphasize that not only institutional-racism has caused this phenomenon, but also other structural economic reasons, *see, e.g.*, Leah Boustan, *The Culprits Behind White Flight*, N.Y. TIMES, May 15, 2017, <https://www.nytimes.com/2017/05/15/opinion/white-flight.html> [<https://perma.cc/3BH7-7P9N>].

³⁵ Richard T. Ford, *Law’s Territory*, 97 MICH. L. REV. 843, 917 (1999).

³⁶ Aoki, *supra* note 24, at 789.

³⁷ DiMento & Ellis, *supra* note 26, at 52. These new suburbs were of course segregated. Within them, practices such as exclusionary zoning and racially restrictive covenants controlled the composition of the population. *See, e.g.*, SONIA HIRT, ZONED IN THE USA 40, 45 (2014); ROBERT C. ELLICKSON, AMERICA’S FROZEN NEIGHBORHOODS 28-37 (2022) (hereinafter: ELLICKSON). *See also* GERALD E. FRUG, CITY MAKING 77 (1999) (hereinafter: Frug (1999)) (“If no suburb excluded the poor or people of color, the nature of central cities would be radically different.”)

³⁸ MIKE H. ROSE & RAYMOND A. MOHL, INTERSTATE: HIGHWAY POLITICS AND POLICY SINCE 1939 2-3 (3rd ed., 2012) (hereinafter: Rose & Mohl).

³⁹ PETER HALL, CITIES OF TOMORROW 291 (1988).

factory floor to fluorescent offices.⁴⁰

Against this backdrop, the idea of the Interstate System materialized. In this section, I will briefly discuss these two interrelated facets of this system: its economic, and society-shaping forces.

1. *Highway Lobby: The Law and Politics of the Interstate System*

In the 1939 New York World's Fair, a single blockbuster exhibition topped all others: The General Motors *Highways and Horizons* Exhibit (Futurama). The exhibition attracted approximately five million visitors that have come "to get a sixteen-minute glimpse at the motorways of the world of tomorrow."⁴¹ This exhibit showcased a future United States crisscrossed with highways spanning, with a particular focus on futuristic urban expressways. The architect of this exhibit, Norman Geddes, stated that the dozens of visitors were captivated by the Futurama vision because they "ride in motor cars and therefore are harassed by the daily task of getting from one place to another ... The Futurama gave them a dramatic and graphic solution to a problem which they all faced."⁴² Every visitor received a pin saying "I have seen the future."⁴³

This tour de force of the American auto industry did not appear in a void. After the reelection of President Roosevelt in 1932, New Deal economists envisioned highways as a boost to the economy after the Great Depression: Highway construction would generate jobs, and convenient highways would aid in safely shipping goods for increasing

⁴⁰ Aoki, *supra* note 24, at 774; Frieden & Sagalyn, *supra* note 29, at 12.

⁴¹ NORMAN BEL GEDDES, *MAGIC MOTORWAYS* 3 (1940).

⁴² *Id.* at 3-4.

⁴³ MCNY Blog: New York Stories, MUSEUM OF THE CITY OF NEW YORK, Nov. 26, 2013, <https://blog.mcny.org/2013/11/26/i-have-seen-the-future-norman-bel-geddes-and-the-general-motors-futurama/> [<https://perma.cc/8R5C-HZ9Q>].

consumption.⁴⁴ In 1938, just a year before *Futurama*, the Federal-Aid Highway Act authorized the Bureau of Public Roads (BPR) to compose a report on the feasibility of such a highway system.⁴⁵

The study, *Toll Roads and Free Roads*,⁴⁶ focused on the need for highways to solve “the sharp enlargement” of traffic in and around cities.⁴⁷ Although the BPR concluded that “only a major operation will suffice” to solve this problem, there were “literally stupendous difficulties and expenses involved” in executing such an operation.⁴⁸ The main expenses were associated with “the acquisition of right-of-way and damage to, or obliteration of, private property.”⁴⁹

But it was, simply put, worth it, because it would aid suburbanization. According to the report, “the motor vehicle ... made possible the outward transfer of the homes of citizens with adequate income from the inner city to the suburbs and it now conveys these citizens daily back and forth to their city offices and places of business.”⁵⁰

Building highways, according to the report, would serve another important social goal: “slum clearance.” The report states that the old home “abandoned” by the new suburbanites “have descended by stages to lower and lower income groups ... Almost untenable, occupied by the humblest citizens, they fringe the business district, and form the city’s slums – a blight near its very core! ...”⁵¹ Parking lots for white suburbanites that often replaced these “blighted” dwellings are referred to in the report as “facilities of higher

⁴⁴ DiMento & Ellis, *supra* note 26, at 24, 40, 53.

⁴⁵ Federal Aid Highway Act § 13 (1938).

⁴⁶ DiMento & Ellis, *supra* note 26, at 53; BUREAU OF PUBLIC ROADS, *TOLL ROADS AND FREE ROADS* (1939) (hereinafter: *Toll Roads and Free Roads*).

⁴⁷ *Toll Roads and Free Roads*, *id.* at 90.

⁴⁸ *Id.* at 94.

⁴⁹ *Id.* at 94.

⁵⁰ *Id.* at 94-95.

⁵¹ *Ibid.*

dignity! ...”⁵² This is a clear association between the racial, classist, and economic justification for suburbanization.

As DiMento and Ellis note, the report is plagued with technological determinism, attributing “city-shaping powers to the automobile.”⁵³ This approach was influenced by the Chicago School of urban sociology, which argued that urban space is produced by “biotic urge,” or social Darwinism.⁵⁴ Thus, the *Toll Roads and Free Roads* report, deploying this theory, explained “blight” as part of a “natural selection” process, that requires razing all the inner city slums to make way for the more socially beneficial urban highways.⁵⁵ The BPR flagged as promising the relatively permanent effect of highways on cities.⁵⁶

However, the report’s recommendations did not materialize. First, President Roosevelt, however, visioned the future highways system connecting cities across the country, not running through their business districts.⁵⁷ Then, World War II halted the development of American infrastructure generally. During the war “homes and highways went unrepaired and traffic on roads near defense plants backed up for miles.”⁵⁸

⁵² *Ibid.*

⁵³ DiMento & Ellis, *supra* note 26, at 57 (“But automobiles are inert objects. Only people using automobiles in particular ways shape cities.”) Gottdiener considers this technological determinism ironic, since “conventional analysts have developed an appreciation for the role of technological innovation as a force of production in the Marxian sense [and] spatial patterns of organization change[s] as a result of social relations of industrial development change[s],” MARK GOTTDIENER, *THE SOCIAL PRODUCTION OF URBAN SPACE* 44-45 (2nd ed., 1994) (hereinafter: Gottdiener). See also Nathaniel Baum-Snow, *Did Highways Cause Suburbanization?*, 122 Q. J. ECON. 775 (2007); Frug (1999), *supra* note 37, at 132 (“The major contribution of the federal government has taken the form of massive financial support for suburbanization. The suburban boom could not have occurred without the funding, provided by the Federal-Aid Highway Act of 1956, for the highways and beltways that now link suburbs with central cities and with each other.”)

⁵⁴ Gottdiener, *id.* at 27-28 (“The early Chicago School maintained a behavioral perspective by connecting human behavior with economic competition and social order with the spatial deployment of the division of labor,” at 29).

⁵⁵ Raymond A. Mohl, *Planned Destruction: The Interstate and Central City Housing*, in *FROM TENEMENTS TO THE TAYLOR HOMES* 226, 230 (2000) (hereinafter: Mohl (2000)).

⁵⁶ Bruce Seely mentioned that the BPR, in *Interregional Highways*, recognized that “highways had a permanent impact on urban development,” BRUCE E. SEELY, *BUILDING THE AMERICAN HIGHWAY SYSTEM: ENGINEERS AS POLICY MAKERS* 182 (1987).

⁵⁷ DiMento & Ellis, *supra* note 26, at 54.

⁵⁸ Rose & Mohl, *supra* note 38, at 15.

Anticipating that this situation will lead to a financial crisis, Roosevelt once again pushed highway construction as a solution.⁵⁹ On April 1941, President Roosevelt appointed a special committee, known as the National Interregional Highway Committee (NIHC) “to investigate the need for a limited system of national highways ... and to advise the Federal Works Administrator as to [the] possibility of utilizing some of the manpower and industrial capacity expected to be available at the end of the war.”⁶⁰ And indeed, when Congress enacted the Defense Highway Act of 1941,⁶¹ it appropriated twenty-five million USD “for carrying out projects to correct critical deficiencies in lines of the strategic networks of highways and bridges” during the war.⁶²

The NIHC report, *Interregional Highways*, mapped out an approximately 34,000-mile interregional highway network, that will go all the way to urban cores.⁶³ The NIHC stated that downtown lands are “cramped, crowded, and depreciated,” and mixed land uses are creating “the slum area where living conditions are poor,”⁶⁴ and therefore should be replaced with highways. Like the 1939 report, *Interregional Highways* presented this as a

⁵⁹ DiMento & Ellis, *supra* note 26, at 60.

⁶⁰ THE NATIONAL INTERREGIONAL HIGHWAY COMMITTEE, INTERREGIONAL HIGHWAYS III (1944) (hereinafter: *Interregional Highways*).

⁶¹ Defense Highway Act of 1941, 23 U.S.C. §§ 101-117.

⁶² *Id.* at § 104(a).

⁶³ Raymond A. Mohl, *Stop the Road*, 30(5) J. URB. HISTORY 674, 677 (2004) (hereinafter: Mohl (2004)). President Roosevelt in his message to Congress at the opening of *Interregional Highways*, states that “the report recommends the designation and improvement to high standards of a national system of rural and urban highways totaling approximately 34,000 miles,” *Interregional Highways*, *supra* note 60. Schwartz states that while the NIHC suggested three possible highway routes, “it was the third largest of these (33,920 miles) which the Committee concluded was ‘optimal’; the system would connect all cities of over 300,000 population, and almost all cities of over 100,000. Over 4,400 of the proposed miles would be located within city boundaries; this mileage was intended to ‘provide direct connection into and through all of [the] cities’ reached by the interregional system. The Committee went on to indicate the general desirability of additional circumferential and disturbing routes within metropolitan areas; it recommended up to 5,000 miles of these as a supplement to the basic 33,920 miles” (Schwartz, *supra* note 25, at 183).

⁶⁴ *Interregional Highways*, *supra* note 60, at 53.

natural process to be addressed using rational planning,⁶⁵ with the automobile being the city's redeemer:⁶⁶ "So long ... as the central areas of the cities are poor places in which to live and rear children, people will continue to move to the outskirts. Undoubtedly a factor that has facilitated this movement had been the improvement of highways."⁶⁷

Driven by the report, a "Highway Lobby" was starting to form. Different interest groups – highway engineers, road builders, truckers – have started to push for an all-encompassing federal legislation that will shape public roads for their own convenience and business interests.⁶⁸ All had their own interest. For truckers, for example, the infrastructure itself was the benefit: If the highways will be federally funded, it could award the trucking industry a substantial edge in freight competition over railroads, with the federal government paying the right-of-way costs.⁶⁹

In 1944, *Interregional Highways* was incorporated into the Federal Highway Act of 1944.⁷⁰ But the funding was not sufficient,⁷¹ and a disagreement between states and the

⁶⁵ "The plight of the cities is due to the most rapid urbanization ever known, without sufficient plan or control. The result is square mile after square mile of developed city that is functionally and structurally obsolete both as to buildings and neighborhoods arrangements," *ibid*.

⁶⁶ "The automobile has made *partial escape* from this undesirable state of affairs easy and pleasant for at least some of the population. Suburban home developments have been made attractive largely by the possibilities of quick and *individual* daily transportation thus afforded," *Interregional Highways*, *id.* at 53-4 (emphases added). The part about "individual ... transportation" stands out as part of the classist future the NIHC envisioned for America, a future which does not entail sharing commutes in public transit.

⁶⁷ *Ibid.* See also Schwartz, *supra* note 25, at 254. "It is highly important that this force be so applied as to promote a desirable urban development. If designed to do this, the new facilities will speed such a development and grow in usefulness with the passage of time ... The interregional highways must be designed for long life," *Interregional Highways*, *supra* note 60, at 55.

⁶⁸ Mohl (2004), *supra* note 63, at 677.

⁶⁹ See e.g., Daniel P. Moynihan, *New Roads and Urban Chaos*, REPORTER, Apr. 14, 1960, available at https://www.ahenryrose.com/uploads/7/9/6/4/79645630/new_roads_urban_chaos_daniel_patrick_moynihan.pdf [<https://perma.cc/26KV-E794>].

⁷⁰ Schwartz, *supra* note 25, at 233. Public Laws, Ch. 625 (Dec. 20, 1944). Section 7 of the Act reads: "There shall be designated within the continental United States a National System of Interstate Highways not exceeding forty thousand miles in total extent so located as to connect by routes, as direct as practicable, the principal metropolitan areas, cities, and industrial centers, to serve the national defense, and to connect at suitable border points with routes of continental importance ..."

⁷¹ The 1944 Act allocated \$375 million for urban highway construction, but the Clay Committee found that these highways would require \$15 billion to build. The Clay Committee was established by President

federal government regarding how to construe the Joint Action Clause of the 1944 Act⁷² further delayed the project.

The Highway Lobby, however, was not ready to give up. It found associating highway construction with “slum clearance” to be its best strategy for selling the project. In 1949, the American Road Builders Association communicated to President Truman that the routing of the Interstate System through cities could “contribute in a substantial manner to the elimination of slum and deteriorated areas.”⁷³ The Urban Land Institute (ULI), founded in 1936, represented the interests of downtown real estate owners and developers. In the decade following WWII, ULI’s Central Business District Council focused on urban freeways as “the salvation of the central district, the core of every city.”⁷⁴ The Automotive Safety Foundation, in a pamphlet entitled *What Freeways Mean to Your City*, argued that “freeways were desirable, beneficial, and beautiful, they stimulated rising land values and prevented ‘the spread of blight and ... slums’.”⁷⁵

In other words, proponents of the system spoke of “killing two birds with one stone”:

Eisenhower in 1954 to report on special funding for the Interstate System. It was chaired by General Lucius D. Clay, a longtime Eisenhower confidant, *see* Schwartz, *supra* note 25, at 187. Clay, testifying before the Senate’s Subcommittee on Public Roads in 1955, stated that as a result of the hearings conducted by the Clay Committee, “we became convinced, first, that our present highway system had not kept pace with the growth of the automobile in this country, and, secondly, that the immediate plans for construction would not only not keep pace with the present demands, but would be entirely inadequate for the anticipated growth of traffic if the present trend in that growth continues,” Statement of General Lucius D. Clay Chairman, President’s Advisory Committee on a National Highway Program, U.S. Senate Subcommittee on Public Roads (84th Congress, March 11, 1955).

As Robert Goodman shows, these conclusions are not surprising considering that alongside Clay, the committee was comprised of David Beck, the International Brotherhood of Teamsters president; S. Sloan Colt, president of Bankers Trust Company; William A. Roberts, Allis-Chalmers president (road-building equipment manufacturer); and Stephen D. Bechtel, president of the Bechtel Construction Corporation. “So strong are the business interests guiding Washington’s highway programs that when Congress called for a \$6 billion cut in government spending in 1968 in order to continue the blood bath in Vietnam, its \$12.3 billion 1968 Highway Act added still more mileage to the highway program,” ROBERT GOODMAN, *AFTER THE PLANNERS* 114 (1972) (hereinafter: Goodman).

⁷² Federal-Aid Highway Act §§ 2-3 (1944).

⁷³ Rothstein, *supra* note 31, at 128;

⁷⁴ Mohl (2000), *supra* note 55, at 232.

⁷⁵ Mohl (2000), *id.* at 233.

Improving traffic conditions *and* removing undesirable residents and buildings.⁷⁶ The president of the American Association of State Highway Officials (AASHO), Alfred (Alf) Johnson, was later quoted stating 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 ‘n---rtown.’”⁷⁷

In 1947, the Chief of the Bureau for Public Roads, Thomas H. MacDonald, made a number of steps to promote the lagging Interstate System, specifically within cities. First, MacDonald made *The Case for Urban Expressways* in an article by that name,⁷⁸ and in a speech at the U.S. Chamber of Commerce Conference on “Urban Problems.”⁷⁹ Second, in 1947 an agreement was reached between the BPR and state highway departments.⁸⁰

In 1955, the BPR released the *General Location of National System of Interstate Highways*, commonly known as the Yellow Book,⁸¹ designating the suggested locations for the interstate system to be built. A typical plan introduced by the Yellow Book for large metropolitan areas showed “an inner belt road around downtown, an outer belt highway circling the suburbs, and one or more radial highways connecting the suburbs to the city center.”⁸² This concretization of the interstate system, with specific designations, had a

⁷⁶ Deborah N. Archer, “*White Men’s Roads Through Black Men’s Homes*”: *Advancing Racial Equity Through Highway Reconstruction*, 73(5) VAND. L. REV. 1259, 1277 (2020) (hereinafter: Archer (2020)).

⁷⁷ Schwartz, *id.* at 239 n.481; Frieden & Sagalyn, *supra* note 29, at 28; Rothstein, *supra* note 31, at 128; Archer (2020), *supra* note 76, at 1275.

⁷⁸ DiMento & Ellis, *supra* note 26, at 76.

⁷⁹ Referring to housing demolitions as a result of highway construction, MacDonald said that “it is a happy circumstance that living conditions for the family can be re-established and permit the social as well as economic decay at the heart of the cities to be converted to a public asset,” cited in Mohl (2000), *supra* note 55, at 231.

⁸⁰ Schwartz, *supra* note 25, at 184. 37,800 of Section 7’s 40,000 miles could be designated by the Bureau, with almost 3,900 miles of which in urban areas.

⁸¹ U.S. Department of Commerce, Bureau of Public Roads, *General Location of National System of Interstate Highways*, Sept. 15, 1955, available at https://en.wikisource.org/wiki/General_Location_of_National_System_of_Interstate_Highways [https://perma.cc/HT5G-AQKB].

⁸² Frieden & Sagalyn, *supra* note 29, at 21.

“probable effect” of rendering the highway program “more attractive to Congressmen [representing] urban areas where Interstates were specifically displayed.”⁸³ A new momentum was building.⁸⁴

When elected as president, Eisenhower was determined to change the decentralized funding scheme of the former Federal Highway Aid Acts.⁸⁵ Therefore, the Federal-Aid Highway Act of 1956 addressed the funding issue with three main tools: A 90 percent federal share in the cost of highway construction;⁸⁶ an increase in several federal highway-user taxes, including the gas and tire taxes,⁸⁷ and a new annual licensing tax for heavy vehicles;⁸⁸ and the establishment of a Highway Trust Fund, into which all of these taxes will be pooled and would be automatically funneled into federal highway grants.⁸⁹

As Robert Goodman notes, the 90-10 funding formula made it an “irresistible inducement” for states to build highways and funnel those funds:⁹⁰ “Considering Washington’s enormous contribution to state economies through its 90 percent underwriting of state highway building, it shouldn’t be very surprising that the states will

⁸³ Schwartz, *supra* note 25, at 193.

⁸⁴ There was also a more prosaic reason for the growing need for the system: Changes in automobile design in the 1950s resulted in larger, heavier, and more powerful cars and trucks, leading to increased traffic volumes; this necessitated wider lanes and stronger pavements, DiMento & Ellis, *supra* note 26, at 95.

⁸⁵ Campbell Haynes, *One Mile North*, 8 BELMONT L. REV. 1, 7 (2020) (hereinafter: Haynes); Rose & Mohl, *id.* at 70.

⁸⁶ Federal-Aid Highway Act 1956, § 108 (e) ((23 USC 60(e)). This share included eminent domain expenses of acquiring right-of-way, *id.* at § 109(a) (40 USC 258a).

⁸⁷ Highway Revenue Act of 1956, §§ 202, 204 (26 USC 4041, 4071).

⁸⁸ “Increase in Tax on Trucks, Truck Trailers, Buses, Etc.” *Id.* at § 203 (26 USC 4061). Vehicles heavier than 26,000 pounds. Initially, these changes faced opposition from the Highway Lobby: The rubber and petrol industries condemned raising fuel and tire taxes; the bus and trucking industries, including the Teamsters’ Union, rejected the bill when it was first introduced due to its levying of large vehicle tax, and differential tax on heavy vehicles; and the American Auto Association argued that the taxes on large vehicles were not substantial enough, *see*, Rose & Mohl, *supra* note 38, at 86; Schwartz, *supra* note 25, at 193.

⁸⁹ *Id.* at § 209. Rose and Mohl mention that this Highway Trust was a way to appease auto, trucking associations, and state road engineers, that had complained for years that states collect taxes from highway users but spend them on non-highway expenses. Different states tried to tackle that with “anti-diversion” clauses in state legislation and even in state constitutions (*see infra* note 224). The Trust made this “anti-diversion” automatic in regard to federal taxes and funding, *see* Rose & Mohl, *supra* note 38, at 90.

⁹⁰ Goodman, *supra* note 71, at 114

build almost anything to bring home the federal largess.”⁹¹

With the promise of forty-one thousand miles of free roads crisscrossing the country,⁹² to be completed over 13 years,⁹³ the Interstate Highway System was according to Eisenhower “the biggest peacetime construction project of any description ever undertaken by the United States or any other country.”⁹⁴ As David Harvey neatly narrated: “The highway lobby in the United States, the automobile, oil, and rubber industries and the construction interests, changed the face of America and used the coercive power of the built environment to ensure rational growth in the consumption of their products.”⁹⁵

2. *Race Cars: The Social Planning Power of Urban Highways*

Federal Highway Acts were legislated multiple times and eventually extended the initial thirteen-year deadline for building the interstate system to a forty-year one.⁹⁶ But almost none of these laws addressed the mass displacements caused by the construction of this system. Although the House’s 1956 Federal Highway Bill did contain a provision including relocation expenses within the 90 percent funding for construction, this provision was deleted by the Public Works Committee in the Senate.⁹⁷

⁹¹ *Id.* at 117. The Highway Act of 1962 required states to submit by 1965 a comprehensive transportation planning process, to assure that highway funds are not being spent on needless roads for state highway departments to support local contractors, DiMento & Ellis, *supra* note 26, at 118-19. All of the then-existing urban areas included in the Act (224 in number) initiated an urban transportation process, *id.* at 119.

⁹² Federal-Aid Highway Act 1956, § 108(l) (23 USC 260). Of those 41,000 miles, 6,100 were in urban areas. Later amendments enhanced the mileage authorization to 42,500 miles and enlarged the urban share to 8,600 miles, Frieden & Sagalyn, *supra* note 29, at 21.

⁹³ *Id.* at § 108(a), “It is the intent of the Congress that the Interstate System is completed as nearly as practicable over a thirteen-year period and that the entire System in all the States be brought to simultaneous completion.” There was also a sunset provision in the legislation, expiring the Highway Trust on June 30, 1973, *id.* at § 209(e)(1).

⁹⁴ DWIGHT D. EISENHOWER, MANDATE FOR CHANGE 548 (1963).

⁹⁵ David Harvey, *Labor, Capital, and Class Struggle Around the Built Environment in Advanced Capitalist Societies*, 6(3) POLITICS & SOC. 265, 279 (1976).

⁹⁶ Haynes, *supra* note 85, at 8. Highways Acts were legislated in 1959, 1961, 1965, 1966, 1968, 1970, 1973, and so on, until 1996.

⁹⁷ Schwartz, *supra* note 25, at 237; Rothstein, *supra* note 31, at 131; Mohl (2000), *supra* note 55, at 231. This, perhaps, was part of a larger trend, considering the fact that these freeways were already more expensive

The 1956 Act, however, provided a provision mandating public hearings for highways “involving the bypassing of, or going through, any city, town, or village.”⁹⁸ needed to But as Bridget Fahey has shown, “what counts as an appropriate ‘public hearing,’ a term not defined in the statute, has been highly contested.”⁹⁹ For example, when public hearing regarding I-40 in Nashville was announced for the wrong day,¹⁰⁰ the Sixth Circuit did not find a violation of the requirement.¹⁰¹

The Yellow Book’s designations routed “a disproportionate number of Interstates . . . through low-income neighborhoods,”¹⁰² in which right-of-way costs were lower and the destruction generated less political resistance.¹⁰³ According to one estimate, the Interstate System is responsible for the displacement of 1 million persons.¹⁰⁴

Relocation assistance was not provided until the Federal-Aid Highway Act of 1962 and was gradually bolstered in the 1968 and 1970 Acts.¹⁰⁵ In addition, in 1971 Congress enacted the Uniform Relocation Assistance and Real Properties Acquisition Acts (or the

than rural ones (some report states \$364,000 per mile against \$2 million per mile); the difference stemmed mainly from the cost of land, see Schwartz, *Id.* at 241. “Council of Economic Advisors chairman Arthur Burns warned [in 1956] that compensation would ‘run up costs’ of the highway program, predicting that the system would evict nearly 100,000 people a year as it grew,” Rothstein, *ibid.*

⁹⁸ Federal-Aid Highway Act 1956, § 116(c) (40 USC 276). State highway departments had to provide the BPR with a transcript of a public hearing on the matter, or show that it “has afforded the opportunity for such hearings, and has considered the economic effects of such a location.”

⁹⁹ Bridget A. Fahey, *Coordinated Rulemaking and Cooperative Federalism’s Administrative Law*, 132 *YALE L. J.* 1320, 1350 (2023).

¹⁰⁰ JOHN BURBY, *THE GREAT AMERICAN MOTION SICKNESS: OR WHY YOU CAN’T GET THERE FROM HERE* 103 (1971).

¹⁰¹ Because “no literate citizen of the Nashville community could have been unaware” of the proposed highway, since it was published in the newspapers beforehand, *Nashville I-40 Steering Committee v. Ellington*, 387 F.2d 179, 183 (1967). Haynes cites a memo written by one of Justice Warren’s clerks in the U.S. Supreme Court, arguing for granting certiorari in this case because they believed that § 116 was misinterpreted, Haynes, *supra* note 85, at 38.

¹⁰² Schwartz, *id.* at 238.

¹⁰³ Aoki, *supra* note 24, at 744. Mohl (2000), *supra* note 55 at 234. See also *supra* notes 30-34 and accompanying text (the ghettoization of the urban Blacks, and the spatial definition of race).

¹⁰⁴ ALAN A. ALTSHULER, *THE CITY PLANNING PROCESS* 339 (1965). Frieden and Sagalyn used the figure of “some 330,000 families through 1967,” Frieden & Sagalyn, *supra* note 29, at 29.

¹⁰⁵ Schwartz, *supra* note 25, at 237.

“Uniform Act”), which required federal, state, and local agencies to provide relocation assistance whenever they displace property owners.¹⁰⁶ However, while homeowners have been eligible for federal monetary compensation,¹⁰⁷ the more economically and politically infringed group of tenants could only receive “advisory services” regarding alternative housing solutions,¹⁰⁸ “nothing more than advice on where to look for a place to live.”¹⁰⁹ Moreover, by the time the legislation passed, the bulk of displacements caused by the development of the interstate system have already been done.¹¹⁰

The mass displacements and other social and spatial impacts of urban freeways did not go unnoticed or unprotested. Over the late 1960s and early 70s there was a shift in perspective among the general public and the planning community. Highways were no longer were a tool of “blight removal” but perceived as a “dagger in the heart of town.”¹¹¹ The first explicit change in the system’s routing was instigated by citizens of San Francisco, after roughly a decade of protests against the suggested extension of the Embarcadero Freeway into Golden Gate Park.¹¹² In 1965 the city’s Board of Supervisors halted the plan altogether.¹¹³ Residents of cities such as New York, Miami, New Orleans, and Boston,

¹⁰⁶ Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105(1) MICH. L. REV. 101, 121 (2006).

¹⁰⁷ 42 U.S. Code § 4622 (a)-(c). “As Francis C. Turner, Federal Highway Administrator, put it, ‘Now we have to change people’s minds and sell them on a relocation plan. Before,’ continued Turner, ‘we just bought property and relocation was their [the states’] responsibility.’ Instead of simply designing a highway and ramming it down the community’s throat, ‘interdisciplinary teams’ of experts, often including ‘community representatives,’ are now put together to find soothing alternative,” Goodman, *supra* note 71, at 121.

¹⁰⁸ 42 U.S. Code § 4625 (c)(2) (“(c) Each relocation assistance advisory program ... shall include such measures, facilities, or services as may be necessary or appropriate in order to ... (2) provide current and continuing information on the availability, sales prices, and rental charges of comparable replacement dwellings for displaced homeowners and tenants and suitable locations for business and farm operations.”).

¹⁰⁹ Frieden & Sagalyn, *supra* note 29, at 31.

¹¹⁰ Mohl (2000), *supra* note 55 at 231; Schwartz, *supra* note 25, at 237.

¹¹¹ See Gordon Fellman, Barbara Brandt, and Roger Rosenblatt, *Dagger in the Heart of Town*, 7 TRANS-ACTION 38 (1970); see also DiMento & Ellis, *supra* note 26, at 153.

¹¹² Haynes, *supra* note 85, at 10.

¹¹³ Schwartz, *id.* at 205; see generally Katherine M. Johnson, *Captain Blake versus the Highwaymen: Or, How San Francisco Won the Freeway Revolt*, 8(1) J. PLAN. HIST. 56 (2009).

protested against new urban expressways,¹¹⁴ in what became known as the *Highway Revolts*.

The revolts had mixed results. New Orleans is a striking example. A local coalition of preservationists successfully killed plans to extend the I-10 highway through the city's French Quarter.¹¹⁵ But the alternative route for this highway, known as the Claiborne Expressway, was in the city's predominantly Black neighborhood of Tremé.¹¹⁶ Unlike the preservationists, Tremé's residents just "didn't have the political clout, the get-your-representative-on-the-phone political access to stop it," as local geographer Richard Campanella told the *New York Times*.¹¹⁷ As Deborah Archer puts it, concerns such as preservation were all "raised and prioritized by white communities – *not* the Black communities that were segregated, stifled, and suppressed by interstate highways."¹¹⁸

In an effort to further coordinate federal spending on highways nationwide, the Department of Transportation (DOT) was created in 1966.¹¹⁹ The first secretary of transportation, Alan S. Boyd, seemed attentive to the civil outcry. Speaking in California in 1967, Boyd stated that "the so-called freeway revolts around the country have been a

¹¹⁴ See generally TOM LEWIS, *DIVIDED HIGHWAYS* 179-210 (2013) (hereinafter: Lewis); Mohl (2004), *supra* note 63; see also KARILYN CROCKETT, *PEOPLE BEFORE HIGHWAYS* 1, 7-8 (2018) (hereinafter: Crockett); Goodman, *supra* note 71, at 58 ("Cambridge is a city, not a highway").

¹¹⁵ Mohl (2004), *supra* note 63, at 682; Lewis, *id.* at 209.

¹¹⁶ Congress for the New Urbanism, *Claiborne Express*, available at <https://www.cnu.org/what-we-do/build-great-places/claiborne-expressway> [<https://perma.cc/XH35-QFKJ>].

¹¹⁷ Audra D. S. Burch, *One Historic Black Neighborhood's Stake in the Infrastructure Bill*, *N.Y. TIMES*, Nov. 20, 2021, <https://www.nytimes.com/2021/11/20/us/claiborne-expressway-new-orleans-infrastructure.html> [<https://perma.cc/ZQK3-76CJ>]; "some people didn't even realize it was happening until the backhoes showed up," *ibid.*

¹¹⁸ Deborah N. Archer, *Transportation Policy and the Underdevelopment of Black Communities*, 106 *IOWA L. REV.* 2125, 2137 (2021) (hereinafter: Archer (2021)). For an account of how historic preservation disparately displaces Black communities (or "another example of whites deciding what is best for [B]lacks") see Michael deHaven Newsom, *Blacks and Historic Preservation*, 36(3) *L. & CONTEMP. PROBS.* 423 (1971) (arguing that historic preservation has often been "lobb[ie]d by middle- and upper-class-whites," and that "the goals and methods of those interested in restoration need to be reexamined to accommodate black aspirations," *id.* at 431).

¹¹⁹ DiMento & Ellis, *supra* note 26, at 118-19.

good thing.”¹²⁰ Boyd believed that more citizens’ involvement in highway decision-making was called for, and in 1968 even asserted that urban highways should be “an integral part of the community, not a cement barrier or concrete river which threatens to inundate an urban area.”¹²¹

Two years later, and after the replacement of Boyd with John A. Volpe,¹²² the Federal Highway Administration shared its own vision of highways being “an integral part of the community.” The Administration, in a press release, envisioned highways reutilized in part as “a basketball court laid out under a structurally modern viaduct.”¹²³

This picture of prosperity under the highway was of course quite far from the truth. Although the Interstate System did provide economic opportunities and afforded the increase of U.S. homeownership by 50 percent in the suburbs,¹²⁴ these new opportunities were available almost exclusively to white Americans.¹²⁵ This was intentional. In a 1967 New York Times article, a journalist was astonished to report that “no longer is it sufficient for a highway to carry vehicles efficiently and speedily from Point A to Point B. Now ...

¹²⁰ Cited in Mohl (2004), *supra* note 63, at 681.

¹²¹ *Ibid.*

¹²² Volpe, appointed by Nixon, was described as a “hard-line road builder” who “possessed a record of unfettered prohighwayism” and “identified more with roads than with transportation,” THE GREAT AMERICAN MOTION SICKNESS, *supra* note 100, at 57 (see also Mohl (2004), *supra* note 63, at 682). Volpe previously served as the governor of Massachusetts, where he pushed for the expansion of the Massachusetts Turnpike twelve miles into the heart of Boston, Lewis, *supra* note 114, at 207. Lewis argues that the John A. Volpe Construction Company was procured to build the new DOT headquarters at 400 Seventh Street, Washington D.C. in 1969, *ibid.*

¹²³ Department of Transportation, Federal Highway Administration, News, Feb. 16, 1970, available at <https://books.google.com/books?id=-d4gAQAAMAAJ&pg=RA1-PP11&lpg=RA1-PP11&dq#v=onepage&q&f=false> [<https://perma.cc/VS6R-SBPS>]; “The budding basketball star of tomorrow could be a kid who learned how to dribble, pass and shoot because an interstate highway came through his neighborhood. And this same youth, who willed away hours of his life wondering what to do next, can now cavort on a basketball court laid out under a structurally modern viaduct.” See also Goodman, *supra* note 71, at 121.

¹²⁴ Aoki, *supra* note 24, at 789.

¹²⁵ Kevin Douglas Kuswa, *Suburbification, Segregation, and the Consolidation of the Highway Machine*, 3 J. L. Soc’y 31, 47 (2002).

it should contribute to the development of the neighborhood's economic and social life.”¹²⁶

This “development” was entrenched in the built environment. Highways reproduced exclusionary-zoning maps planners were legally prohibited from executing.¹²⁷ As Richard Rothstein described this process in Miami: “In 1965, 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.”¹²⁸ In Birmingham, Alabama, for example, I-65 “followed the boundaries drawn by the racial zoning maps.”¹²⁹

Numerous communities were ruined by urban freeways. I-94 in St. Paul, Minnesota, built in 1956, displaced one-seventh of the city’s population of Black residents.¹³⁰ In Miami, I-95 “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 [the city],”¹³¹ displacing about 10,000.¹³² In Pittsburgh, Pennsylvania, I-579 cut through Hill District, a local Black community, displacing thousands of people – reducing the district’s population from 54,000 residents in 1950 to approximately 9,500 in the 2010s,¹³³ less than

¹²⁶ B. Drummond Ayres, Jr., ‘White Roads Through Black Bedrooms’, N.Y TIMES, Dec. 31, 1967, <https://timesmachine.nytimes.com/timesmachine/1967/12/31/96981459.html?pageNumber=97> [<https://perma.cc/4ME2-42HQ>] (“Plans that do not include sociological, economic, and aesthetic considerations simply will not be approved by Washington.”)

¹²⁷ Aoki, *supra* note 24, at 744.

¹²⁸ Rothstein, *supra* note 31, at 129.

¹²⁹ Archer (2020), *supra* note 76, at 1284.

¹³⁰ Archer (2021), *supra* note 118, at 2135. For an illuminating visualization of the way highway I-94 dissected the Rondo neighborhood, see Rachael Dottle et al., *What It Looks Like to Reconnect Black Communities Torn Apart by Highways*, BLOOMBERG, July 28, 2021, <https://www.bloomberg.com/graphics/2021-urban-highways-infrastructure-racism/> [<https://perma.cc/ZTP9-YYHJ>]. This article offers enlightening infographics on a number of other urban freeways with the similar history: Chattanooga, Tennessee (I-24); New Orleans, Louisiana (I-10); Detroit, Michigan (I-94, I-75); Cincinnati, Ohio (I-75, I-71); Houston, Texas (I-10, I-69, I-610). “Very few Blacks lived in Minnesota, but the road builders found them,” (attributed to Altshuler, *supra* note 104), Archer, *ibid*; David Karas, *Highway to Inequality*, 7 NEW VISIONS FOR PUB. AFF. 9, 15 (2015).

¹³¹ Archer (2020), *supra* note 76, at 1278.

¹³² Raymond A. Mohl, *Interstating Miami*, 60 TEQUESTA: J. HIST. ASS’N S. FLA. 5, 5, 12, 17 (2008).

¹³³ Archer (2021), *supra* note 118, at 2135.

it had in 1890.¹³⁴ In Syracuse, New York, where I-81 functions as a “Berlin Wall,” separating the haves and have-nots,¹³⁵ the highway was built as a “line of demarcation between white communities and people of color.”¹³⁶

Highways not only preserved existing racial lines and economic boundaries, but also created new ones, echoing the vicious cycle of blight that was discussed above.¹³⁷ For example, in the demolition of Jefferson Street in North Nashville, Tennessee, home to eighty percent of all businesses owned by African Americans in the city, the entire community business center was erased.¹³⁸ More than 100 local businesses and six Black churches, in addition to making fifty local streets dead-ended.¹³⁹ Customers could not access local businesses because pedestrian movement became near impossible due to highways;¹⁴⁰ it also destroyed the possibility of community building through daily social and economic interactions, leaving small city businesses to close or move.¹⁴¹ Numerous such socialization sites were demolished to make room for highways: churches, schools,

¹³⁴ “Beginning in the 1910s, the Hill attracted migrants from elsewhere in the United States (particularly from the rural American South in the Great Migration) and abroad. The neighborhood’s Black population grew rapidly from around 10,000 in 1890 to over 37,000 by 1920,” African American Registry, People, Location, Episodes, The Hill District (Pittsburgh, PA), a Story, <https://aaregistry.org/story/the-hill-district-pittsburgh/> [<https://perma.cc/2QVJ-GZ7K>].

¹³⁵ *Id.* at 2140.

¹³⁶ Archer (2021), *supra* note 118, at 2139-140.

¹³⁷ See *supra* note 33 and accompanying text. See also Archer (2020), *supra* note 76, at 1290 (“As jobs moved to the suburbs, residents remaining in city centers struggled to find jobs because of racism, further perpetuating a cycle of poverty”) and at 1293 (“The cycle is self-perpetuating.”)

¹³⁸ Archer (2020), *supra* note 76, at 1289; Haynes, *supra* note 85, at 32 (“These businesses had nowhere to move – due to exclusionary zoning and Jim Crow – and it seemed like their customers would begin to frequent the white-owned shopping mall just to the north.”)

¹³⁹ Archer (2020), *ibid.*

¹⁴⁰ “In all this express highway planning ... nowhere has the writer seen any provision for the pedestrian – he is the forgotten man,” DiMento & Ellis, *supra* note 26, at 78.

¹⁴¹ Archer (2020), *supra* note 76, at 1294-295. For a contemporary account on effects of limited pedestrian movement on downtown businesses, and their subsequent move to the suburbs, see Conor Dougherty & Emma Goldberg, *What Comes Next for the Most Empty Downtown in America*, N.Y. TIMES, Dec. 17, 2022, <https://www.nytimes.com/2022/12/17/business/economy/california-san-francisco-empty-downtown.html> [<https://perma.cc/V5WY-XTD2>].

businesses, and parks.¹⁴² As Raymond Mohl described this scene, “I-40 demolished more than 620 [B]lack homes *It separated children from their playgrounds and schools, parishioners from their churches, and businesses from their customers.*”¹⁴³

The case of Hamtramck, Michigan highlights the interplay between the socio-economic implications of the Interstate System and the capital capture logic of the Highway Lobby that drove it into being.

The City of Hamtramck is located outside Detroit. Starting in 1962, the City initiated an “urban renewal” project. Securing federal funds from the Department of Housing and Urban Development, it started to evict residents in the southwestern corner of the city for the Chrysler Corporation to expand its plant into the area.¹⁴⁴ Residents were displaced and their homes “converted into a huge parking lot for Dodge Main, Chrysler Corporation’s Assembly Plant, and for additional industrial and commercial establishments.”¹⁴⁵ In 1966, a portion of I-75 was constructed in the area to support the plant. For the construction of this highway segment, referred to locally as the Chrysler Expressway, more “blighted” houses in this part of the city were razed.¹⁴⁶ It was later found by the district court, as a matter of fact, that the construction was a part of the city’s “planned program of population loss.”¹⁴⁷ Hamtramck’s population decreased by some 10,000 people that decade,¹⁴⁸ this

¹⁴² Archer (2020), *supra* note 76, at 1295; *see generally*, Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherent Public Property*, 53(3) U. CHI. L. REV. 711 (1986) (socialization sites).

¹⁴³ Raymond A. Mohl, *Citizen Activism and Freeway Revolts in Memphis and Nashville*, 40(5) J. URB. HIST. 827, 880 (2014) (emphasis added).

¹⁴⁴ *Garrett v. Hamtramck*, 503 F.2d 1236, 1239 (6th Circuit, 1974) (hereinafter: *Garrett* (1974)).

¹⁴⁵ *Garrett v. Hamtramck*, 335 F. Supp. 16, 20 (1971) (hereinafter: *Garrett* (1971)).

¹⁴⁶ *Garrett* (1974), *supra* note 144, at 1239 (“It is undenied that both white and Negro residents were displaced by these two projects, with a majority of those being displaced at least in the Smith-Clay area, being Negro.”)

¹⁴⁷ *Garrett* (1971), *supra* note 145, at 20 (“These activities coupled with racially discriminatory private housing practices were substantially responsible for causing a decrease in the Black population of the City from 14.5% in 1960 to approximately 8.5% in 1966; meanwhile, surrounding municipalities experienced substantial increases in their Black population,” *Id.* at 22); *Garrett* (1974), *supra* note 144, at 1242.

¹⁴⁸ *Garrett* (1974), *supra* note 144, at 1239 (from approx. 37,000 residents to approx. 26,400).

decrease was not equally suffused: “Although Blacks constituted less than 15% of the City’s population at the time, more than 70% of the persons removed from the City by the construction of the expressway were Black.”¹⁴⁹

Eventually, after the third iteration of the case, the city settled.¹⁵⁰ It committed to building more than a hundred new houses in a new public project. As will be discussed in parts II-III of this paper, building housing might be a desired strategy to mitigate the impacts of urban highways. The Hamtramck public housing project, though, was not completed until forty years later, in 2015,¹⁵¹ with three houses still in the process of being built as of July 2022.¹⁵² In 2018, The “Sarah Sims Garrett Memorial Park” opened at an entry point to I-75, commemorating the instigator of the lawsuit.¹⁵³

* * * *

Today, communities of color continue to be segregated and suppressed by urban freeways. Divisive highways continue to be built today within American cities, and specifically within Black communities.¹⁵⁴ Vast amounts of federal and state money is still

¹⁴⁹ Garrett (1971), *supra* note 145, at 20.

¹⁵⁰ Garrett v. Hamtramck, 394 F. Supp. 1151 (1975).

¹⁵¹ Eric D. Lawrence, *Displaced Families Get Homes to Help Settle 1968 Case*, DETROIT FREE PRESS, Sept. 9, 2015, <https://www.freep.com/story/news/local/michigan/wayne/2015/09/09/displaced-families-get-homes-help-settle-1968-case/71963774/> [<https://perma.cc/9YS7-NE2G>]; Keith A. Owens, *Justice at Last: Housing Discrimination Lawsuit Finally Ends*, Sept. 9, 2015, <https://michiganchronicle.com/2015/09/09/justice-at-lasthousing-discrimination-lawsuit-finally-comes-to-a-close/> [<https://perma.cc/W74P-KYSP>].

¹⁵² Charles Sercombe, *Funding is in Place to Build the Last Houses to Settle a City Lawsuit*, THE HAMTRAMCK REVIEW, July 29, 2022, <http://www.thehamtramckreview.com/funding-is-in-place-to-build-the-last-houses-to-settle-a-city-lawsuit/> [<https://perma.cc/N5B5-RBCZ>].

¹⁵³ Charles Sercombe, *New Park Dedicated to Housing Discrimination Victims*, THE HAMTRAMCK REVIEW, Nov. 30, 2018, <http://www.thehamtramckreview.com/new-park-dedicated-to-housing-discrimination-victims/> [<https://perma.cc/X4GM-JGS4>]; Biba Adams, *Your Guide to Metro Detroit’s Juneteenth Activities*, MODEL D, June 7, 2021, <https://www.modeldmedia.com/features/juneteenth-2021.aspx> [<https://perma.cc/J2YG-CW82>].

¹⁵⁴ See, e.g. Wesley Morris, *How a Highway Divided a Community in Philadelphia*, N.Y. TIMES, June 9, 2022, <https://www.nytimes.com/2022/06/09/podcasts/still-processing-highways-biden-infastructure.html> [<https://perma.cc/F5CP-4UD5>] (hereinafter: Morris).

being invested in existing urban freeways.¹⁵⁵

In a memo regarding “Our Nation’s and the Federal Government’s History of Discriminatory Housing Practices and Policies,” signed by President Biden in his first week in office, he acknowledged that “many urban interstate highways were *deliberately* built to pass through Black neighborhoods, often requiring the destruction of housing and other local institutions. *To this day*, many Black neighborhoods are disconnected from access to high-quality housing, jobs, public transit, and other resources ...”¹⁵⁶

The lingering legacy of highways persists today in many communities of color. In Philadelphia, for example, the Vine Street Expressway dissects Chinatown right in the middle, separating the community from the Holy Redeemer Catholic Church and School. To this day, the community’s children have to cross the 10-line expressway twice a day to school and back, and the community’s elders need to cross it to reach the local food bank.¹⁵⁷

B. Discussion: The Law and Political Economy of Urban Highways

In 1958, when the renowned urbanist Lewis Mumford looked at the newly established Interstate System, what he saw was a disaster in the making: “When the American people, through their Congress, voted a little while ago (1957) [sic] for a twenty-six-billion-dollar highway program, the most charitable thing to assume about this action is that they hadn’t

¹⁵⁵ See, e.g. Adam Paul Susaneck, *Mr. Biden, Tear Down This Highway*, N.Y. TIMES, Sept. 8, 2022, <https://www.nytimes.com/interactive/2022/09/08/opinion/urban-highways-segregation.html> [<https://perma.cc/YT9J-LQUT>].

¹⁵⁶ “The effects of these policy decisions continue to be felt, as racial inequality still permeates land-use patterns in most U.S. cities and virtually all aspects of housing markets ... In addition, people of color disproportionately bear the burdens of exposure to air and water pollution ...” (emphases added), Joseph R. Biden Jr., The White House, *Memorandum on Redressing Our Nation’s and the Federal Government’s History of Discriminatory Housing Practices and Policies*, Jan. 26, 2021, available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-redressing-our-nations-and-the-federal-governments-history-of-discriminatory-housing-practices-and-policies/> [<https://perma.cc/VN8F-G38R>].

¹⁵⁷ Morris, *supra* note 154 (Eddie Wong, the housing manager of On Lok House [in Chinatown], described the walks as a real-life game of Frogger ... if Frogger was played by an 80-year-old with a shopping cart.”)

the faintest notion of what they were doing.”¹⁵⁸ Mumford predicted that “within the next fifteen years they will doubtless find out; but by that time it will be too late to correct all the damage to our cities and countryside, not least to the efficient organization of industry and transportation.”¹⁵⁹ Fifteen years later, when political scientist Daniel Moynihan looked at what this program has in fact brought, he agreed with Mumford’s prophecy: it was “too late: most systems have already been built.”¹⁶⁰

In this section, I will tackle the two major points raised by these two thinkers: were the policymakers clueless in committing to the highway’s vision, or had they a “notion of what they were doing”; I will then ask: Is it really too late?

As we saw above, the American Interstate System did more than just connect the country: it changed the American landscape to this day. Highways served as physical barriers to the development of myriad communities of color across the country while destroying others, mainly poor and Black neighborhoods; they were another brick in the wall of building segregation “into the physical environment using transportation infrastructure.”¹⁶¹ Rephrasing Bruce Seely,¹⁶² highway engineers acted as lawmakers, with

¹⁵⁸ LEWIS MUMFORD, *THE HIGHWAY AND THE CITY* 234 (1963) (hereinafter: Mumford).

¹⁵⁹ *Ibid.*

¹⁶⁰ Daniel P. Moynihan, *Policy vs. Program in the 70s*, *THE PUBLIC INTEREST* 90 (1970) (“Indeed, a bare fifteen years after the Interstate program commenced, it is just about impossible to get a major highway program approved in most large American cities. But it is too late: most systems have already been built. In the process – such at least would be my view – quite appalling mistakes were made ...”)

¹⁶¹ Archer (2021), *supra* note 118, at 2138 (“For instance, railroads provide an analogous divide. Indeed, Black people ‘were often historically restricted to neighborhoods separated from whites by railroads, turning the tracks into iron barriers of race and class.’ Thus, even popular phrases like ‘the other side of the tracks’ have historical roots in the use of railroad tracks to segregate and destroy communities. In many cities, these dividing lines persist to this day as not only ‘a reflection of decades of discriminatory policies and racism, but also of the power of infrastructure itself to segregate.’”; citing Emily Badger and Darla Cameron, *How Railroads, Highways and Other Man-Made Lines Racially Divide America’s Cities*, *WASH. POST*, July 16, 2015, <https://www.washingtonpost-com.ezp-prod1.hul.harvard.edu/news/wonk/wp/2015/07/16/how-railroads-highways-and-other-man-made-lines-racially-divide-americas-cities/>. [https://perma.cc/ZER3-4FNN])

¹⁶² *See supra* note 56.

highways serving as embedded law governing countless lives. Highways replaced struck-down zoning laws and discriminatory legal practices such as redlining.¹⁶³ This is what Sarah Schindler refers to as *architecture as regulation*:¹⁶⁴ the ways in which many “monumental structures of concrete and steel embody a systematic social inequality, a way of engineering relationships among people that, after a time, becomes just another part of the landscape.”¹⁶⁵ This is another way in which “the legacies of the past continue to regulate in the present.”¹⁶⁶

But highways did another thing, impacting the lives of America’s poor in more indirect ways than physically displacing them: The Highway Acts of the twentieth century cemented contemporary political economy into American cities and froze it in time.

It was by no means an innovative intervention. Highway engineers, as Mumford mentioned, were “to repeat on a more colossal scale the same errors” they have done in the past with elevated rail infrastructure, which resulted in lower property values and a general mess in cities.¹⁶⁷ This technological determinism – the notion discussed above regarding how a single mode of infrastructure can impact the entire span of a city and its markets – was apparent even before railroads entered cities. It was manifested in America’s first “mega-infrastructure,” the Erie Canal.

The Canal, which opened in New York in 1825 to cut through the state and enable

¹⁶³ See *supra* note 128 and accompanying text.

¹⁶⁴ Sarah B. Schindler, *Architectural Exclusion: Discrimination and Segregation Through Physical Design of the Built Environment*, 124 YALE L. J. 1934 (2015) (hereinafter: Schindler). See also KEVIN LYNCH, WHAT TIME IS THIS PLACE 40 (MIT Press, 1972) (“Like law and custom, environment tells us how to act without requiring of us a conscious choice.”)

¹⁶⁵ Winner, *supra* note 5, at 124.

¹⁶⁶ Schindler, *supra* note 164, at 2015.

¹⁶⁷ Mumford, *supra* note 159, at 240-41 (“The destruction of the old elevated railroads in New York was, ironically, hailed as a triumph of progress precisely at the moment that a new series of elevated highways was being built.”)

westward commerce, instigated a national interest in state investment in transportation infrastructure. As one commentator stated when the works commenced, “by this great highway, unborn millions will easily transport their surplus productions to the shores of the Atlantic.”¹⁶⁸ Legal scholar David Schleicher shows how the Erie Canal was a maverick in municipal finance, practically introducing the instrument of municipal bonds as we know it today.¹⁶⁹ For a few years, the canal provided an unequivocal economic success for the state and city of New York. As one contemporary remarked, “Considerations of political economy, and of political and commercial supremacy, in all their various phases, have been urged and repeated in favor of [the Canal’s] original construction, and of its subsequent enlargement; and of yet further enlarging and perfecting its capacity.”¹⁷⁰ This process led many other states to try and establish their own transportation infrastructure to perfect their interstate and international commerce.¹⁷¹ However, when states started to form private-public partnerships to finance these projects and not use the bond mechanisms that proved successful in New York, a downward spiral began, leading to the Panic of 1837, a nationwide debt crisis in which many states defaulted on their debts.¹⁷²

To some extent, the Interstate System may be regarded as a return to this kind of government investment model in transportation infrastructure, one that was hindered by the past’s poor experience. In our context, it was a transition from the (private) railroad to a publicly funded and operated system of highways. Thus, it could even be said that

¹⁶⁸ Cited in LIONEL D. WYLD, *LOW BRIDGE! FOLKLORE AND THE ERIE CANAL* 1 (1977).

¹⁶⁹ SCHLEICHER, *BAD STATE*, *supra* note 19, at 37.

¹⁷⁰ Merwin S. Hawley, *The Erie Canal: Its Origin, Its Success & Its Necessity* (a Paper Read Before the Buffalo Historical Club, Feb. 3, 1868), 19564 AM. PAMPHLETS N-YHS 3 (1868).

¹⁷¹ RICHARD BRIFFAULT ET AL., *STATE AND LOCAL GOVERNMENT LAW* 717 (9th ed., 2022); SCHLEICHER, *BAD STATE*, *supra* note 19, at 37.

¹⁷² ALBERTA M. SBRAGIA, *DEBT WISH* 34-35 (1996). In reaction to this fiscal fiasco, in the 1840s and 1850s states started to amend their constitutions to add provisions making it more difficult for states to incur debt and limit states’ exposure to market risks, *see* BRIFFAULT ET AL., *ibid*; SCHLEICHER, *BAD STATE*, *ibid*.

highways followed what K. Sabeel Rahman called “the public utility tradition,” in which law and institutional design facilitated a shift in authority over infrastructural goods from private to public hands that “in theory, were more accountable and public-spirited.”¹⁷³ It is, however, questionable to what degree highways functioned as a public good or utility.

As shown above, the Highway Lobby worked outside and within the U.S. government¹⁷⁴ to entrench the highway vision and “the religion of the motorcar.”¹⁷⁵ The Futurama vision was indeed the vision of the automobile, rubber, cement, and petrol industries.¹⁷⁶ Those industries labored to ensure the American dependence on their products permanently,¹⁷⁷ and in the process changed American residential, labor, and leisure patterns. In many important ways, highways changed the political economy of the city, following the general understanding of how economic and racial injustice are produced by geography and urban planning.¹⁷⁸

It also changed cities’ economies. First, there is what Roderick Hills and David Schleicher called the “transportation revolution.”¹⁷⁹ The Interstate System, combined with

¹⁷³ K. Sabeel Rahman, *Infrastructural Exclusion and the Fight over the City*, 53 HARV. C.R.-C.L. REV. 533, 547-48 (2018) (hereinafter: Rahman (2018)).

¹⁷⁴ See, e.g., the composition of the Clay Committee, *supra* note 71.

¹⁷⁵ Mumford, *supra* note 159, at 234.

¹⁷⁶ As to the petrol industry, it should be noted that the federal fuel tax has not been raised since 1993. Robert S. Kirk, *Federal Highway Programs: In Brief* 3 (Congressional Research Service, Feb. 7, 2022), available at <https://crsreports.congress.gov/product/pdf/R/R47022/4> [<https://perma.cc/YQD5-HNZN>] (hereinafter: CRS Report (2022)). Although an increase of 10 to 15 cents per gallon could “fully fund highway and public transit programs at their current levels,” the Congressional Research Service discarded this option due to political and technological determinism: “Even if Congress were to approve such a change, likely improvements in vehicle fuel efficiency and more use of hybrid and electric vehicles threaten the long-term viability of fuel taxes as the main source of surface transportation funds. Indexing fuel taxes to inflation and fuel efficiency could extend the viability of the fuel taxes,” Robert S. Kirk & William J. Mallett, *Highway and Public Transit Funding Issues 2* (Congressional Research Service, March 1, 2021), available at <https://crsreports.congress.gov/product/pdf/IF/IF10495> [<https://perma.cc/4XTS-X5PR>].

¹⁷⁷ See *supra* note 56, and accompanying text.

¹⁷⁸ See, e.g. Rahman (2018), *supra* note 173, at 534.

¹⁷⁹ Roderick M. Hills, Jr. & David Schleicher, *The Steep Costs of Using Noncumulative Zoning to Preserve Land for Urban Manufacturing*, 77 U. CHI. L. REV. 249, 253-54 (2010).

the “container revolution,”¹⁸⁰ enabled easier and less expensive shipment methods of goods to and within the U.S., thus eliminating the need to locate factories close to piers and waterways. “By 1965,” as Hills and Schleicher note in the context of New York City, the municipality “had lost much of its maritime shipping business to New Jersey, and factories had deserted Bay Ridge and Sunset Park in droves”; leading to the “blighting” of the area: “New York’s waterfront had been reduced to derelict shambles, and the city’s industrial job base had suffered staggering losses.”¹⁸¹

Second, the fact that cities’ downtown areas became inaccessible to pedestrians due to urban freeways led to local businesses’ closure,¹⁸² and to the 1970s boom of downtown shopping malls.¹⁸³ This seems like the ultimate manifestation of the Futurama vision: A sterile environment in which nothing but capitalist logic rules, the Townless Highway.¹⁸⁴

Highways have for almost a century been a prominent tool for displacing Black people for “white roads”;¹⁸⁵ and what these roads have done is to distribute white wealth – indirectly by affording the suburbanization of (white) citizens and industries, and directly by displacing Black communities for the expansion of the auto industry, as the Chrysler Expressway example illustrated.

¹⁸⁰ See generally MARC LEVINSON, *THE BOX: HOW THE SHIPPING CONTAINER MADE THE WORLD SMALLER AND THE WORLD ECONOMY BIGGER* (2006).

¹⁸¹ Hills & Schleicher, *supra* note 179, at 254.

¹⁸² See, e.g. *supra* notes 137-138 and accompanying text.

¹⁸³ Frieden & Sagalyn, *supra* note 29, at 171 (“More than one hundred new downtown retail centers opened for business between 1970 and 1988.”); Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1203 (2018) (“Cities put shopping malls or festival marketplaces downtown, sought to make their streets amenable to automobiles, and then built highways to bring suburbanites to the city’s core.”)

¹⁸⁴ Benton MacKaye, a member of the Regional Planning Association of America, had developed the “Townless Highway” concept in the 1920s for an opposite goal: to keep the city from sprawling in unwanted directions. His vision was building new communities placed near exits of regional highways in order to prevent “motor-slum” towns, Benton MacKaye and Lewis Mumford, *Townless Highway for the Motorist*, HARPER’S MAGAZINE 347, 351 (July 31, 1931). Mumford later commented that this notion demonstrates “that fast transportation, safe transportation and pedestrian movement, and sound community building are parts of a single process,” LEWIS MUMFORD, *TECHNICS AND CIVILIZATION* 237 (Uni. Chi. Press edit., 2010).

¹⁸⁵ See *supra* note 126, *White Roads Through Black Bedrooms*.

Furthermore, the different Highway Acts centralized American infrastructure, by subjecting state and local governments' investment in highway infrastructure to federal funding and thus – to federal logic. As we saw, this centralized decision-making enabled the capture of the process by the Highway Lobby; in Marxist terms, this move constituted a substitution of “the power of a centralized status hierarchy for the power of those who control the means of production.”¹⁸⁶ In other words, if the Interstate System functions as a situated law, this is a federal law – a highly centralized, top-down mechanism – and an economic one, which substitutes what Hannah Arendt called the need for “public freedom”¹⁸⁷ with constraining the public choice to fit capitalist logic of accumulation.¹⁸⁸

To this day, this logic prevails and impedes all other feasible development. Thus, the choice to build a national highway system was a policy choice to “connect commuters to their downtown offices,” and not to invest in mass transit.¹⁸⁹ This was a choice not to “put suburban jobs within reach of urban African Americans and [not] to reduce their isolation from the broader community.”¹⁹⁰ This choice, as Archer notes, reinforces the disadvantages initially distributed by the construction of the Interstate System, “while also inflicting new harms.”¹⁹¹ This is because Black communities in the U.S. are more likely to live in urban

¹⁸⁶ Gerald E. Frug, *The City as a Legal Concept*, 93(6) HARV. L. REV. 1057, 1069 (1980).

¹⁸⁷ *Id.* at 1068.

¹⁸⁸ See, e.g. JOHN R. LOGAN & HARVEY LUSKIN MOLOTOCH, *URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE* 56 (20th Ann. ed., 2007) (“Colorado’s leaders made Denver a highway crossroads by convincing President Eisenhower in 1956 to add three hundred miles to the system to link Denver to Salt Lake City by an expensive mountain route. A presidential stroke of the pen removed the prospects of Cheyenne, Wyoming, of replacing Denver as a major western transportation center.”)

¹⁸⁹ Rothstein, *supra* note 31, at 188

¹⁹⁰ *Id.* at 189 (“The decision to invest limited transportation funds in highways rather than subways and buses has had a disparate impact on African Americans.”)

¹⁹¹ Archer (2021), *supra* note 118, at 2141. See also H. Alan Høglund, *Past Holds Key to Highways of Future*, N.Y. TIMES, May 30, 1985, <https://www.nytimes.com/1985/05/30/opinion/1-past-holds-key-to-highways-of-future-014702.html> [<https://perma.cc/AWU4-2TGS>] (“the disastrous early decision that interstates should slash directly through center cities, rather than skirting them ... this decision led to expressways that physically paralleled and ultimately sabotaged passenger rail service.”).

areas, and because “communities of color and low-income communities use public transit at higher rates than white and wealthy communities do.”¹⁹²

As Gregory Shill argues, this was a conscious choice to promote the technology of the private car over public transportation: “Rules embedded across nearly every field of law privilege the motorist and, collectively, build a discriminatory legal structure [called] ‘automobile supremacy.’”¹⁹³ In the context of the Interstate System, Shill asks what is the “cost of free roads”: According to one estimate, the Interstate System has cost the American tax-payer over half a trillion dollars in the first 50 years of its existence; those expenses were heavily subsidized, because they have been borne for the most part by general – rather than motor – taxpayers.¹⁹⁴ Furthermore, Goodman points out that even if motor taxes *were* being used to fund the System, this would not have covered the costs of “neighborhood disruption.”¹⁹⁵ Furthermore, this mechanism forces motor users to pay for the specific infrastructure of expressways, and not, for example, mass transit.¹⁹⁶ Thus, in many ways, highways were deemed to be the *only* mode of transport development,¹⁹⁷ and an alternative future based on mass transit was abandoned.¹⁹⁸

It seems that this trend is steady in federal lawmaking in the last decade. The Fixing America’s Surface Transportation Act (FAST Act) of 2015,¹⁹⁹ for example, has authorized

¹⁹² Archer, *id.* at 2143.

¹⁹³ Gregory H. Shill, *Should Law Subsidize Driving*, 95 NYU L. REV. 498, 502 (2020) (Shill demonstrates this statement across different legal fields, for instance: speed limits, the car-centric definitions of legal terms, land use subsidies, insurance law, tax law, and more).

¹⁹⁴ *Id.* at 537.

¹⁹⁵ Goodman, *supra* note 71, at 117-118.

¹⁹⁶ *Ibid.*

¹⁹⁷ *Id.* at 120. *See also* S. Burlington County NSSCP v. Mt. Laurel, 336 A.2d 713, 718 (1975) (“The New Jersey Turnpike, and now route I-295, a freeway paralleling the turnpike, traverse the municipality near its base ... This highway network gives the township a most strategic location from the standpoint of *transport of goods and people by truck and private car. There is no other means of transportation,*” emphasis added).

¹⁹⁸ Lewis, *supra* note 114, at 194.

¹⁹⁹ Pub. L. No. 114-94.

\$305 billion over the years 2016-2020 for highways and public transportation investments.²⁰⁰ However, out of this investment, approximately \$207 billion were earmarked for highway funding, leaving public transportation funding with around \$61 billion.²⁰¹ As of 2022, the Highway Trust Fund (that was established in the 1956 Act and was the driving funding force behind the materialization of the Interstate System) consists of two separate accounts – a highway account, and a mass transit account; however, the mass transit account receives more than 10 times less than the highway one.²⁰² It is conventional wisdom that in the U.S., transportation funding is distributed 80/20 between public and car transportation and, in favor of the latter.²⁰³

Already seventy years ago, Mumford warned that “the fatal mistake we have been making is to sacrifice every other form of transportation to the private motorcar.”²⁰⁴ As Shill has shown, “almost every level of government in the United States treats public transit as a marginal service ... designed to ensure a safety-net level of infrequent, inadequate transportation access for the poorest rather than as a valuable utility for society and the economy at large.”²⁰⁵

²⁰⁰ U.S. Department of Transportation, Federal Highway Administration, Fixing America’s Surface Transportation Act, <https://www.fhwa.dot.gov/fastact/> [<https://perma.cc/57FX-7M4U>].

²⁰¹ Archer (2021), *supra* note 118, at 2142 (“This amount was split between several programs [with the lion share of approx.. \$13 billion going to Good Repair Program, which] provides funding primarily for repairing and upgrading rail transit systems.”).

²⁰² CRS Report (2022), *supra* note 176, at 3 (“The highway account receives an allocation equivalent to 15.44 cents of the gasoline tax and 21.44 cents of the diesel tax. The mass transit account receives the revenue generated by 2.86 cents of the gasoline and diesel taxes (n.9: Non-fuel taxes accrue only to the highway account).” The gasoline tax is 18.3 cents per gallon, and the diesel tax is 24.3 cents per gallon, and amounts to approximately 85%-90% of the taxes levied on highway users (which include fuels, heavy truck tires and sales, and a weight-based heavy-vehicle use tax), *ibid*.

²⁰³ JULIE LIVINGSTON & ANDREW ROSS, CARS AND JAILS 5 (2022) (hereinafter: LIVINGSTON & ROSE)

²⁰⁴ Mumford, *supra* note 159, at 237.

²⁰⁵ Shill, *supra* note 193, at 538. *See also* Kinder Institute for Urban Research, Rice University, *The Link Between Cars and Income Inequality* (2017), <https://kinder.rice.edu/urbanedge/2017/link-between-cars-and-income-inequality> [<https://perma.cc/3GP4-DR3F>] (finding that economic disparities narrowed when cities develop a “multimodal” transportation system, not reliant solely on cars.)

Thus, highways put cars at the center of the American economy. As one commentator has phrased it, “motocracy is the culmination of oil-fueled capitalism.”²⁰⁶ But it is more than that – as the Alliance for Automotive Innovation, an auto manufacturers interest group, states on its website: Cars are “driving the U.S. economy,” with “no other industry in America [having] such an expansive reach to every state, delivering economic benefits and creating jobs in so many different sectors.”²⁰⁷ This “reach to every state” was secured by the interstate, and it has proved resistant to change.

Established by law, urban highways ensured the dependence on automobiles and were also used as a tool for social control. Inequality was embedded within the Interstate System itself. Some have even called highways “a racist infrastructure.”²⁰⁸ Recently, U.S. Secretary of Transportation Buttigieg has said that “there is racism physically built into some of our highways.”²⁰⁹ As Deborah Archer put it, “America’s highways are part of the racial architecture of our country, with barriers both visible and invisible.”²¹⁰

To this day marginalized communities continue to suffer from the consequences of

²⁰⁶ Clyde Lawrence, *Motocracy: The Politics of Car Dependency*, HARV. CRIMSON, Oct. 25, 2022, <https://www.thecrimson.com/article/2022/10/25/lawrence-car-dependancy/> (citing Giulio Mattioli, Cameron Roberts, Julia K, Steinberger, Andrew Brown, *The Political Economy of Car Dependence*, 66 ENERGY RES. & SOC. CHANGE 101486 (2020)) [<https://perma.cc/G328-7YH8>].

²⁰⁷ Alliance for Automotive Innovation, *The Industry*, <https://www.autosinnovate.org/initiatives/the-industry> [<https://perma.cc/ZY2T-V9DV>].

²⁰⁸ Joan Fitzgerald & Julian Agyeman, *It’s Time to Dismantle Racist Infrastructure. Let’s Start with American Highways*, FAST CO., Sept. 8, 2021, <https://www.fastcompany.com/90673415/its-time-to-dismantle-racist-infrastructure-lets-start-with-american-highways> [<https://perma.cc/GP4V-7RXD>]. See also Erin Blakemore, *Interstate Highways were Touted as Modern Marvels. Racial Injustice was Part of the Plan*, WASH. POST, Aug. 17, 2021, <https://www.washingtonpost.com/history/2021/08/16/interstate-highways-were-touted-modern-marvels-racial-injustice-was-part-plan/> [<https://perma.cc/N9DZ-WD4Z>].

²⁰⁹ April Ryan, *Buttigieg Says Racism Built into US Infrastructure Was a ‘Conscious Choice’*, THE GRIO, Apr. 6, 2021, <https://thegrio.com/2021/04/06/pete-buttigieg-racism-us-infrastructure/> [<https://perma.cc/PWW9-YJ5L>].

²¹⁰ Archer (2020), *supra* note 76, at 1330 (“Professor Derick Bell wrote of how racism is permanently embedded in America’s ‘psychology, economy, society and culture.’ 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 ... The question before the country is whether and how we will truly confront those barriers.”)

highways. People living with highways in their neighborhoods are at increased risk of contracting pollution-related diseases,²¹¹ and having mental health issues;²¹² car dependency limits people's access to health care,²¹³ and perpetuates poverty in already marginalized communities.²¹⁴ As Nicole Garnett put it, using Bell and Parchomovsky's term, some lost their homes and may have received compensation (if they were owners and not tenants), but others suffered "derivative takings – noise, fumes, physical separation from their neighbors, decreased property values – for which they received no compensation."²¹⁵ Furthermore, people are still losing their homes to highways – mostly poor people of color; according to one estimate, more than 200,000 people have lost their homes in the U.S. in the three decades that have passed since the official ending of the construction of the Interstate System.²¹⁶

It seems we are trapped in a loop: More transportation politics that diffuse disparate impacts on the poor and communities of color, deepen our dependence on the private car, and consequently on polluting industries; it is a loop both in time and space.

Spatially, we are trapped by our infrastructure. Temporally, this is a retelling of an old story repeating itself. Hence, it is essential to ask what can be done. I turn to this

²¹¹ Wendy Q. Xiao, *The Road to Racial Justice: Resolving the Disproportionate Health Burden Placed on Communities of Color by Highway Pollution*, 52(2) COLUM. HUM. RTS. L. REV. 911 (2021); Regan F. Patterson & Robert A. Harley, *Effects of Freeway Rerouting and Boulevard Replacement on Air Pollution Exposure and Neighborhood Attributes*, 16 INT'L J. ENVIRON. RES. PUBLIC HEALTH (2019); Tegan K. Boehmer et al., *Residential Proximity to Major Highways*, CDC (2010).

²¹² Archer (2020), *supra* note 76, at 1296-297.

²¹³ Archer (2021), *supra* note 118, at 2147-148 ("More than 3.6 million Americans do not get medical care each year because of lack of transportation," at 2147).

²¹⁴ Alana Semuels, *The Role of Highways in American Poverty*, THE ATLANTIC, Mar. 18, 2016, <https://www.theatlantic.com/business/archive/2016/03/role-of-highways-in-american-poverty/474282/> [<https://perma.cc/GZ8S-YZZY>].

²¹⁵ Garnett, *supra* note 106, at 119.

²¹⁶ Liam Dillon & Ben Poston, *Freeways Force Out Residents in Communities of Color – Again*, LA TIMES, Nov. 11, 2021, <https://www.itdp.org/2022/06/19/an-antiracist-future-for-highways/> [<https://perma.cc/L7ER-M562>].

question in the next section.

II. AN INNER LOOP? THE LEGAL DESIGN OF THE FUTURE OF FREEWAYS

Urban highways currently are in poor shape: “The system is aging, its bridges collapsing, and its maintenance long deferred.”²¹⁷ The infrastructure that was specifically purposed to tackle the issue of urban “blight” has become a source of plight. It is tempting to term it a twist of fate.²¹⁸ However, as we have seen, the “clearance” intent had little to do with blight and neglect; at least not in the sense of the damage freeways today inflict on cities.

As was discussed above, highways present a “legacy problem,”²¹⁹ by maintaining the marginalization of people based on class and race and limiting entire communities’ mobility and possibilities. Archer has even called transportation policy a civil rights issue: due to the ways transportation inequality “impacts housing, voting, health, education, and economic opportunity.”²²⁰ According to Archer, a transportation justice revolution should take place as a part of the Third Reconstruction,²²¹ and is needed “to address historic and systematic racism and inequality, create radically different legal and institutional regulatory forms, and center human dignity, and community equity as central to the American Agenda.”²²² In the context of transportation policy, this move will “meaningfully address how race, class, and place intersects to shape people’s lives” in transportation

²¹⁷ Rose & Mohl, *supra* note 38, at 177.

²¹⁸ Rose and Mohl called this unfolding ironic, *Id.* at 179.

²¹⁹ Schindler, *supra* note 164, at 2014-15 (“even if some more progressive cities and planning departments now consider some of these issues in making decisions about the built environment ... Architecture is enduring; the layout of cities is hard to change.”)

²²⁰ Archer (2021), *supra* note 118, at 2150.

²²¹ As Archer articulates, following other critical race theorists, the period of post-Civil War Reconstruction marked the initial endeavor to transform the dynamics between the federal and state governments and their previously enslaved populace. While the Civil Rights Movement is frequently referred to as the Second Reconstruction, its purpose extended beyond addressing the U.S. Supreme Court's doctrine of "separate but equal," to Jim Crow laws in the South, and the “wide-ranging state-sponsored racial terror ...” *id.* at 2149.

²²² *Ibid.*

systems and infrastructure.²²³

Several states still have in their state constitutions highway provisions. These provisions are used, for example, to entrench anti-diversion clauses and to ensure that motor-related taxes do not get funneled to any purpose other than the construction or repairment of highways.²²⁴ In Missouri, the constitution even preempts municipalities from engaging in “limitations concerning the distance between houses or other buildings abutting such highway or concerning the width or type of construction.”²²⁵

In the past, mainly in the Highway Act of 1956, most funding – and thus most control – went directly to the states (through their highway departments). To a large extent, this is still the dominant funding scheme. As a result, states are incentivized to keep financing the erection and expansion of highways as the only possible transportation approach.²²⁶ Thus, although the Federal Highway Administration issued a policy directive advising not to expand existing highways or building new ones,²²⁷ states still do just that.²²⁸

²²³ *Ibid.*

²²⁴ *See, e.g.* Ark. Const. Amendment 91, §6 (highway revenues); Idaho Const. Art. VII, § 17 (Gasoline taxes and motor vehicle registration fees to be expended on highways); Ky. Const. § 230 (certain revenues usable only for highway purposes); La. Const. Art. VI, § 23.1 (Financing of construction, maintenance, improvement, and extension of highways); Minn. Const., Art. XIV, § 5 (Highway user tax distribution); Mo. Const. Art. IV, § 30(d) (prohibition against diverting revenues for non-highway purposes); Mont. Const., Art. VIII § 6 (Highway revenue non-diversion); N.D. Const. Art. X, § 11 (Highway fund); Nev. Const. Art. 9, § 5 (proceeds from fees for licensing and registration of motor vehicles and excise taxes on fuel reserved for construction, maintenance and repair of public highways); N.H. Const. Pt. SECOND, Art. 6-a (use of certain revenues restricted to highways); Tex. Const. Art. VIII, § 7-c (dedication of revenue from state sales and use tax and taxes imposed on sale, use, or rental of motor vehicle to state highway fund).

²²⁵ Mo. Const. Art. IV, § 31 (state highways in municipalities).

²²⁶ Eden Weingart, *Widening Highways Doesn't Fix Traffic. So Why Do We Keep Doing It?*, N.Y. TIMES, Jan. 6, 2023, <https://www.nytimes.com/2023/01/06/us/widen-highways-traffic.html> [<https://perma.cc/H6QX-T5QG>] (“Every year, states spend billions of dollars expanding highways while other solutions to congestion, like public transit and pedestrian projects, are usually handled by city transit authorities and receive less funding.”)

²²⁷ U.S. Department of Transportation, Federal Highway Administration, *Information: Policy on Using Bipartisan Infrastructure Law Resources to Build a Better America*, Dec. 16, 2021, <https://perma.cc/QLS3-KDF9>.

²²⁸ *See, e.g.* Brooklyn, NY (Winnie Hu, *Could the B.Q.E. Return to Six Lanes of Traffic?*, N.Y. TIMES, Dec. 13, 2022, <https://www.nytimes.com/2022/12/13/nyregion/bqe-six-lanes.html> [<https://perma.cc/G4AR-RZ8R>]); Portland, OR (Nadja Popovich & Brad Plumer, *Can Portland Be a Climate Leader Without*

So what is the desired future of these highways? I detect two main policy-oriented approaches in the literature – racial equity impact studies, and community control. These two approaches could be seen as contradictory: While the former is meant to be conducted as part of a top-down plan, the other is more “organic” and bottom-up. Put differently, while a racial equity assessment is a part of a bigger scheme of governmental control over infrastructure, community control could be more decentralized and arise from the needs and demands of a community directly by it. I will argue that both approaches should be regarded as complementary rather than contradictory.

In the following sub-sections I will briefly introduce these two approaches. After that, I will move to contextualize the particular strengths and weaknesses of each approach by discussing the three major alternatives currently debated in the field: tearing down highways, capping them, or trying to reutilize them in one way or another.

A. Policy Approaches: Race Equity Impact Studies and Community Control

First, is Archer’s transportation justice framework.²²⁹ Such a framework should, according to Archer, deploy the method of Racial Equity Impact Studies (REIS) in the context of urban highways. This concept implicitly accepts the idea that highways are here to stay, and proposes that “states and localities planning highway redevelopment projects complete multi-agency, multi-domain, and regionally focused racial equity impact studies prior to developing and implementing their plans.”²³⁰ According to Archer, using REIS will help

Reducing Driving?, N.Y. TIMES, Apr. 21, 2022, <https://www.nytimes.com/interactive/2022/04/21/climate/portland-emissions-infrastructure-environment.html> [<https://perma.cc/9MHM-Z4FT>]; Houston, TX (Oliver Milman, “*It’s just more and more lanes*”: the Texan Revolt Against Giant New Highways, THE GUARDIAN, Apr. 29, 2022, <https://www.theguardian.com/us-news/2022/apr/29/texas-highway-expansions-project-displacements-protests> [<https://perma.cc/3NX9-7X2F>]).

²²⁹ Transportation justice “seeks to merge elements of the environmental justice and civil rights movement, with a focus on racial justice, fairness, and equity,” Archer (2020), *supra* note 76, at 1328.

²³⁰ *Id.* at 1321.

to address the rebuilding of “the nation’s aging infrastructure” while at the same time “promoting racial equity and encouraging concrete action towards remedying the harms inflicted by the interstate highway system.”²³¹

This will be accomplished by not only addressing displacement and mitigating the harm caused by building or rebuilding city highways; rather, REISs will need to also address the impact on the community from different angles, namely residential segregation, educational and employment continuity, economic activity, and the effect on long-term residents in the form of gentrification resulting from the economic investment in the neighborhood.²³² This is a “critical lens” that takes “an antiracist approach” to “our institutions of power, policy, and planning.”²³³

However, it is important to note that implicit in the REIS process is some sort of centralized authority, that is controlling the process. Thus, even if this authority is engaging in minority impact assessment, it is still invested with the power of the “final say,” and it is not clear to what extent this REIS process is legally binding. The Bipartisan Infrastructure Bill of 2021, which will be discussed in part III, demonstrates both these points to some extent when it specifies that the *federal* Secretary of Transportation should consider, as an *additional* consideration for infrastructure projects, including highways, “whether a project may benefit an Area of Persistent Poverty or a Historically Disadvantaged Community.”²³⁴

²³¹ *Id.* at 1326-327.

²³² *Id.* at 1327.

²³³ Institution for Transportation & Development Policy, *An Antiracist Future for Our Highways*, June 19, 2022, <https://www.itdp.org/2022/06/19/an-antiracist-future-for-highways/> [<https://perma.cc/5ZYX-29J3>].

²³⁴ Notice of Funding Opportunity for the Department of Transportation’s Multimodal Project Discretionary Grant Opportunity, 87 Fed. Reg. 17108, 17115 (March 25, 2022); “Historically Disadvantaged Communities include (1) certain qualifying census tracts, (2) any Tribal land, or (3) any territory or possession of the United States. The department is providing a list of census tracts that meet the definition of Historically

Other than questions of who is the relevant level of government to administer such a process, it is debatable who is the relevant community to go through such a process. Is it only the current residents of an impacted area? Should we track past tenants of the neighborhood that were displaced by the relevant highway? Should the residents of the city as a whole should have a stake in this debate, since it will affect the city they live in? and if so, to what extent – only transportation input or broader considerations? Should participants need to be vetted according to their race? Their class?²³⁵

As discussed above, other than just displacing numerous people of color from their homes, highways – especially urban ones – continue to impact the lives of marginalized communities across the country, by posing different hazardous barriers other than just physical ones. Mainly, urban highways aided in the facilitation of car supremacy in the U.S. today. Therefore, it is important to emphasize this fact when assessing racial equity and the impact of a certain project.

Another set of possible weaknesses of this approach could be glanced at by comparing it with existing regulatory schemes that focus on impact studies. Namely, different environmental laws such as the federal National Environmental Policy Act and its different state counterparts focus on Environmental Impact Studies (EIS). These impact studies have been criticized over the years for three main reasons. First, it is argued that these studies are procedural rather than substantive criteria, which incentivize a cost-benefit analysis rather than meeting and balancing complicated human needs. Second,

Disadvantaged Communities, as well as a mapping tool to assist applicants in identifying whether a project is located in a Historically Disadvantaged Community,” *id.* at 17116.

²³⁵ Cf. Richard T. Ford, *The Boundaries of Race*, 107 HARV. L. REV. 1841, 1909-10 (1994) (proposing that local governments should have permeable boundaries, in order to avoid the “evils of parochialism and insularity.”)

these studies regularly fail to provide any “objective” information but are rather biased in the direction of the agency that composed them. And third, the major argument against EISs is that they are used solely to abuse and delay any meaningful planning process.²³⁶

There is no bright-line rule to answer all these questions and concerns in all possible contexts. Every urban freeway story is different, even if they all share some broad characteristics. A possible way to mitigate this aspect is through community control of the process. Although this aspect brings back the question of which is the relevant community, it is nonetheless an important factor to take into consideration.

Recent scholarship in the field of civil participation fleshes out another possible weakness of the REIS tool: its focus on oversight rather than control. In Archer’s model, a state law that incorporates the REIS framework within it, “should mandate a deeply collaborative, community-based process.”²³⁷ What this community-based vision entails, is a “sharing of power” model, in which “members of the impacted community must not only be heard but have a seat at the table.”²³⁸ However, as K. Sabeel Rahman and Jocelyn Simonson show, this might not go far enough.

Rather than relying on *participation*, Rahman and Simonson suggest thinking about *control*.²³⁹ This is a shift from focusing on the need for a wide consensus among different groups to conceptualizing democratic decision-making, “particularly by disempowered or

²³⁶ ROBERT C. ELLICKSON, VICKI L. BEEN, RODERICK M. HILLS, CHRISTOPHER SERKIN, *LAND USE CONTROLS: CASES AND MATERIALS* 394-98 (4th ed., 2013). An illustration of the prolonged process and time-consuming nature of such studies is evident in the case study of Providence, Rhode Island presented in this paper, *see infra* note 312 and accompanying text.

²³⁷ *Ibid.*

²³⁸ *Id.* at 1329.

²³⁹ K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CAL. L. REV. 679, 699 (2020) (hereinafter: Rahman & Simonson).

marginalized constituencies.”²⁴⁰ Therefore, the “natural” legal arena for this type of community control is in the sphere most closely linked to communities – local governments. This turn is a part of a broader understanding in recent literature, of local political empowerment through local government law as a potential answer to inequality created and sustained by market capitalism.²⁴¹

In order to ensure such power-shifting, Rahman and Simonson offer an institutional design based on “three-dimensional thinking”:²⁴² (1) the nature of authority, (2) the composition of the governing body, and (3) the moment of authority.²⁴³ This model focuses on the policy-making process itself, rather than on a specific outcome,²⁴⁴ thus not inherently contradicting the REIS framework (which focuses on informing the decision-making process). However, a close examination of the components – or “dimensions” – of this institutional design fleshes out some conflicts with REIS. In the first instance, there is a difference between a model of informed decision-making, and what Rahman and Simonson call the nature of authority: the difference between input and power. This difference lies on a continuum, with input being for example “a body whose recommendations are merely advisory,” and power – on the other nod – manifested in an idea of “a body with complete, non-reviewable control over policies and decisions that govern local services.”²⁴⁵

²⁴⁰ *Id.* at 689. Rahman & Simonson do not specify how to identify such groups. However, it should be noted that they highlight the “dangers in relying on localism as a panacea,” with “even the word ‘community’ ... carrying with it associative dangers of vagueness and co-optation,” *id.* at 687. On the “normatively ambiguousness” of local autonomy, see Richard Briffault, *Our Localism: Part II – Localism and Legal Theory*, 90 COLUM. L. REV. 346, 446 (1990).

²⁴¹ Schragger, *The Political Economy of City Power*, *supra* note 10, at 130-32.

²⁴² Rahman & Simonson, *supra* note 239, at 683.

²⁴³ *Id.* at 720-26.

²⁴⁴ *Id.* at 732-33 (“This approach comes from a recognition that governance is an ongoing process in which historical inequalities are embedded,” at 732).

²⁴⁵ *Id.* at 720.

There are different sets of trade-offs to choose from. A first set regards the qualifications that are required in order to participate in or control a certain local process; a second set is whether representatives should have autonomy and independence from the city or the neighborhood leaders; a third set of questions regards the relationship between the representatives and their larger constituents.²⁴⁶ These are all general questions regarding participatory and representative democracy,²⁴⁷ but they bear specific complications in this context of representing “those who have been systematically excluded from political participation.”²⁴⁸ In other words, this is a question of how to design a local and minority-oriented institution that does not replicate the problems plaguing our democratic institutions generally.

This is another “legacy problem”: the status quo particularly burdens marginalized communities lacking political power. This is the third and last dimension Rahman and Simonson ask us to consider – even if we do manage to enable politically disempowered groups to seize control over the means of decision, it is important that it doesn’t occur too late. We should be mindful of the fact that “prior decisions have already locked much more in place,” and that the moment of decision “plays a role in defining the degree of power that an institution affords to a given constituency.”²⁴⁹

In the context of urban highways, as we saw, communities tried to seize control almost from the beginning of the process. In some instances, it was already too late;²⁵⁰ in others, the efforts were successful, but mostly when correlated with white and upper-class

²⁴⁶ *Id.* at 725.

²⁴⁷ *See, e.g.* Nikolas Bowie, *Antidemocracy*, 135 HARV. L. REV. 160, 172-74 (2021).

²⁴⁸ Rahman & Simonson, *supra* note 239, at 725.

²⁴⁹ *Ibid.*

²⁵⁰ *See supra* note 160 and accompanying text.

priorities.²⁵¹ As Mohl puts it, perhaps too rosy, “where freeway opponents built interracial and cross-class coalitions ... their chances of delaying or defeating the highwaymen improved markedly.”²⁵² Those “coalitions,” perhaps more than “interracial” or “cross-class,” were another manifestation of the political majority succeeding in securing their interests, which happen to align to some extent with those of other communities.

Karilyn Crockett demonstrates this last idea in the context of the successful political battle against the Boston and Cambridge Inner Loop freeway. In her book, *People Before Highways*, she interviews Chuck Turner, a Boston organizer at the time, and shows how the big coalition of highway opponents – as endorsed by Mohl – really did not represent a community, let alone minority control:

While liberal Cambridge activists fought for the preservation of racially and economically diverse neighborhoods, a group of Boston residents advanced a black nationalist agenda that prioritized a need for greater *economic, not racial, integration*. The leaders of Boston’s Black United Front and Black Panther Party were emphatic in their demand for local control of land planning and use. Chuck Turner, a well-known neighborhood activist, was chairman of the Boston chapter of the Black United Front and cochair of the Greater Boston Committee on the Transportation Crisis. When I asked Turner if he had been worried about the claim that the highway would produce a more racially segregated city, he shook his head and flatly answered, “No, not at all.”²⁵³

²⁵¹ See *supra* note 118 and accompanying text.

²⁵² Mohl (2004), *supra* note 63, at 700.

²⁵³ Crockett, *supra* note 114, at 22 (emphasize added).

* * * *

As the discussion thus far has shown, racial and economic equity should be a focal point of the discussion around the future of urban highways. It will be discussed at greater length below, in the context of specific solutions to the future of urban highways.

It is important to bear in mind the vicious cycle dynamics described in the context of the history of urban “blight” in the first part of this paper; it is what Rahman and Simonson call “the dialectical relationship between structural inequalities and political power,” i.e. the fact that “when groups historically relegated to geographically segregated communities with subpar infrastructure attempt to remedy those imbalances, they find themselves thwarted by the very source gaps they aim to close.”²⁵⁴ This caveat is an important reminder of the inherent limitations of trying to generalize the problem of urban highways and its possible solutions: The concerns regarding how should we institutionally design a model of community control are relevant only if we think of it top-down, as something that *should* be designed; perhaps for a real community control to happen there must first be an organic community seizure of control, a truly bottom-up process of empowerment.

B. Where’s the Next Exit: The Concrete Future of Urban Freeways Removal

Today, “deciding how, when, where, and in what way to replace highways and bridges in cities are already some of the most pressing urban governance challenges facing state and local government officials.”²⁵⁵ As we saw in the sub-section above, this is a governance challenge not only to local officials but also to local communities. As we will see next, there are currently several different options on the table regarding the future of urban

²⁵⁴ Rahman & Simonson, *supra* note 239, at 698.

²⁵⁵ Edward W. De Barbieri, *Urban Anticipatory Governance*, 46 FLA. ST. U. L. REV 75, 128 (2019).

freeways; I will discuss the major three ones: tearing down, reutilizing, or capping.

There is some nationwide movement to address the role of transportation infrastructure, especially highways, within American cities. However, Rose and Mohl predict that “realistically,” the “main-line expressways that carry heavy auto and truck traffic through metropolitan areas” will not go anywhere; in fact, they say, “no one expects” that.²⁵⁶ The crux of the issue, according to them, is that the Interstate System “remains essential both to the mobility of the American people and to the *health of the American economy*.”²⁵⁷

Nonetheless, community organizers, as well as planners and politicians, participate in this debate, transforming “transportation politics and policy [and] city streets and neighborhoods into contested spaces once again.”²⁵⁸ Building on the general argument made in this paper, this “teardown movement” could be seen as a rejection of the status quo notion that automobility is the only kind of mode of transportation that could support the existing American economy. Socially speaking, it is a way of “knitting back together the many neighborhoods that were ripped apart” by the system.²⁵⁹

Teardown advocates could be sorted into a number of categories. On one side of the spectrum lie proponents of solutions that embrace the inevitability of the automobile, and simply seek to find different routes and locations for existing highways to mitigate the harm caused by them. Seen from a perspective of race and class, this approach sees current routes and locations of urban freeways as perpetuating harms tracing back to urban

²⁵⁶ Rose & Mohl, *supra* note 38, at 189.

²⁵⁷ *Id.* at 177.

²⁵⁸ Raymond A. Mohl, *The Expressway Teardown Movement in American Cities*, 11(1) J. PLAN. HIST. 89, 98 (2012).

²⁵⁹ Jack Skelley, *Tear Down That Freeway!*, URB. LAND INST., Apr. 20, 2011, <https://urbanland.uli.org/sustainability/tear-down-that-freeway/> [<https://perma.cc/7NEZ-V9YB>].

freeways' initial designations through existing neighborhoods. Seen from a perspective of political economy, however, this approach does not address the path-dependence the interstate system has cultivated in regard to automobile usage and dependency.

An example of such a project is Oklahoma City's \$730 million project to relocate its urban share of I-40, the elevated Crosstown Expressway. The project was initiated in 2012 to replace the highway with "a tree-lined, street-level boulevard."²⁶⁰ However, by the time the project was completed in 2019 it was apparent that the new boulevard was "designed to optimize the flow of auto and truck traffic," with none of the promised trees planted and no pedestrian amenities implemented.²⁶¹ The freeway was relocated just five blocks south.²⁶²

On the other nod of the continuum of the possible future of urban highways lies the "more dramatic approach" of dismantling them without relocating or replacing them.²⁶³ The Park East freeway in Milwaukee is such an example. This freeway was built in the 1960s, with construction destroying more than 6,300 housing units and displacing almost 20,000 people between 1960 and 1971.²⁶⁴ However, due to local opposition, the expressway project was halted during the 1970s, with only a one-mile segment of the

²⁶⁰ Rose & Mohl, *supra* note 38, at 184.

²⁶¹ Brett Dickerson, *Controversial Oklahoma City Boulevard Opened by Gov and Mayor*, OK. CITY FREE PRESS, Aug. 20, 2019, <https://freepressokc.com/controversial-oklahoma-city-boulevard-opened-by-gov-and-mayor/> [<https://perma.cc/GV2F-WENC>].

²⁶² Interestingly enough, the project did aid to some extent in envisioning a different future for highways, by enabling the recycling of beams from the dismantled old elevated highway to renovate and repair old bridges across Oklahoma, thus potentially freeing some public funds for different causes, Steve Lackmeyer, *Salvaged I-40 Crosstown Expressway Beams are Helping Build County Crossings Across Oklahoma*, THE OKLAHOMAN, Jan. 12, 2022, <https://www.oklahoman.com/story/news/2022/01/12/oklahoma-city-i-40-crosstown-expressway-bridge-beams-bridges-crossings/6469913001/> [<https://perma.cc/745B-VNBF>].

²⁶³ Rose & Mohl, *supra* note 38, at 178.

²⁶⁴ ALEX SNYDER, *FREWAY REMOVAL IN MILWAUKEE: THREE CASE STUDIES 23* (a thesis submitted in partial fulfillment of the requirement for the degree of master of science in urban studies, University of Wisconsin-Milwaukee, 2016).

highway completed.²⁶⁵ The project to remove the one-mile spur was pursued by then-Milwaukee-Mayor John Norquist for several years until an agreement with the county and the state was reached. The project commenced in 2002, financed by federal highway-fund money and local Tax Increment Financing (TIF).²⁶⁶ Although the initial prospect of the project was to build a boulevard instead of the freeway, a Milwaukee TIF report states that the “demolition of the freeway freed up approximately 25 acres of underutilized land for future development.”²⁶⁷ And indeed, the property values in the district that was established around the torn-down freeway increased in value from a total of \$430,100 in 2003, to \$338,511,600 in 2021, pushing forward the development of the area.²⁶⁸

The Milwaukee project is conceived as a success, although it raises concerns about the gentrification of the area. In 2022, Cavalier Johnson – the first Black Milwaukee mayor – announced a study to remove a second freeway in the city, a 1.5-mile-long Wisconsin Highway 175, saying that “currently this freeway serves as a dividing line between ... neighborhoods solely for the use of cars.”²⁶⁹

A different reason why Milwaukee is considered a success story has to do with its specific actors. In 2003, after successfully implementing the East Park project, Norquist

²⁶⁵ City of Milwaukee, Department of City Development, *Park East Freeway – History and Removal*, <https://city.milwaukee.gov/DCD/Projects/ParkEastredevelopment/Park-East-History> [<https://perma.cc/AQJ9-PHQC>].

²⁶⁶ Congress for the New Urbanism, *Park East Freeway*, <https://www.cnu.org/what-we-do/build-great-places/park-east-freeway> [<https://perma.cc/97SP-C3KK>].

²⁶⁷ City of Milwaukee, *Tax Incremental Districts Annual Status Report*, Dec. 31, 2021, available at <https://city.milwaukee.gov/ImageLibrary/Groups/cityDCD/business/TIF/2021-Reports/2021TIDReport-FULL.pdf> [<https://perma.cc/WU2Y-92UP>].

²⁶⁸ *Id.* at 19.

²⁶⁹ Jeramey Jannene, *Should Milwaukee Remove a Second Freeway?*, URB. MILWAUKEE, May 4, 2022, <https://urbanmilwaukee.com/2022/05/04/transportation-should-milwaukee-remove-a-second-freeway/> [<https://perma.cc/S6WW-DEDZ>]. See also Alison Dirr, *Milwaukee Mayor Cavalier Johnson Signals Openness to I-794 Deconstruction*, MILWAUKEE J. SENTINEL, Nov. 15, 2022, <https://www.jsonline.com/story/news/local/milwaukee/2022/11/15/milwaukee-mayor-johnson-signals-openness-to-i-794-deconstruction/69648008007/> [<https://perma.cc/BE2J-A7Z6>].

resigned as mayor of Milwaukee and became the president and CEO of the Congress of New Urbanism (CNU).²⁷⁰ CNU is a key organization in the renewed national interest in the deconstruction of urban freeways.²⁷¹ The organization is facilitating two projects in this context: Highways to Boulevards, and Freeways Without Futures. While the former is focused on successful finished projects,²⁷² the latter maps more urban highways to be considered as future projects.²⁷³ Viewed on the axis of REIS and community control, as was discussed above, it seems that CNU projects are closely related to the latter, with the organization's fundamental tenet being "root the program in community priorities."²⁷⁴

Echoing the time-dimension of Rahman and Simonson's approach, CNU does recognize the need for meaningful community participation from the get-go, not to be only "solicited after alternatives have already been proposed."²⁷⁵

Another urban freeway teardown case is the story of the unfinished Embarcadero Freeway. The Loma Prieta earthquake in Northern California in December 1989 heavily impacted the region and afforded an opportunity for a reconsideration of several urban infrastructures.²⁷⁶ In San Francisco, the earthquake seems to have provided the city with a

²⁷⁰ Robert Steuteville, *Milwaukee Mayor John Norquist Named CNU President and CEO*, PUB. SQUARE, <https://www.cnu.org/publicsquare/milwaukee-mayor-john-norquist-named-cnu-president-and-ceo> [https://perma.cc/T3EE-YRUG].

²⁷¹ Rose & Mohl, *supra* note 38, at 182. See also Robert Steuteville, *CNU President John Norquist to Step Down After a Decade*, PUB. SQUARE, Dec. 2, 2013, <https://www.cnu.org/publicsquare/cnu-president-john-norquist-step-down-after-decade> [https://perma.cc/3DCZ-XNNZ].

²⁷² As successful projects the organization lists Harbor Drive (Portland, OR, 1974); Embarcadero Freeway (San Francisco, CA, 1991); Central Artery (Boston, MA, 1991); Central Freeway (San Francisco, CA, 1992); West Side Highway (New York, NY, 1996); Interstate 880 (Oakland, CA, 1998); Park East Freeway (Milwaukee, WI, 2002); Riverfront Parkway (Chattanooga, TN, 2004); Interstate 195 (Providence, RI, 2007); Sheridan Expressway (New York, NY, 2019); Interstate 395 (Washington, DC, 2019). CNU, *Highways to Boulevards, A Fact Sheet* (2020), available at <https://perma.cc/ZKC3-VH28>.

²⁷³ CNU, *Freeways Without Futures* (2021), available at <https://www.cnu.org/highways-boulevards/freeways-without-futures/2021> [https://perma.cc/C9WU-EVQP].

²⁷⁴ CNU, *FOUR PRINCIPLES FOR A FEDERAL HIGHWAYS TO BOULEVARD PROGRAM 5* (2021).

²⁷⁵ *Ibid.*

²⁷⁶ Rose & Mohl, *supra* note 38, at 182; Tom [sic], *Loma Prieta: The Earthquake That Started a Transportation Revolution*, LIVABLE CITY, Oct. 16, 2019, <https://www.livablecity.org/loma-prieta-the-earthquake-that-started-a-transportation-revolution/> [https://perma.cc/9ANE-7CP7].

good excuse: In 1986, three years prior to the earthquake, two ballot initiatives regarding the Embarcadero Freeway were rejected by the voters – Proposition I, which asked voters whether to tear down the Embarcadero Freeway; and Proposition J, which asked whether it shall be replaced to “increase public access to the waterfront and improve traffic.”²⁷⁷ Thus, the earthquake three years later made the demolition of the freeway more feasible.²⁷⁸

This was not the last word in San Francisco’s freeway battles, though. In 1997, a majority of San Francisco residents voted to pass a ballot initiative to “authorize Caltrans to rebuild portions of the Central Freeway [and] end the ban on new construction of new above-ground Freeway ramps north of Fell Street.”²⁷⁹ There was of course no possibility for nuisance in a city-wide ballot initiative, but this example still highlights a shortcoming of community control that was discussed above: this framework might still subject local minorities to the political will of the majority. If we consider removing urban highways as generally for the benefit of marginalized communities, the San Francisco case shows how direct democracy could be used regressively.

A different alternative for urban highways, which is sometimes proposed as part of a “highway to boulevard” project and sometimes as an independent one, is the capping of highways. This is not a new concept, and these projects legally present themselves in different forms.

The first highway that was capped and a park built over it, was in Seattle, Washington

²⁷⁷ Jay Patterson, San Francisco Registrar of Voters, *Voter Information Pamphlet*, June 3, 1986, https://webbie1.sfpl.org/multimedia/pdf/elections/June3_1986short.pdf [<https://perma.cc/Q6XW-JYG3>].

²⁷⁸ Bill Van Niekerken, *SF’s ‘Foolish Freeway’: The Battle to Tear Down the Embarcadero Freeway*, SAN FRANCISCO CHRONICLE, Feb. 4, 2019, https://www.sfchronicle.com/chronicle_vault/article/SF-s-foolish-freeway-The-battle-to-tear-13586347.php [<https://perma.cc/U954-FZXJ>].

²⁷⁹ City and County of San Francisco Voter Information Pamphlet and Sample Ballot (Proposition H, pp. 85-96), Nov. 4, 1997, https://webbie1.sfpl.org/multimedia/pdf/elections/November4_1997short.pdf [<https://perma.cc/XEG8-GZSD>].

in 1976.²⁸⁰ The local government's impetus to pursue this project was a proposal from a local developer to erect a downtown office building: There was a need for a site to place a parking garage to collect all downtown traffic coming off the highway to the proposed development.²⁸¹ As we can see, the logic behind the project was not mitigating the harm created by the freeway; it adhered to its logic. The project was eventually funded by city-issued bonds, approved by a ballot initiative, and received matching funding from the Federal Highway Authority.²⁸²

Other capping projects were not executed by a state highway department but were rather part of a Public-Private-Partnership, like the "Big Dig" project in Boston. As transportation historian Michael Fein put it, what "proved to be the Big Dig's most distinguishing characteristic" was "the privatization of political power, rather than its localization."²⁸³ The Central Artery/Tunnel Project, largely known as the Big Dig, was planned to replace Boston's six-lane elevated Central Artery (I-93) with an underground freeway.²⁸⁴ Preliminary designs began in the 1980s. The project, estimated at \$14.6 billion for only seven miles of road,²⁸⁵ has been largely conceived of as the most expensive public

²⁸⁰ Grace Brennan, *Parks on the Highway: Building a Cap Park as a Solution to Decades of Devastation Caused by the Construction of the Cross-Bronx Expressway*, 49(4) *FORDHAM URB. L. J.* 825, 844 (2022) (hereinafter: Brennan); Seattle Parks and Recreation, Freeway Park, <https://www.seattle.gov/parks/find/parks/freeway-park> [<https://perma.cc/PH2E-9C5P>].

²⁸¹ ALAN TATE, *GREAT CITY PARKS* 21 (2015).

²⁸² *Here's Forward Thrust in Review*, SEATTLE MUN. NEWS, Sept. 22, 1969, <https://access-newspaperarchive-com.ezp-prod1.hul.harvard.edu/us/washington/seattle/seattle-municipal-news/1969/09-22/page-2/> [<https://perma.cc/TRZ2-NBHA>].

²⁸³ Michael R. Fein, *Tunnel Vision: "Invisible" Highways and Boston's "Big Dig" in the Age of Privatization*, 11(1) *J. PLANNING HIST.* 47, 48 (2012) (hereinafter: Fein).

²⁸⁴ Massachusetts Department of Transportation, Highway Division, The Big Dig, <https://www.mass.gov/info-details/the-big-dig-project-background#introduction-> [<https://perma.cc/5QXN-XCAT>].

²⁸⁵ ALAN A. ALTSHULER & DAVID E. LUBEROFF, *MEGA-PROJECTS* 76 (2003) (hereinafter: Altshuler & Luberoff).

highway project in U.S. history.²⁸⁶ Altshuler and Luberoff have defined this project as “bottom-up federalism”: while nearly all the initiative for the project came from local and state levels, most of the financing has come from the federal government.²⁸⁷

The Massachusetts Turnpike Authority (MTA), a public corporation created by the state, received ownership of the project in 1997. When works began in 1991, the project was under the management of the Massachusetts State Highway Authority; however, it was transferred to the MTA to gain access to MTA’s toll revenues,²⁸⁸ and to further the project’s privatization. Although the MTA is a public authority, it is regarded as a body that “operates more like a business” that needs to assure lenders and investors,²⁸⁹ and is practically immune from strict public oversight.

Furthermore, the project was led by a joint venture of two consulting companies experienced with “mega-projects” in infrastructure: Bechtel and Parsons Brinckerhoff (B & PB).²⁹⁰ At the beginning, the labor union that represented the state highway engineers opposed this outsourcing of the project and sponsored a ballot initiative in November 1990 to limit the state’s use of private consultants for public projects.²⁹¹ The initiative was rejected, with 51% of the voters declining to restrict the state’s use of consultants.²⁹² Later,

²⁸⁶ Digging Up the Facts: Inspecting the Big Dig and the Performance of Federal and State Government in Providing Oversight of Federal Funds, Before the Committee on Government Reform of the House of Representatives, 109th Cong. 22 (2005).

²⁸⁷ Altshuler & Luberoff, *supra* note 285, at 76.

²⁸⁸ Fein, *supra* note 283, at 55.

²⁸⁹ *Levy v. Acting Governor*, 436 Mass. 736, 748 (2002).

²⁹⁰ The latter was rebranded as WSP, after it had been acquired by them in 2014, *see* WSP, *WSP Parsons Brinckerhoff Rebranding as WSP*, Jan. 12, 2017, <https://www.wsp.com/en-us/news/2017/wsp-parsons-brinckerhoff-rebranding-as-wsp> [<https://perma.cc/W6BS-K48R>].

²⁹¹ Altshuler & Luberoff, *supra* note 285, at 108.

²⁹² Massachusetts State Consultant Limitation Initiative, Question 2 (1990), BALLOTPEdia, [https://ballotpedia.org/Massachusetts_State_Consultant_Limitation_Initiative_Question_2_\(1990\)](https://ballotpedia.org/Massachusetts_State_Consultant_Limitation_Initiative_Question_2_(1990)) [<https://perma.cc/HM4Q-CQNU>]. Recently, the use of private consultants in transportation projects have been also associated with the staggering costs of planning and building new subways in America, *see* Henry Grabar, *Consultants Gone Wild*, SLATE, Feb. 23, 2023, <https://slate.com/business/2023/02/subway-costs-us-europe-public-transit-funds.html> [<https://perma.cc/8MF3-3MJG>].

in 1998, the project’s privatization was finalized: around 200 B & PB employees were “transferred” to the MTA.²⁹³ The official reason for this move was to resolve redundancy and duplications in the project’s personnel, but in reality, it served to obscure the amount of funding that went into private hands as the project dragged on, in an effort to make it look more fiscally-responsible.²⁹⁴ Perhaps even more importantly, due to the abovementioned oversight impunity of the MTA, this move made the project almost completely “free” of public oversight. At the national level, however, the federal government capped its share of the project’s funding, citing among other things the lack of oversight.²⁹⁵

Overall, the project is known as a failure, with staggering expense expenses, leaking sea water, collapsing ceilings, and a decade-long conversion of downtown Boston into an enormous construction site.²⁹⁶ As Fein summarized it, the project will be remembered: “less [as] a model of how to blend expert authority and the democratic process than it is a warning about the thorniness of megaproject politics” and privatization.²⁹⁷

* * * *

Today, at least 28 cities across the nation have begun to remove or to plan the removal of

²⁹³ Fein, *supra* note 283, at 56.

²⁹⁴ *Ibid.*

²⁹⁵ *Id.* at 58. See also Oversight Hearing on the Boston Central Artery/Tunnel Project, Before the Committee on Commerce, Science, and Transportation of the U.S. Senate, 106th Cong. (2000) (“... it must be made clear to all FHWA employees that the purpose behind FHWA’s oversight is to ensure that the federal funding provided to each state is effectively and efficiently used to maintain and improve the National Highway System,” *id.* at 88).

²⁹⁶ See e.g. Matthew L. Wald, *Collapse of Big Dig Ceiling in Boston is Tied to Glue*, N.Y. TIMES, July 11, 2007, <https://www.nytimes.com/2007/07/11/us/11bigdig.html> [<https://perma.cc/P82M-E5JH>]; Anthony Flint, *10 Years Later, Did the Big Dig Deliver?* BOSTON GLOBE, Dec. 29, 2015, <https://www.bostonglobe.com/magazine/2015/12/29/years-later-did-big-dig-deliver/tSb8PIMS4QJUETsMpA7Spl/story.html> [<https://perma.cc/S9CE-C5VQ>] (the estimation is that costs rose from around \$2.5 billion to nearly \$15 billion).

²⁹⁷ Fein, *supra* note 283, at 54.

urban freeways.²⁹⁸ Every city has its own history, topology, constituents, and specific characteristics; there is no one-size-fits-all solution for the future of American urban freeways. Some cities will prefer capping highways and making them a park, others will prefer turning them into a boulevard, and perhaps some cities will choose to raze their share of freeways altogether.

Possible legal mechanisms that could enable each city to work out the solution best suited for its society and space are of utmost importance. This will be the focus of the next section, in which I will delve into case studies of urban freeways removal.

There is a major caveat remaining. It was painstakingly framed by Ms. Lynette Boutte, a resident of New Orleans' Tremé. She still remembers the day the majestic oak trees in the neighborhood were taken down to make way for the Claiborne Expressway. But now, when tearing down the expressway is being considered, Boutte is worried that such an exhaustive project will once again change the face of the neighborhood. She wants the expressway gone, but she is not sure that turning the neighborhood into a construction site once again is the right solution. Moreover, the viaducts under the expressway became a socialization site for many members of the community, hosting markets and jazz musicians; taking it down means taking away what has become a part of the community.

²⁹⁸ Joan Fitzgerald & Julian Agyeman, *supra* note 208; U.S. DOT, Transcript: Secretary Pete Buttigieg Remarks on Launch of Reconnecting Communities Program – Birmingham, Alabama, June 30, 2022, <https://www.transportation.gov/briefing-room/transcript-secretary-pete-buttigieg-remarks-launch-reconnecting-communities-program> [<https://perma.cc/D3QA-9HVA>]; Aaron Moselle, *City to Apply for Funds to Cap Portion of Vine Street Expressway Through Chinatown*, WHYY, June 6, 2022, <https://whyy.org/articles/philly-vine-street-expressway-chinatown-federal-funds-to-cap/> [<https://perma.cc/GBY7-MJ5J>]; Trinity Hunt, *As More Development Threatens, Chinatown is Working to Heal the Concrete Wound that Split the Neighborhood*, BILLY PENN, Aug. 9 2022, <https://billypenn.com/2022/08/09/philadelphia-chinatown-vine-street-expressway-cap-sixers-arena-developers/> [<https://perma.cc/2WTS-N4JA>]; Ian Duncan, *Detroit Wins Grant to Remove Interstate that Wrecked a Black Community*, WASH. POST, Sept. 2022, <https://www.washingtonpost.com/transportation/2022/09/15/detroit-highway-removal-paradise-valley/> [<https://perma.cc/PQ5C-BVJV>].

The DOT’s cynically promoted past prophecy of the “budding basketball star of tomorrow” that will emerge out of the “viaduct basketball court,”²⁹⁹ has materialized into a complex reality. In Ms. Boutte’s own words: “With the size of the ramps, how can you move all that concrete without tearing the neighborhood up even more? When it was built it was disruptive, I don’t like it, but I am not sure you can take it down without causing even more damage. We might just have to live with it.”³⁰⁰

Apart from the direct impacts of physically removing urban highways, there is the pertinent perturbation of a new wave of displacement caused by gentrification, hinted at above.

Thus, funds designated for freeway removal could be used for other social benefits for communities bifurcated by urban highways. For example, funds for highway mitigation could be creatively used for neighborhood-specific or city-wide reparations,³⁰¹ as will be discussed in detail in the next part in regard to Providence, and as is now being pushed for in California.³⁰² It could also be used to incentivize a zoning reform, as will be discussed in the case of New Haven. Either way, these considerations of displacement and placement – the concerns about gentrification on one hand and the residents’ sense of place on the other – should be taken into account when discussing different possible legal designs; we should be careful when legally attending harm facilitated by law not to produce yet more

²⁹⁹ See *supra* note 123 and accompanying text.

³⁰⁰ Audra D. S. Burch, *One Historic Black Neighborhood’s Stake in the Infrastructure Bill*, *supra* note 117.

³⁰¹ Cf. Amy Russo, *Elorza Signs Providence’s \$10M Reparations Budget*, THE PROVIDENCE J., Nov. 18, 2022, <https://www.providencejournal.com/story/news/local/2022/11/18/providence-10m-reparations-budget-what-will-it-fund-rhode-island-money-covid-19-equities-fund/69649382007/> [<https://perma.cc/V9TW-97U8>].

³⁰² California Task Force to Study and Develop Reparation Proposals for African Americans, Interim Report, June 2022, at 173-78 (“freeway construction”); Kurtis Lee, *California Panel Calls for Billions in Reparations for Black Residents*, N.Y. TIMES, May 6, 2023, <https://www.nytimes.com/2023/05/06/business/economy/california-reparations.html> [<https://perma.cc/667S-YYMD>].

harm. This is where community control matters the most – not in places where there is sufficient political power, but where there is none. Community control in that context does not mean parochialism and local capture, but reinstating into the discussion the voices of those unheard.

III. THE LEGAL DESIGN OF FREEWAY REMOVAL: CASE STUDIES

In this chapter, I will contextualize the general takeaways from the discussion above in two case studies: Providence, Rhode Island, and New Haven, Connecticut. Both cities have worked to mitigate the impact urban highways had on their local economy and population. Each city chose a different approach to deal with its history: While Providence initiated a city-wide reparation program to remand past injustices inflicted on its residents, New Haven did not focus on transportation or racial justice concepts. Providence, apart from conducting something that resembles a REIS, also focused on involving the local community, a factor that was missing from the New Haven project. However, as was generally discussed above, this community “involvement” did not amount to a meaningful community “control” of the process. The New Haven project, on the other hand, fleshes out captivating questions of institutional design: whether administrating highway removal projects through state and local governments are really the best pathway to allow for the desired community participation and desired equity outcomes. Perhaps counterintuitively, it will be suggested that there are some benefits to federalizing such a scheme. Accordingly, the last sub-section will discuss the federal Bipartisan Infrastructure Law and the opportunities it presents in that respect.

A. Providence, Rhode Island

During the twentieth century, Providence, Rhode Island, experienced an economic rough

patch: The city that was once a regional stronghold of industries such as textile and jewelry, and of waterfront labor, took a blow when the region went through phases of deindustrialization.³⁰³

Fox Point, a waterfront neighborhood in the East Side of Providence was home to various communities of immigrants. It was a poor neighborhood that was designated a “blighted area” and thus redlined.³⁰⁴ However, according to lifelong resident John Murphy, “there [was] pride of ownership in this neighborhood – it wasn’t a slum.”³⁰⁵ Nonetheless, during the 1950s through the 1970s, the neighborhood was demolished. The docks and waterfront warehouses that provided employment in the neighborhood were shut down to make room for office buildings, parking lots, and of course – the I-195 highway.³⁰⁶ Any job left at the docks became practicably inaccessible to Fox Point residents due to the physical barrier the highway presented to the Jewelry District at large.³⁰⁷ The interstate cut the neighborhood in half in the late 1950s, resulting in a first wave of displacement; by the 1960s, a second wave of displacement began when parts of the bifurcated neighborhoods were designated for historic preservation, turning development for affordable housing

³⁰³ FRANCIS J. LEAZES & MARK T. MOTTE, PROVIDENCE: THE RENAISSANCE CITY 31 (2004) (hereinafter: Leazes & Motte).

³⁰⁴ Redlining Map of City of Providence, Rhode Island (1935), available at <https://www.docsteach.org/documents/document/redlining-map-of-city-of-providence-rhode-island> [<https://perma.cc/9W3P-GRWB>].

³⁰⁵ Katy Pickens, ‘The Magnitude of the Community That We Had’: Fox Point, Gentrification, Urban Renewal, THE BROWN DAILY HERALD, Apr. 27, 2022, <https://www.browndailyherald.com/article/2022/04/the-magnitude-of-the-community-that-we-had-fox-point-gentrification-urban-renewal> [<https://perma.cc/6JLG-X44D>]; See also Brown University Library, Fox Point Project, Interview with John Murphy (2009), <https://repository.library.brown.edu/studio/item/bdr:414240/> [<https://perma.cc/KRR4-PKYD>].

³⁰⁶ Anne Valk, Amy Atticks, Rachael Binning, Elizabeth Manekin, Alizo Schiff, Reina Shibata, and Meghan Townes, *Engaging Communities and Classrooms: Lessons from the Fox Point Oral History Project*, 38(1) ORAL HIST. REV. 136, 139 (2011).

³⁰⁷ RHODE ISLAND BLACK HERITAGE SOCIETY & 1696 HERITAGE GROUP, A MATTER OF TRUTH: THE STRUGGLE FOR AFRICAN HERITAGE & INDIGENOUS PEOPLE EQUAL RIGHTS IN PROVIDENCE, RHODE ISLAND (1620-2020) 95 (2021), available at <https://www.providenceri.gov/wp-content/uploads/2021/06/Matter-of-Truth2.pdf> [<https://perma.cc/5YRF-75Q8>] (hereinafter: A Matter of Truth).

almost impossible. When abutting Brown University started expanding into the neighborhood, with students moving-in and gentrifying it, another wave of displacements ensued.³⁰⁸

The neighboring Black neighborhood of Lippitt Hill (“East Side”) was deemed not worthy of preserving, and was demolished by the Providence Redevelopment Agency in 1960 as part of “urban renewal.”³⁰⁹ The Neighborhood’s residents, which ancestors date back to the freed slaves of the Brown family, were evicted to make room for the University Heights apartment and shopping complex.³¹⁰ Thus, like in various examples that were discussed in previous sections above, Providence’s most marginalized communities were displaced and their businesses demolished, to make way for “white roads”: highways, preservation districts, and shopping centers.

As early as the 1970s, when the city’s planners started thinking about possible ways to redevelop Providence’s still-struggling downtown, relocating the I-195 highway was already a viable option.³¹¹ But only in 1997, after a decade-long Environmental Impact Study was conducted by the city and authorized by the Federal Highway Administration,³¹²

³⁰⁸ Kermit Pattison, *Remembering the Good Ole Days*, THE BROWN DAILY HERALD, Nov. 2, 1989, <https://repository.library.brown.edu/storage/bdr:1036681/PDF/> [<https://perma.cc/35KQ-WNPF>]; see also Lessons from the Fox Point Oral History Project, *supra* note 305, *Ibid*; Briann Greenfield, *Marketing the Past: Historic Preservation in Providence, Rhode Island*, in GIVING PRESERVATION A HISTORY 101 (2020); A Matter of Truth, *Id.* at 102 (“Between 1940 and 1956, Brown University spent \$2.1 million dollars [sic] to purchase properties for new dormitories and offices [in the area, and] dramatically accelerated the destabilization of the East Side’s communities of color.”)

³⁰⁹ Katy Pickens and Rhea Rasquinha, ‘*We as a People Are Tired of Moving*’: *Lippitt Hill and the Displacement of Non-White Communities in Providence*, THE BROWN DAILY HERALD, Apr. 17, 2022, <https://www.browndailyherald.com/article/2022/04/we-as-a-people-are-tired-of-moving-lippitt-hill-and-the-displacement-of-non-white-communities-in-providence> [<https://perma.cc/7ZZH-S65P>].

³¹⁰ Stages of Freedom, Lippitt Hill Oral History Project, available at <https://www.stagesoffreedom.org/lippitt-hill-project> [<https://perma.cc/E4YM-Q2LH>].

³¹¹ Josh Tobias, *Relocating I-195 and Fox Point*, in FOX POINT ORAL HISTORY PROJECT (Brown Uni., (2008)), available at <https://repository.library.brown.edu/studio/item/bdr:147792/> [<https://perma.cc/J8FQ-YL5R>].

³¹² Providence Innovation & Design District, *Development of the Providence: The Economic Impact of Projects Completed, Under Construction or Planned in the First Ten Years 2* (May 19, 2022), available at

works on relocating the highway commenced. The project – titled “Iway” – included the transfer of a 1.6-mile stretch of highway 2,000 feet to the south, just next to the city’s hurricane barrier. The project was funded with GRAVEEs (Grant Anticipation Revenue Vehicles),³¹³ which are bonds issued by states to fund a highway project, in anticipation of being reimbursed by the FHA,³¹⁴ at up to 80 percent of the costs.³¹⁵ Eventually, out of the \$610 million of the total project’s costs, \$510 million came from the federal government.³¹⁶

However, federal funds were used only to support the relocation of the relevant section of the highway. Funding for the construction of roads, open streets, bridges, and the development of parcels in the newly-available land was left for the city, which intended to finance it by selling said land.³¹⁷ For that purpose, the Rhode Island General Assembly authorized the city to borrow up to \$42 million annually.³¹⁸

In 2011 the legislature of Rhode Island created the I-195 Redevelopment District, an entity with “separate legal existence from the city of Providence and from the state [of Rhode Island],”³¹⁹ to be administered by the “I-195 Redevelopment District

[https://www.195district.com/_files/public/I-195%20report_July8%202022_FINAL%20\(1\).pdf](https://www.195district.com/_files/public/I-195%20report_July8%202022_FINAL%20(1).pdf) [<https://perma.cc/T3X3-YBT4>] (hereinafter: Development of the Providence).

³¹³ FHA, Center for Innovative Finance Support, Project Profile: Iway (I-195 Relocation Project), available at https://www.fhwa.dot.gov/ipd/project_profiles/ri_iway.aspx [<https://perma.cc/NS48-ADG9>].

³¹⁴ 23 U.S.C. § 122.

³¹⁵ *Id.* at § 120.

³¹⁶ U.S. Department of Transportation, Office of Public Affairs, *Final Segment of Providence’s “Iway” Opens Today*, Oct. 19, 2009, <https://highways.dot.gov/newsroom/final-segment-providences-iway-opens-today> [<https://perma.cc/UY9K-UAW8>].

³¹⁷ Office of the Rhode Island Governor, *Governor Chafee, RIDOT Announce Transfer of Former I-195 Land for Development*, Press Release, Apr. 24, 2013, <https://www.ri.gov/press/view/19195> [<https://perma.cc/YV4B-LDXN>].

³¹⁸ State of Rhode Island in General Assembly, An Act Relating to Public Property and Works (LC02296/SUB A/4), March 29, 2011, available at https://www.195district.com/_files/public/Migrated/file/Legal%20Documents/195%20Commission%20Statute.pdf [<https://perma.cc/45MF-MLEV>].

³¹⁹ State of Rhode Island, Statutes, Chapter 64.14 The I-195 Redevelopment Act of 2011 § 42-64.14-5.

Commission”³²⁰ (hereinafter: RDC). This seven members committee is controlled de facto by the state: According to the State Senate’s decision, all of RDC members are to be appointed by the governor, three from a list composed by the mayor of Providence, and the remaining four members by the governor alone.³²¹ Providence’s planning director is appointed ex officio, as a non-voting member.³²²

All in all, the RDC – as established – holds general governing powers similar to those of a local government or special district, for example, the power to collect taxes and assessments,³²³ the power to plan and zone³²⁴ and to issue permits,³²⁵ and to survey and adjust property descriptions and boundaries within its jurisdiction.³²⁶ The vast powers of the RDC are deemed “necessary for the welfare of the state and its inhabitants,” and are to be liberally construed so as to trump any inconsistency with the provisions of any other law or ordinance.³²⁷ This intensive and preemptive state involvement in the process underscores how detached this project was from any meaningful community control, especially in a home-rule state like Rhode Island.³²⁸

The property regime and funding mechanism were circularly complex. Initially, the Rhode Island Department of Transportation (RIDoT) owned the newly-available parcels in the district. The Rhode Island Economic Development Corporation – a state corporation

³²⁰ *Id.* at § 42-64.14-6. The commission “shall consist of seven (7) voting members. The governor of the State of Rhode Island shall appoint, with the advice and consent of the senate, the seven (7) voting members of the commission.”

³²¹ With four commissioners constituting a quorum, *id.* at (c).

³²² Together with the executive director of the RI economic development corporation, *Ibid.*

³²³ *Id.* at § 42-64.14.-8(a).

³²⁴ *Id.* at (b)(6)-(7); *see also* at §42-64.14-13(a).

³²⁵ *Id.* at § 42-64.14-13(b).

³²⁶ *Id.* at § 42-64.14.-8(d).

³²⁷ *Id.* at § 42-64.14-20.

³²⁸ R.I CONST. art. XIII; “It is the intention of this article to grant and confirm to the people of every city and town in this state the right of self government in all local matters,” § 1.

– issued bonds totaling \$38,400,000 to buy the property from RIDoT and transfer it to the RDC; the money was to be spent by RIDoT on developing the district’s parcels and make them ready for redevelopment, while the bonds were to be repaid by selling the developable parcels in the district.³²⁹ In 2015, the Rhode Island General Assembly also established the I-195 Redevelopment Project Fund to finance and develop infrastructure in the district.³³⁰

This funding scheme backed by bonds did not prove particularly efficient: to this date, the district’s land has not been fully sold. Only in 2017, six years into the project, did the first parcel of the I-195 land sell.³³¹ As of 2023, 7 acres out of the 19 developable acres of the project, are still available.³³² The total liabilities of the RDC exceeded its total assets by approximately \$23.5 million, attributed mostly to bonded debt.³³³

Interestingly, one of the main objectives of the redevelopment district was to incentivize “life sciences jobs” in the district through tax cuts,³³⁴ meaning to “encourage health-related innovations by supporting and stimulating research and development, manufacturing and commercialization in the life sciences.”³³⁵ Although this objective was drafted in 2011, in the wake of Donald Carcieri’s term as Rhode Island’s last republican

³²⁹ Rhode Island Economic Development Corporation, Economic Impact Analysis of Proposed Economic Development Revenue Bonds I-195 Redevelopment District Project, Apr. 9, 2012, available at <https://tax.ri.gov/sites/g/files/xkgbur541/files/taxcreditreports/EDC-Bonds/I-195-Redevelopment---Bonds.pdf> [<https://perma.cc/KW64-CDSV>]; Kate Bramson, *R.I. Taxpayers Could Be on the Hook for Cost of Purchasing Route 195 Land*, THE PROVIDENCE J., July 13, 2011, <https://www.providencejournal.com/story/news/politics/2011/07/13/r-i-taxpayers-could-be/35435857007/> [<https://perma.cc/PYE8-RJ66>].

³³⁰ 42 R.I.G.L. § 64.24.

³³¹ Associated Press, *I-195 Redevelopment District Commission Chairman Resigns*, THE SEATTLE TIMES, Oct. 17, 2017, <https://www.seattletimes.com/business/i-195-redevelopment-district-commission-chairman-resigns/> [<https://perma.cc/3PZJ-DMLA>].

³³² Providence, The Innovation Design District (last visited, March 11, 2023), <https://www.195district.com> [<https://perma.cc/AU5C-MWGV>].

³³³ “The current year net deficit position is primarily due to \$31,990,000 in bonded debt,” I-195 Redevelopment District, Financial Statements, As of and for the Years Ended June 30, 2022, and 2021, at 6, available at [https://www.195district.com/_files/public/I-195%20Redevelopment%20District%20FY22%20AFS%20\(1\).pdf](https://www.195district.com/_files/public/I-195%20Redevelopment%20District%20FY22%20AFS%20(1).pdf) [<https://perma.cc/QFK9-NLNU>].

³³⁴ 42 R.I.G.L. § 64.14-10 & 11.

³³⁵ *Id.* at § 42-64.14-9(a).

governor to date, it persisted throughout the next decade and was highlighted by the current governor Gina Raimondo's campaign, which pledged to market the I-195 land as an innovation hub that would benefit from the state and city's universities and hospitals.³³⁶ This strategy was also used in New Haven, as will be discussed below.

One of the most contested points in the debate around the district's redevelopment echoes the central questions of this paper: What should be done to mitigate the harms caused by historic urban freeways, what should be developed to replace those highways, and for whom. Fane Tower poses a striking example of this dilemma.

The Fane Organization, a development and real-estate business, offered to purchase a parcel in the district, and to develop thereon a high-rise residential project of around 600 feet to be called "Hope Point" (but known broadly as the "Fane Tower").³³⁷ The district, however, is zoned D-1, a category in which the height of buildings cannot exceed 100 feet. The district redevelopment committee, interested in the economic benefit of the proposed development, sought a rezoning of the parcel along with the developer. As Colin Kent-Daggett of *The College Hill Independent* has put it, Fane Tower was "a referendum on the city's future," a question of whether the City Council would "cave to the whims of a wealthy New Yorker and sacrifice Providence's skyline, along with a \$15 million tax credit? Or would it hold out for a developer willing to respect the existing 100-foot height restriction and ongoing park and pedestrian projects along the Providence River?"³³⁸

The City Plan Commission found the rezoning amendment inconsistent with the

³³⁶ Elizabeth Abbott, *Providence, R.I., Is Building on a Highway's Footprint*, N.Y. TIMES, Aug. 18, 2015, <https://www.nytimes.com/2015/08/19/realestate/commercial/a-highway-is-moved-and-development-follows-in-providence.html> [<https://perma.cc/K739-TLZE>].

³³⁷ Peter Scotti & Assocs., Inc. v. Yurdin, 276 A.3d 915, 918 (RI, 2022) (hereinafter: *Yurdin*).

³³⁸ Colin Kent-Daggett, *Can You Gentrify a Vacant Lot?*, THE COLLEGE HILL INDEPENDENT, Sept. 24, 2018, <https://www.theindy.org/1482> [<https://perma.cc/W73W-JHXH>].

city’s comprehensive plan since it did not take into account the city’s “historic character”; but more importantly: It found that the plan “create[d] housing whose costs would not be appropriate for the financial capabilities of city residents,” lacked affordable housing and any “significant mixed-use.”³³⁹ Providence’s Mayor, Jorge Elorza, vetoed the rezoning.³⁴⁰ However, the City Council overruled the Mayor’s veto and approved the zoning amendment.³⁴¹

After 3 years of litigation, in June of 2022, a final petition against the amendment was rejected by the Rhode Island Supreme Court. However, after the elongated procedures, and a number of redesigns,³⁴² the Fane Organization decided to halt the development of the project altogether in March of 2023, without elaborating on what might be the reason behind this decision.³⁴³ Sharon Steele, the Jewelry District Association’s president and a member of the group that initiated the litigation, said she was “over the moon” at the news since the tower was “bad development.”³⁴⁴

However, it seems that the association’s objection on affordability grounds were strategic. Steele said in an interview that the redevelopment district was established to

³³⁹ *Yurdin, supra* note 337, at 919.

³⁴⁰ *Ibid.* However, the veto did not arise from the lack of affordable housing or the urban nature of mixed-use; rather, it was a result of the fact that “the design of the building was [the Mayor’s] top priority,” Jorge O. Elorza, Regarding: Ordinance-2018-77, An Ordinance in Amendment of Chapter 27 of the Code of Ordinances of the City of Providence, Entitled: “The City of Providence Zoning Ordinance,” Approved Nov. 24, 2014, As Amended for a Text Change and Change in Zoning Map, for the Property Located on Assessor’s Plat 20, Lot 397 (250 Dyer Street) (Nov. 30, 2018).

³⁴¹ Peter Scotti & Assocs., Inc, *supra* note 337, at 919-20. It should be noted that the mayor and city council members were all affiliated with the Democratic party.

³⁴² Wheeler Cowperthwaite, *After Repeated Setbacks and Delays, Decision on Fane Tower Possible in 4 Weeks*, THE PROVIDENCE J., Feb. 17, 2023, <https://www.providencejournal.com/story/news/local/2023/02/17/with-contract-set-to-expire-fane-tower-fate-could-be-decided-in-march/69910054007/> [<https://perma.cc/WG8X-FPY6>].

³⁴³ Patrick Anderson, *The Controversial Fane Tower Project is Dead. What We Know*, THE PROVIDENCE J., March 10, 2023, <https://www.providencejournal.com/story/news/local/2023/03/10/fane-tower-in-providence-project-dead-developers-rights-will-lapse/69995246007/> [<https://perma.cc/ZJJ4-M8XS>].

³⁴⁴ Steph Machado, Eli Sherman, *Fane Tower Project in Providence is Dead*, WPRI, Mar. 10, 2023, <https://www.wpri.com/news/local-news/providence/fane-tower-project-in-providence-is-dead/> [<https://perma.cc/V8HA-FGGW>].

“create jobs in innovation and design” and not housing; in the same fashion, Marc Crisafulli, the recently appointed (Jan. 2023) chairman of the DRC stated that the commission is shifting its development focus to “try to get back to the roots of the mission of the commission, focus on economic and commercial development,” and not residential development.³⁴⁵

Thus, the I-195 Development District, in its 12th year, has yet to accomplish the goal it was created to promote: downtown revitalization. On a deeper level, it failed to undo the damages caused by the introduction of the highway into Fox Point and the Jewelry District in the first place. As mentioned, the Commission did not allow for community control of the development. The Commission also did not conduct any kind of REIS and did not take into account the disparate effect the now-removed highway had on the relevant communities. As Kent-Daggett put it, “Rather than relieve Providence from the wrongs of previous urban planners, the redevelopment of the Jewelry District has burdened the same communities with the consequences of another romanticized phase of American urban planning.”³⁴⁶

But despite this disregard by the state, the city has done something itself.

In July 2020, Mayor Elorza issued an executive order titled “Declaration on Truth, Reconciliation, and Reparation.”³⁴⁷ This executive order initiated a three-phase process,

³⁴⁵ Claudia Chiappa, *195 District Commission is Shifting its Development Focus*, PBN, Feb. 10, 2023, <https://pbn.com/195-district-commission-is-shifting-its-development-focus/> [https://perma.cc/HXJ8-YXPE]; see also Joseph R. Paolino, Jr., *Invest in Science Industries, Not Housing, For I-195 Land*, THE PROVIDENCE JOURNAL, Sept. 27, 2021, <https://www.providencejournal.com/story/opinion/columns/2021/09/27/invest-science-industries-not-housing-ris-195-land/5872000001/> [https://perma.cc/A842-QDBE].

³⁴⁶ Can You Gentrify a Vacant Lot, *supra* note 338.

³⁴⁷ Mayor of Providence, Executive Order 2020-13, July 15, 2020, available at <https://www.providenceri.gov/wp-content/uploads/2020/07/Mayors-Executive-Order-2020-13-1.pdf> [https://perma.cc/Y7FG-X9QL].

starting with “Truth, first by identifying, compiling, and synthesizing, and understanding the institution of slavery, the genocide of Indigenous People, and the continued discrimination within the State of Rhode Island and the City of Providence”;³⁴⁸ the second phase, of reconciliation, “will strive to help our community confront the past and recognize the continued ways that history shapes the present”;³⁴⁹ and lastly, “the city will designate a process whereby recommendations are made to reverse injuries caused by the experiences documented in Phase 1 (Truth)”; these recommendations are to be “ambitiously scaled in order to make Providence a model city for racial and social justice.”³⁵⁰

As part of Phase 1 (Truth), the African American Ambassador Group (AAAG) in the City of Providence³⁵¹ conducted a survey and “recruited lead stakeholders” defined as “African heritage and Indigenous individuals with generational familial and community connections to the four selected neighborhoods of Fox Point, Lippitt Hill, Upper South Providence, and West Elmwood,” to conduct interviews and hear “residents’ stories and perspectives regarding 1950s-60s urban redevelopment in the four selected neighborhoods.”³⁵² These particular four neighborhoods were chosen because of the “racist urban development initiatives that displaced and disenfranchised their African heritage and Indigenous residents,” and because they have in them particular relics of such

³⁴⁸ *Id.* at § 1.

³⁴⁹ *Id.* at § 2.

³⁵⁰ *Id.* at § 3.

³⁵¹ The group is a “group of faith leaders who served as a direct line of communication between the community and the [city] Administration to ensure equitable access to COVID-19 related care and resources” in May 2020, and in August 2022 became a formal “permanent entity” in Providence’s administration, *see* Mayor of Providence, Executive Order 2022-5 (*Establishing the African American Ambassadors Group*), Aug. 25, 2022, https://www.providenceri.gov/wp-content/uploads/2022/08/AAAG_EO.pdf [<https://perma.cc/36SS-PVTQ>].

³⁵² ROGER WILLIAMS UNIVERSITY & PROVIDENCE CULTURAL EQUITY INITIATIVE, TRUTH-TELLING & RECONCILIATION: PROPOSING A FRAMEWORK FOR THE CITY OF PROVIDENCE 13 (2022), available at: <https://drive.google.com/file/d/16TrMGvOCX9BOiuD9xNW06o93QZXZCfjU/view> [<https://perma.cc/DMP6-D77K>].

discrimination: “the interstate we drive on every day evidences the lingering effects of systemically racist approaches to urban development in 1950-60s Providence.”³⁵³

As part of the survey, participants were asked to identify one or two injustices that must be addressed as part of the city’s effort; the “largest thematic category [which was] identified was Housing,” with responses including terms like homeownership, gentrification, homeless, and redlining.³⁵⁴ The fact that “urban redevelopment destroyed communities by fracturing familial ties and economic infrastructure,” was a “theme cutting across interviews.”³⁵⁵

In August 2022, the report of the Providence Municipal Reparations Commission was released, detailing recommendations for the distribution of \$10 million for reparations.³⁵⁶ The funding for the reparation plan was planned to come from the federal government’s American Rescue Plan funds that were allocated to states, municipalities, and individuals to help fight the economic consequences of the Covid-19 pandemic.³⁵⁷

As stated by the Reparation Commission, this act was to “be future-facing,”³⁵⁸ starting by documenting racial disparities “that continue to restrict residents and neighborhoods from fully participating in the city’s economy through wealth building and social equity.”³⁵⁹ Thus, the commission focused on closing the racial wealth gap in

³⁵³ *Id.* at 11.

³⁵⁴ *Id.* at 19.

³⁵⁵ *Id.* at 29.

³⁵⁶ PROVIDENCE MUNICIPAL REPARATIONS COMMISSION, REPORT OF THE PROVIDENCE MUNICIPAL REPARATIONS COMMISSION (2022) (hereinafter: Reparation Commission Report).

³⁵⁷ THE WHITE HOUSE, AMERICAN RESCUE PLAN, <https://www.whitehouse.gov/american-rescue-plan/> [<https://perma.cc/62SC-C36Q>] (last visited Mar. 14, 2023).

³⁵⁸ *Id.* at 27.

³⁵⁹ *Id.* at 29; This documentation reveals, for example, that while Fox Point, College Hill, and Mount Hope (where Lippitt Hill once stood), were once prominent communities for immigrants Black people, and are now home to fewer Black and American Indian Households, they did yet not completely gentrified, with Fox Point and parts of Mount Hope showing in the top 50% of Census Tracts by population below the poverty line, *id.* at 29-30.

Providence, a result of “the system of racial discrimination [and the still] persistent multigenerational ‘Racial Wealth and Equity Gap’ that continues to disadvantage descendants today.”³⁶⁰ The committee mentioned as actions that continue to extend this disparity the “interstate highway improvements [that] ghettoized and later deconstructed largely African heritage and limited-income neighborhoods including Fox Point, Upper South Providence, West Elmwood, College Hill, and Lippitt Hill.”³⁶¹ Therefore, as part of the 11-point investment plan a formal municipal apology for urban renewal policies and practices was also recommended.³⁶²

The same month, August 2022, Mayor Elorza issued an executive order “Recognizing and Apologizing for the City of Providence’s Role in Discriminatory Practices and Policies,” among them red-lining policies, urban redevelopment, and the discriminatory application of the Federal Housing Act.³⁶³ Therefore, the “City of Providence accept[ed] ownership” of these wrongdoings, and “will move forward in actively preventing such events from ever happening again” by advancing the Committee’s recommendations for reparations.³⁶⁴

The allocation of the \$10 million of reparation funds was determined by the commission and approved by the mayor. Generally, the reparations were to be distributed through investments in different programs, with the bulk of it directed toward “equity building” programs, e.g. the homeownership program and a home repair fund;³⁶⁵ the

³⁶⁰ Reparation Commission Report, *supra* note 356, at 12 (“Defining Reparations: Closing the Racial Wealth Gap in Providence.”)

³⁶¹ *Ibid.*

³⁶² *Id.* at 14.

³⁶³ Mayor of Providence, Executive Order 2022-6, § 4, Aug. 25, 2022, https://www.providenceri.gov/wp-content/uploads/2022/08/Apology_EO.pdf [<https://perma.cc/5ZZG-Z4E5>].

³⁶⁴ *Id.* at § 7(b).

³⁶⁵ Reparation Commission Report, *supra* note 356, at 15.

establishment of neighborhood incubators focused on African heritage and indigenous communities;³⁶⁶ and the creation of an “African Heritage and Indigenous Survivors & Descendants of Providence Urban Renewal Displacement” fund.³⁶⁷ Only \$ 400,000 were allocated to this fund, in two different programs: “a Fund Dedicated to Urban Renewal Impacts,” and “Grant Program to Assist Urban Renewal Impacted Neighborhoods.”³⁶⁸

The plan was criticized by locals, who raised two main concerns. First, it was regarded as a lip service for repairing past injustices, and that nothing more will be done. As Justice Gaines, a local Black poet and community organizer told the *Washington Post*, “This is a short-term response to a 400-year problem because it makes people feel better. My big fear is that there are now white s people in our state who could say we already gave them reparations.”³⁶⁹ Dannie Ritchie, an adjunct assistant professor of Africana Studies at Brown University said that it is “dangerous” to call this plan “reparations,” because “then it will be done without ever really having a conversation about what repairing the harm would look like.”³⁷⁰ Second, this reparation plan was alarming to some because of its presumptive race neutrality. The eligibility for reparations was determined by residency and earnings criteria, which theoretically could make white people also eligible for reparation funds. The city’s response to this concern was that as long as “race isn’t lost in

³⁶⁶ *Id.* at 18.

³⁶⁷ *Id.* at 19.

³⁶⁸ PROVIDENCE, PROVIDENCE MUNICIPAL REPARATIONS OVERVIEW <https://www.providenceri.gov/wp-content/uploads/2022/08/ReparationsBudgetOnePager2.pdf> [<https://perma.cc/NN54-NL63>] (last visited: Mar. 21, 2023). As part of this fund, the Commission recommended investing in “down payments assistance, education scholarships, workforce training, and small business development.” As will be discussed below, this last approach is not dissimilar to the one envisioned by the Bipartisan Infrastructure Law, which incorporated the Minority Business Development Act of 2021.

³⁶⁹ Emmanuel Felton, *Providence Offers Reparations to Address Racism. White People Can Apply*, WASH. POST, Nov. 29, 2022, <https://www.washingtonpost.com/nation/2022/11/29/reparations-program-providence-rhode-island/> [<https://perma.cc/H828-HZPA>].

³⁷⁰ *Ibid.*

the conversation,” this should not pose a problem.³⁷¹

These specific concerns resonate with more general ones in the case of reparations. Scale matters. As Ta-Nehisi Coates wrote in his seminal Atlantic article *The Case for Reparations* from 2014:

What I’m talking about is more than recompense for past injustices – more than a handout, a payoff, hush money, or a reluctant bribe. What I’m talking about is a national reckoning ... Reparations would mean a revolution of the American consciousness, a reconciling of our self-image as the great democratized with the facts of our history.³⁷²

Providence is using its reparation program explicitly to work toward this reconciliation. It is questionable whether \$10 million are enough for such an ambitious plan. For reference, the City’s general “rescue plan” from which the reparation monies are derived, is \$166 million in ARPA funds. Although transportation infrastructure is not addressed in this plan, it does allocate \$17 million for affordable housing development, \$3 million for home repair programs, and \$1 million for emergency housing solutions.³⁷³ Although these programs are not directly aimed to relieve the consequences of the urban freeway on marginal communities in Providence, they might still have this effect if implemented robustly within those communities to make access to housing more affordable and impede the wave of displacement currently at play due to the redevelopment district’s rapid gentrification.

It is yet to be seen what will come out of Providence’s reparations program,

³⁷¹ *Ibid.*

³⁷² Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC, June 2014, <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> [<https://perma.cc/DTE7-BSG5>].

³⁷³ PROVIDENCE RESCUE PLAN, PVD RESCUE PLAN BUDGET OVERVIEW, <https://pvdrescueplan.com/budget-overview/> [<https://perma.cc/QTb2-P73X>] (last visited: Mar. 21, 2023).

specifically in the context of remanding for past urban renewal and highway programs. As I have tried to demonstrate, this effort is complementary to the actual removal of the highway; thus far, the “Innovation District” economically developed almost nothing but empty lots.³⁷⁴

There is a new mayor in Town. Mayor Elorza reached his two-term limit and was replaced in late 2022 by Mayor Smiley.³⁷⁵ Mayor Elorza’s legacy and the reparations program are to be implemented by his successor. As of March 2023, not a single dollar has been distributed from the designated funds.³⁷⁶

B. New Haven, Connecticut

If in Providence the highway removal was facilitated by the state, in the case of New Haven it was the federal government. Federal funding for urban highway removal is relatively a new phenomenon. But it seems only reasonable: The federal government funded the construction of the interstate in the past, and now it will fund its reconstruction.

In 2010, the U.S. DoT decided to fund such projects in three cities – New Haven, New Orleans,³⁷⁷ and New York City – aimed at tearing down local highways and replacing them with walkable boulevards,³⁷⁸ using Transportation Investment Generating Economic

³⁷⁴ It should be noted, however, that according to the I-195 Redevelopment Committee 2022 Report, the projects completed in the district thus far have generated 3,428 new jobs in the area, Development of the Providence, *supra* note 312, at 8.

³⁷⁵ Amy Russo, *Brett Smiley Declares Victory in Race to be Providence’s Next Mayor*, THE PROVIDENCE J., Sept. 13, 2022, <https://www.providencejournal.com/story/news/local/2022/09/13/providence-mayor-ri-2022-primary-election-results-smiley-cuervo-lafortune/8013754001/> [<https://perma.cc/5YN2-8DLM>].

³⁷⁶ Chinmayi Rajaram, *‘Tip of the Iceberg’: Activists, Members of Reparations Commission Reflect on Providence’s \$10 million Reparation Program*, BROWN DAILY HERALD, Mar. 15, 2023, <https://www.browndailyherald.com/article/2023/03/tip-of-the-iceberg-activists-members-of-reparations-commission-reflect-on-providences-10-million-reparations-program> [<https://perma.cc/72PM-C8YM>].

³⁷⁷ In New Orleans, although the 2010 grant initiated a study of tearing down the Claiborne Express, this project has not materialized to this day, as we saw above, Susan Buchanan, *New Orleans Considers Removing Its Claiborne Overpass*, HUFF. POST, Jan. 9, 2013, https://www.huffpost.com/entry/new-orleans-considers-rem_b_2436610 [<https://perma.cc/R44S-ZYZK>].

³⁷⁸ Rose & Mohl, *supra* note 38, at 186.

Recovery (TIGER II) grants.³⁷⁹ As the New Haven project shows, these projects were only partially successful. While phase I of the New Haven project has been completed in 2016 and is considered a success by the city,³⁸⁰ it seems that its success is limited to the narrow economic interests of the municipality.

The project revolved around the Oak Street Connector. This road was an extension of Route 34 that went through downtown New Haven. This “limited access expressway” was supposed to transfer traffic from I-95 through the city and into the westward suburbs. However, the project was stalled through the 1970s: With the cost of construction continually increasing and public opinion shifting,³⁸¹ the state stopped funding the project altogether,³⁸² but retained the rights-of-way in the parcels preserved for the incomplete Connector. The City of New Haven, demonstrating disbelief in the feasibility of the project ever materializing, sold the air rights over those parcels. Thus, in 1981 the “Air Rights Garage” was opened between M.L.K Boulevard and South Frontage Road, realistically cementing the end of the project.³⁸³ The project was formally abandoned when the state, as part of a budget crisis in 2002, sold the parcels designated for the completion of the road

³⁷⁹ Now known as RAISE. , U.S. Department of Transportation, About RAISE Gants, <https://www.transportation.gov/RAISEgrants/about> [<https://perma.cc/L99V-HFND>].

³⁸⁰ See e.g. Will Wang, *Downtown Crossing Project Moves Forward*, YALE NEWS, Nov. 17, 2017, <https://yaledailynews.com/blog/2017/11/17/downtown-crossing-project-moves-forward/> [<https://perma.cc/8FDA-Y2HV>].

³⁸¹ FRANCESCA RUSSELLO AMMON, BULLDOZER: DEMOLITION AND CLEARANCE OF THE POSTWAR LANDSCAPE 152, 178-79 (2016) (hereinafter: AMMON, BULLDOZER).

³⁸² Jonathan Hopkins, *How About this Future for Legion Ave.?*, NEW HAVEN INDEPENDENT, Nov. 17, 2014, https://www.newhavenindependent.org/article/a_different_approach_for_route_34w [<https://perma.cc/ZTD9-NAQU>].

³⁸³ Harrison Silver, *Renewal to Wreckage: Redevelopment in New Haven and the Oak Street Project 60* (May 9, 2022) (History Dep. Senior Thesis, Trinity College), <https://digitalrepository.trincoll.edu/cgi/viewcontent.cgi?article=1978&context=theses> [<https://perma.cc/K8YK-DSM4>] (Silver mentions that “interestingly, the city still maintained innovative plans for the Connector to continue as a ‘below-grade roadway’ running beneath [the garage].”)

to Pfizer, which opened a research facility there in 2005.³⁸⁴ It sealed the fate of the Oak Street Connector, which has come to be known as “the expressway to nowhere.”

To originally enable the erection of this “expressway to nowhere,” the State of Connecticut and its Highway Department demolished more than 2,000 dwelling units in more than 400 structures across the city.³⁸⁵ The ramifications were particularly hard in one of New Haven’s most diverse and low-income communities: Oak Street. The expansion of the highway into this neighborhood caused the eviction of more than 880 households (or about 3,000 residents), and approximately 350 businesses from one of New Haven’s most dense and poor neighborhoods.³⁸⁶ The Oak Street neighborhood was home to many minorities – Black, Italian, Irish, and Jewish families. According to New Haven Downtown Crossing, the entity in charge of the highway removal project, the razing of the Oak Street neighborhood “occurred in an era when automobile mobility was prioritized over neighborhood cohesion.”³⁸⁷

In August 2010, The City of New Haven filed a TIGER II grant application for the reutilization of Route 34. According to the application’s cover letter, signed by New Haven’s mayor John DeStefano, Jr., the city’s main incentive for the project was “our commitment to reclaim land, develop new basic industries, and make New Haven a global center of economic influence.”³⁸⁸ This need was born out of the “2007-2009 recession”

³⁸⁴ New Haven | Route 34, *History and Context*, CONGRESS FOR NEW URBANISM, <https://www.cnu.org/highways-boulevards/campaign-cities/new-haven> [<https://perma.cc/CFS7-U92D>].

³⁸⁵ AMMON, BULLDOZER, at 145 (This figure of more than 400 buildings was in addition to the 3,000 buildings that were demolished by the city between 1957 and 1980 using federal urban renewal funds.)

³⁸⁶ *Id.* at 164.

³⁸⁷ Downtown Crossing New Haven, History, <https://downtowncrossingnewhaven.com/history/> [<https://perma.cc/Q2EJ-BVS5>].

³⁸⁸ John DeStefano, Jr., *RE: Downtown Crossing, New Haven, CT, Request for TIGER II Grant Assistance*, in DOWNTOWN CROSSING: TIGER II CAPITAL GRANT APPLICATION, Aug. 21, 2010, 3 <https://www.ctdatahaven.org/sites/ctdatahaven/files/NewHaven%20Rt34%20Boulevardization%20TIGERI%20ProjectNarrative%202010.pdf> [<https://perma.cc/AU2A-W2SY>].

and the city’s “unemployment rate [that stood] at 12.7% well above the rate for Connecticut (8.9) and the nation (9.5%).”³⁸⁹

The city consulted with an “outstanding team of partners, which includes the State of Connecticut, Yale University, and Yale-New Haven Hospital and Winstanley Enterprises,”³⁹⁰ but it seems that no resident of the city, let alone of the project’s area, was consulted. The grant application only vaguely mentioned the investment in the project “leverages basic economic development opportunities,” and “restores livability in the inner city.”³⁹¹ The application’s section regarding “The Need For Safe Connectivity” highlights the benefits of reutilizing the road to improve the “transition of traffic from I-91/I-95 highways to the local roadway network.”³⁹² It seems that the visionaries of the New Haven project had a revisionist idea of what this road should be used for, channeling the spirit of the original justification for urban highways. The application *does* mention that the project will help reconnect the historic neighborhood divided by the expressway; however, it is hard to see in exactly what practical way it aimed at doing so, especially since the initial plan was to widen parts of the road from 3 to 4 lanes.³⁹³

Phase I of the project – funded by the TIGER II grant – eventually included narrowing parts of the road and imposing a speed limit of 25 MPH, but the “approximately 2.4 acres of developable land [that] was reclaimed” by the project went to private hands with “the construction of a 14-story, 450,000 square foot research facility ... which is fully leased and contributing to the City’s tax base.”³⁹⁴ While the project received approximately \$16

³⁸⁹ *Ibid.*

³⁹⁰ *Ibid.*

³⁹¹ *Id.* at 7.

³⁹² *Id.* at 8.

³⁹³ *Id.* at 7.

³⁹⁴ Downtown Crossing, New Haven, Phase 1, From Expressway to Urban Boulevards, <https://downtowncrossingnewhaven.com/phase-1/> [<https://perma.cc/XR5B-PQSF>].

million in federal funds, with state's matching,³⁹⁵ the pharmaceutical company Alexion which occupies this new "research facility" received \$51 million in state tax benefits.³⁹⁶

Hence, the federal grant was mostly used to lure business activity back into town without mitigating the initial harm caused by the highway to the urban texture. Anstress Farwell, president of the New Haven Urban Design League has criticized the project exactly for that reason, saying it would bring numerous more cars into downtown New Haven and thus undermine the "pedestrian-focused goals" of the project: "It's just a worse version of what we dealt with before [during the 1950-60s]," Farwell said, "what we really need to change is mobility patterns through this area."³⁹⁷ In other words, without creating more housing options, transportation alternatives, and a pedestrian-focused downtown, more jobs in the business district will just mean more cars entering the city, driven by suburbanite workers that will not significantly contribute to the city's society, culture, or economy. And indeed, the very-first building to be constructed as part of the downtown redevelopment project was an 850-space parking garage.³⁹⁸

Thus, generally speaking, it seems questionable whether a change in this "car supremacy" logic is on the horizon, especially in a part of the city that was damaged in the past from the demolition of houses and is currently in dire need for affordable dwellings and new modes of mobility options. The city initially pushed for a housing development

³⁹⁵ Downtown Crossing New Haven, Project Funding, <https://downtowncrossingnewhaven.com/project-funding/> [<https://perma.cc/H6VR-SWNZ>].

³⁹⁶ *CT giving Alexion \$51M for New Haven Move, 300 Jobs*, HARTFORD BUSINESS, June 19, 2012 <https://www.hartfordbusiness.com/article/ct-giving-alexion-51m-for-new-haven-move-300-jobs> [<https://perma.cc/9SEV-R83Z>].

³⁹⁷ C.J. Hughes, *A Plan in New Haven to Right a Highway's Wrong*, N.Y. TIMES, July 17, 2012, <https://www.nytimes.com/2012/07/18/realestate/commercial/a-plan-in-new-haven-to-right-a-highways-wrong.html> [<https://perma.cc/75FG-B89Z>].

³⁹⁸ Robert Steuteville, *New Haven's Downtown Crossing Approved, Despite Critics*, PUBLIC SQ. (CNU), Aug. 10, 2012, <https://www.cnu.org/publicsquare/new-havens-downtown-crossing-approved-despite-critics> [<https://perma.cc/M8HD-QH46>].

as part of the Downtown Crossing project.³⁹⁹ However, it did not come to fruition, and only recently, in late 2022, a new developer started to work on developing a housing complex in the area.⁴⁰⁰

Downtown Crossing's intervention has come at a time of a general housing crisis in Connecticut generally,⁴⁰¹ and in New Haven specifically.⁴⁰² From that perspective, it could be too much to ask the city to solve the affordability crisis all by itself. A presumptive reinforcement for this view could be found in the statewide efforts pushed by the Connecticut legislature to reform zoning and planning laws in the state to help alleviate the housing crisis.⁴⁰³ In other words, New Haven's housing and mobility problems might be a part of some of the state's general hindrances in the area of housing, and while the city might try to address it, a more beneficial approach would be increasing local tax revenue to make the city a better place to live in.⁴⁰⁴

The "Work Live Ride" bill promoted in the Connecticut legislature (sHB 6980) is an example of what could have been achieved locally by the Downtown Crossing project if the city's orientation was a little wider than just economically developing the business

³⁹⁹ Lisa Prevost, *Developer Takes a New Look at Downtown New Haven*, N.Y. TIMES, Feb. 11, 2014, <https://www.nytimes.com/2014/02/12/realestate/commercial/a-stretch-of-downtown-new-haven-gets-a-second-look.html> [<https://perma.cc/5KXW-8HZP>].

⁴⁰⁰ Mark Zaretsky, *New Haven, Spinnaker Break Ground for 200-Apartment 1st Building on Former Coliseum Site*, NEW HAVEN REGISTER, Nov. 11, 2022, <https://www.nhregister.com/news/article/New-Haven-breaks-ground-former-Coliseum-site-17575688.php> [<https://perma.cc/WS6F-JBH4>]. Twenty percent of this new development is reserved for affordable housing, but the details of how much exactly and what affordable means are yet to be seen when the building will eventually be developed.

⁴⁰¹ Camila Vallejo, *In Connecticut, Rental Vacancy Rates Are the Lowest in the U.S., Leaving Renters with Few Options*, CTPUBLIC, Aug. 26, 2022, <https://www.ctpublic.org/news/2022-08-26/in-connecticut-rental-vacancy-rates-are-the-lowest-in-the-u-s-leaving-renters-with-few-options> [<https://perma.cc/P55P-HLFG>].

⁴⁰² Nati Tesfaye et al., *City Leaders Hope to Alleviate Affordable Housing Crisis in 2023*, YALE DAILY NEWS, Jan. 26, 2023, <https://yaledailynews.com/blog/2023/01/26/city-leaders-hope-to-alleviate-affordable-housing-crisis-in-2023/> [<https://perma.cc/D42S-5V67>].

⁴⁰³ Ginny Monk, *CT Housing Legislation to Get Renewed Focus on 2023 Session*, CT MIRROR, Jan. 5, 2023, <https://ctmirror.org/2023/01/05/ct-legislative-session-housing-evictions-zoning-homelessness/> [<https://perma.cc/9J9M-HKWS>].

⁴⁰⁴ However, this reasoning is undermined by the generous tax cuts given to downtown developments as part of the project.

district. As will be discussed, it is an imagined reality in which the project – which was conducted without any meaningful community control or REIS – could have been utilized in order to aid existing residents and not lure suburbanites’ offices and cars.

The aforementioned bill is a proposed zoning reform focused on transit-oriented zoning, a scheme occupied with “increased density of development, including mixed-use development and concentration of discretionary state investment.”⁴⁰⁵ According to the bill, municipalities that will zone for Transit-Oriented Districts (TOD) will be eligible for receiving discretionary infrastructure funding from the state,⁴⁰⁶ the main “carrot” in this suggested system. A “stick” in this proposed bill is requiring each municipality that chooses to zone accordingly (or: “transit-oriented community”) to reserve – by a 40-year deed restriction – a certain percentage of affordable housing⁴⁰⁷ in the new TODs.⁴⁰⁸

Although this bill has not yet passed and is still subject to contentious debates in the Connecticut state legislature, it shows the missed opportunities in the ways New Haven chose to spend its federal TIGER II grant. The scheme presented by the “Work Live Ride” requires the availability of funds external to the city – to provide the “carrot” – in this

⁴⁰⁵ Office of Legislative Research (CT), sHB 6980 Bill Analysis (File No. 594) 11 (2023) (hereinafter: sHB 6890, OLR Bill Analysis).

⁴⁰⁶ sHB 6890, Jan. Session, 2023, § 1(b) (CT, 2023); “ ‘Discretionary infrastructure funding’ means any grant, loan or other financial assistance program administered by the state” (*id.* at § 1(a)(12)), including the following programs: Urban Act Grant Program, Targeted Brownfield Development Loan Program, Brownfield Municipal Grant Program, Main Street Investment Fund, and Incentive Housing Zone Program (sHB 6890, OLR Bill Analysis, at 12-13).

⁴⁰⁷ Affordable housing is not a term actually mentioned in the relevant provision; rather, it states that the these “dwelling units shall be sold or rented at, or below, process which will preserve the units as housing for which persons and families pay thirty per cent less of their annual income, where such income is less than or equal to eighty per cent of the area median income ...” sHB 6890, *id.* at § 1(h).

⁴⁰⁸ *Ibid.* “The percentage of deed-restricted dwelling units required under this subsection shall be determined based upon sales market typologies as described in the most recent Connecticut Housing Finance Authority Housing Needs Assessment: (1) Twenty per cent for any municipality designated High Opportunity/Strong Market; (2) Eighteen per cent for any municipality designated High Opportunity/Weak Market; (3) Twelve per cent for any municipality designated Low Opportunity/Strong Market; (4) Five per cent for any municipality designated Low Opportunity/Weak Market; and (5) Zero per cent for any municipality designated Low Development Activity.”

instance represented by discretionary infrastructure funding. In the case of the Oak Street Connector, such funds were available to the city and could be used in creative ways to mitigate the historic and ongoing harm caused by the road. Even without the proposed bill's "sticks," i.e. the affordable housing set-asides, the city could have used the federal funding not to subsidize commercial car-oriented development in downtown New Haven, but to develop denser and transit-oriented multifamily housing, expanding the availability of rentable and livable apartments in a city where residents struggle to find places to live.⁴⁰⁹

Circling back to the case made regarding the missed opportunities in the mitigation of New Haven's "expressway to nowhere," the federal grant could have been leveraged to incentivize local development of denser, transit-oriented homes. Thus, it could have mitigated two of the most common wrongs associated with urban highways, as was discussed in earlier parts of this paper: the displacement of numerous communities without adequate replacement for the dwellings they occupied (a deficiency still lasting and manifested in the persisting national wealth-gap), and the fixation on private cars as the centerpiece of American mobility modes. In other words, not unlike the "Work Live Ride" proposed legislation, investing in replacing the Oak Street Connector with housing rather than business development, could have helped revive the downtown by investing in people rather than business. More people living in walkable communities could have meant a different kind of economic development.

Indeed, the municipality might have had other incentives in mind, adhering to the conventional wisdom of separating uses (not building housing downtown) and generally

⁴⁰⁹ Laura Glesby, *Housing Q: Why's the Rent So Damn High?*, NEW HAVEN INDEPENDENT, Mar. 6, 2023, https://www.newhavenindependent.org/article/why_is_rent_so_unaffordable [https://perma.cc/NVG2-JB5R].

relying on businesses to lead development in the city (not building housing at all).⁴¹⁰ However, the contemporary experience of emptying downtowns in the wake of a work-from-home era, demonstrates that such restrictions are unrealistic also from an economic standpoint,⁴¹¹ and actually contribute to economic inequality.⁴¹²

These restrictions also contribute to racial inequality. The proposed “Work Live Ride” bill is promoted by “DesegregateCT,” a “pro-homes coalition of over 75 nonprofits and neighborhood groups founded in June 2020, in the wake of George Floyd’s murder, to expose the role land use policies play in Connecticut’s staggering economic and racial segregation and to make significant structural change to address it.”⁴¹³ This coalition was also one of the groups behind the 2021 Connecticut zoning reform. This reform, amending Connecticut State Zoning Enabling Act ensured, among other things, the legal prohibition on capping the number of multi-family housing units, and on discriminating in housing based on income source.⁴¹⁴

Thus, this example shows how a zoning reform – or at least the investment of monies

⁴¹⁰ William A. Fischel, *The Evolution of Homeownership*, U. CHI. L. REV. 1503, 1514-15 (2010) (discussing how zoning policies from the 1970s onwards inhibited home construction in cities and specifically how “the completion of the interstate highway system and the accompanying growth of automobile ownership enabled many more low-income households to get access to the suburbs,” at 1515).

⁴¹¹ Mae Anderson et al., *Cities Reviving Downtowns by Converting Offices to Housing*, AP, Apr. 24, 2023, <https://apnews.com/article/cities-downtowns-vacant-offices-affordable-housing-pandemic-cc2cd895fd0f186229f69b74a133eddb> [<https://perma.cc/EJF5-M34F>]; for criticism, see Tracy Hadden Loh et. al., *Myth About Converting Offices into Housing – and What Can Really Revitalize Downtowns*, BROOKINGS INSTITUTE, Apr. 27, 2023, <https://www.brookings.edu/research/myths-about-converting-offices-into-housing-and-what-can-really-revitalize-downtowns/> [<https://perma.cc/GHP8-5KDN>].

⁴¹² David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 YALE L. J 78, 115 (2017) (“Because these restrictions raise the cost of housing, they disproportionately prevent poor and working-class people from taking advantage of high-wage labor markets.”)

⁴¹³ DesegregateCT, Annual Report 2 (2022), available at <https://static1.squarespace.com/static/5ee8c6c9681b6f2799a4883a/t/638a60b001cedd4a703b95f4/1670013122891/DesegregateCT+Annual+Report+2021-2022> [<https://perma.cc/9SS3-UVDK>].

⁴¹⁴ 2021 Connecticut Public Act 21-29 § 4(d)(8),(10); interestingly, the Act also prohibits denying “any land use application” on the basis of “a district’s character,” a famous NIMBY trope against developing multifamily housing. This “argument” dates back, at least in canonical Supreme Court jurisprudence to the bedrock of single-use zoning, *Village of Euclid v. Ambler Realty Co.* (US 1926), which famously characterized apartment buildings as “mere parasites” to the more favorable suburban single-family units.

into developing livable units instead of solely investing in business interests – can help alleviate another common harm associated with urban highways: the displacement of marginalized communities, often racial minorities. Even without a comprehensive REIS, substantial community benefits could have been gained from developing the newly evacuated Oak Street Connector in the direction of developing TODs. Even if the proposed intentions behind developing the space once occupied by the urban expressway were to economically develop the city for the benefit of the local community, the time that has passed since this decision has shown that it practically did not play out this way.

Moreover, as was discussed above, the example of Providence shows that also a heavy focus on mitigating past racial harms is not sufficient without addressing the other systemic factors urban highways have brought upon local communities. In New Haven, this missed opportunity – which is now being promulgated through sHB 6980 – demonstrated how the same consequences of REIS, or a plain race and class consciousnesses, could have been achieved by means of addressing the material harm caused by highways displacement and disruptions.

The remaining question is the one related to community control. The centralized push for zoning reform at the state level seems to expose the limitations of community control. While some have criticized the state legislature’s efforts to intervene in zoning laws as eroding the local control of land,⁴¹⁵ this is not necessarily a negative impact. It might help alleviate concerns of local capture – either of capital or of political resistance (e.g. NIMBY)

⁴¹⁵ Ginny Monk, *CT ‘Work Live Ride’ Bill Revives Transit-Oriented Development Debate*, CT MIRROR, Mar. 15, 2023, <https://ctmirror.org/2023/03/15/ct-zoning-reform-work-live-ride-transit-oriented-development-tod-desegregate/> [<https://perma.cc/ZDN4-2TK6>].

– which could impede the construction of new housing (at least affordable ones).⁴¹⁶ Put differently, the realistic manifestation of “community control” might be in the form of entrenched and systematic inequality, where marginalized groups are seldom considered part of the relevant community, at least meaningfully, as stakeholders.

Conceptually, Robert Ellickson has argued that the ability of zoning laws to provide denser, more adequate, and more affordable housing is non-existent absent a state-wide reform.⁴¹⁷ This, as the argument goes, is mainly due to the costs of collective action that impede any potential change,⁴¹⁸ especially in a reality of “hyperlocalism,” the consideration of only existing – and powerful – homeowners’ voices.⁴¹⁹ The New Haven story seems to corroborate this theory, in at least two meaningful ways.

First, the entire impetus for the project, at least monetarily, was external federal funding. It enabled the city to evade local gridlock and initiate action on the decades-long nuisance of the urban expressway. Second, and perhaps more important, the New Haven example shows that even with that funding, it adhered to local rationales and perhaps parochial decision-making mechanisms, that ended up not drastically helping the city’s financial situation or its residents’ needs. Therefore, the state zoning reforms briefly discussed above might be an adequate solution to this systemic issues.

As was discussed in part II of the paper, the nature of the “local” is elusive; such is the nature of the “community.” Different interest groups try to harness these concepts to

⁴¹⁶ Lisa Prevost, *Town After Town, Residents Are Fighting Affordable Housing in Connecticut*, N.Y. TIMES, Sept. 4, 2022, <https://www.nytimes.com/2022/09/04/realestate/connecticut-affordable-housing-apartments.html> [<https://perma.cc/D8XN-9FT5>].

⁴¹⁷ ELLICKSON, *supra* note 37, at 139.

⁴¹⁸ Roderich M. Hills, Jr. & David N. Schleicher, *Balancing the ‘Zoning Budget’*, 62 CASE W. RES. L. REV. 81, 89-96 (2011).

⁴¹⁹ See generally Noah M. Kazis, *Transportation, Land Use, and the Sources of Hyper-Localism*, 106 IOWA L. REV. 2339 (2021).

promote their agendas. It is important to bear this realization in mind while discussing the possible strategies to mitigate the past and ongoing effects of urban highways on American cities and communities. Mentioned above is the concern of some Connecticuters that the centralization of zoning means the expropriation of local control. In this context, I have also highlighted the dubious nature of community control: similar to hyperlocalism, this kind of control could just entrench existing segregatory and discriminatory practices.

Therefore, it is worth mentioning something Sydney Elkhay, a coordinator with DesegregateCT, has said in this regard. “It is a bill that promotes local control,” Elkhay said of the sHB 6980, “while also seeking to solve some of the more systemic issues facing our state.”⁴²⁰ Thus, resonating the famous Madisonian concern regarding local tyranny of the majority,⁴²¹ perhaps taking zoning away from localities will counterintuitively liberate some communities and afford them some real and meaningful control, at least over the space available for them to occupy.⁴²²

From an institutional design perspective, it is tempting to take away from this discussion the lesson that federal funding is more deferential to localities than state actions. In the case of New Haven, the proposed zoning reform will mandate the city to zone and plan in certain ways, while the TIGER II funds were basically given to the city to use at its discretion. If we take seriously the notion of local control, then federal administration and

⁴²⁰ *Supra* at note 415.

⁴²¹ James Madison, *Federalist No. 10*, in ALEXANDER HAMILTON, JAMES MADISON, JOHN JAY, THE FEDERALIST PAPERS 49 (Palgrave Macmillan, 2009).

⁴²² However, it is yet to be discussed whether states could provide any meaningful avenue for change in that regard, considering how state legislatures lately have been abusing the power invested in them by the majority of voters to target representatives of specific constituencies, *see e.g.* Kimberlee Kruesi et al., *Tennessee’s House Expels 2 of 3 Democrats Over Gun Protest*, AP, Apr. 7, 2023, <https://apnews.com/article/tennessee-lawmakers-expulsion-d3f40559c56a051eec49e416a7b5dade> [<https://perma.cc/55SJ-7MA2>]; Amy Beth Hanson et al., *Transgender Lawmaker Banned from Montana House Floor for Rest of 2023 Session*, PBS, Apr. 26, 2023, <https://www.pbs.org/newshour/politics/montana-republican-legislators-to-vote-on-censure-or-expulsion-of-transgender-democrat> [<https://perma.cc/RB3Q-BQPY>].

funding might be more beneficial than state action from this lens. On the flip side, we also saw that if the thing we talk about when we talk about “community control” is marginalized communities and not colloquially meaning the “community” or locality as a whole, then the state-wide reform might achieve more substantial results.

However, none of these conclusions is exclusively necessary. As the discussion regarding Providence has shown, state intervention backed by the best of intention on behalf of city hall is not sufficient to deal with the ramifications of urban highways on cities’ social fabric. It might not be a matter of funding or where it comes from, but of recalibrating preferences and outlooks.

C. Future Federal Routes: The Bipartisan Infrastructure Law

We saw two different examples of urban highway removal programs. Both examples were partial, at best. While in New Haven the city focused on replacing the highway with more business development, a lack of attention to racial equity and enhancement of multi-modal mobility solutions did not help the downtown to thrive again. In Providence, on the other hand, the municipality did extensive work on racial equity and initiated a reparation program to – among other things – atone for its past urban renewal policies, but insufficient attention to accessibility and the affordability of housing in the newly-gentrified area was detrimental to the effort to repair past injustices.

Another path lies within the Bipartisan Infrastructure Law. In 2021, President Biden signed the Infrastructure Investment and Jobs Act (the Infrastructure Law),⁴²³ which is presumably “the single largest dedicated bridge investment since the interstate highway

⁴²³ The Infrastructure Investment and Jobs Act of 2021, Pub. L. No. 117-58, 135 Stat. 429 (2021).

system”.⁴²⁴ Unfortunately, it seems that to some extent, the law maintains the interstate logic: The total sum approved for highway infrastructure spending through 2026 is around \$325 billion⁴²⁵ across 41 programs,⁴²⁶; but the Law’s investment in public transportation is \$82.6 billion across 25 programs.⁴²⁷ And even when states or local governments *can* secure funding for mass transit through this law, it basically pushes them to choose between maintaining existing incompatible and neglected infrastructure (which either way will not be adequate for meeting demand) and building a new mass transit infrastructure, for which the funds will not suffice.⁴²⁸ As Julie Livingston and Andrew Ross put it: “The rewriting [of the Law and its] appropriations for transportation needs was all too revealing. The sums initially proposed for rail and public transit had been sliced by nearly half, while funding for new roads and bridges designed for private vehicle use survived almost intact.”⁴²⁹

Is the Infrastructure Law essentially the Federal-Aid Highway Act of 2021? Although there are some indications that it is,⁴³⁰ there are also some intriguing provisions in this

⁴²⁴ The White House, President Biden’s Bipartisan Infrastructure Law, <https://www.whitehouse.gov/bipartisan-infrastructure-law/>.

⁴²⁵ CRS Report (2022), *supra* note 176, at 4 (around \$70 billion are appropriated every year for highway funding). The federal funding could be up to 100 percent of the cost of the project, but will be approved on a case-to-case basis, Infrastructure Act, *supra* note 423, at §117.

⁴²⁶ Out of which the National Highway Performance Program was appropriated \$148 billion, and the Surface Transportation Block Grant Program \$72 billion, see Tanya Snyder, Jordan Wolman, Annie Snider, John Hendel, and Eleanor Mueller, *Biden Won on Infrastructure. Democrats Are Struggling to Get Voters to Care*, POLITICO, Nov. 6, 2022, <https://www.politico.com/news/2022/11/06/biden-infrastructure-democrats-voters-00064694>. In addition to approximately \$270 billion from the Highway Trust Fund approved for spending on the federal-aid highway program, infrastructure Act, *supra* note 423, at §11101(a)(1).

⁴²⁷ Not including passenger and freight rails, which is appropriated \$63 billion across 5 programs, Politico, *supra* note 426.

⁴²⁸ Ted Mann & Julie Bykowitz, *As Infrastructure Windfall Approaches, Transit Agencies Grapple With How to Spend It*, WALL STREET JOURNAL, Dec. 30, 2022, https://www.wsj.com/articles/as-infrastructure-windfall-approaches-transit-agencies-grapple-with-how-to-spend-it-11672376084?mod=Searchresults_pos1&page=1 [<https://perma.cc/7FXQ-AXY4>].

⁴²⁹ LIVINGSTON & ROSE, *supra* note 203, at 5 (“Shredding the hopes of those who were counting on a more even-handed distribution between drivers and transit agencies, the final split (82/18) was even worse than the 80/20 ratio observed by congressional custom since the years of the first Nixon administration.”)

⁴³⁰ See, e.g. Julie Bykowitz & Ted Mann, *Austin Wants Mass Transit, but the New Infrastructure Law Will Give It a Bigger Highway*, WALL STREET JOURNAL, March 13, 2022, <https://www.wsj.com/articles/austin-wants-mass-transit-but-the-new-infrastructure-law-will-give-it-a-bigger-highway->

“mega-bill” that might suggest otherwise.

For example, it seems that the Biden Administration acknowledges, at least symbolically, the connection between infrastructure and economic marginalization. With the incorporation of the Minority Business Development (MBD) Act of 2021, the Infrastructure Law creates the MBD Agency within the Department of Commerce, which is in charge of enabling “the Federal Government to better serve the needs of minority business enterprises,” mainly by engaging with such businesses on a regional basis.⁴³¹

Even more intriguing is the way the Infrastructure Law addresses the way in which American transportation infrastructures have been used to decimate urban communities.⁴³² This was introduced in the Law as the *Reconnecting Communities Pilot Program*.⁴³³

Under this pilot program, the Secretary of Transportation is authorized to award planning grants to states, local governments and metropolitan planning organizations, and nonprofit organizations, for them to study and evaluate “the feasibility of removing, retrofitting or mitigating an existing eligible facility to restore community connectivity.”⁴³⁴

An eligible facility is defined as a “highway or other transportation facility that creates a barrier to community connectivity, including barriers to mobility, access, or economic development, due to high speeds, grade separations, or other design factors.”⁴³⁵

11647163803?mod=Searchresults_pos1&page=2 [https://perma.cc/Q4T2-B4K7] (“To win enough Republican votes to pass the bill, Democrats shrank their initial request for mass transit and other non-highway programs and ditched a requirement that states repair roads and bridges before building new ones.”)

⁴³¹ Infrastructure Law, *supra* note 423, at §100003(e)(2)(B). The presumption is that the term “socially or economically disadvantaged individual” includes any individual who is “Black or African American; Hispanic or Latino; American Indian or Alaska Native; Asian; Native Hawaiian or other Pacific Islander,” *Id.* at §100003(15)(B). See generally Infrastructure Law, *Id.*, at Div. K.

⁴³² Jim Tankersley and Zolan Kanno-Youngs, *Biden Seeks to Use Infrastructure Plan to Address Racial Inequities*, N.Y. TIMES, Apr. 1, 2021, <https://www.nytimes.com/2021/04/01/us/politics/biden-infrastructure-racial-equity.html>.

⁴³³ Infrastructure Law, *supra* note 423, at §11509.

⁴³⁴ *Id.* at §11509(c)(2).

⁴³⁵ *Id.* at §11509(a)(1).

The entity that receives the planning fund to evaluate whether or not to remove or repurpose a specific highway⁴³⁶ is required to consider, among other things, current traffic patterns, the capacity of existing transportation networks, the effect of removal of the highway on the mobility of people and freight, the cost of the remove, and the anticipated economic impact of removing or retrofitting the highway.⁴³⁷ The planning entity may, but is not required to, provide an opportunity for public engagement or oversight.⁴³⁸

When evaluating such a planning scheme before deciding what removal or retrofitting project to fund,⁴³⁹ the Secretary must mainly consider “the degree to which the project will improve mobility and access through the removal of barriers,” traffic patterns and freight movement, “the results of a cost-benefit analysis of the project,” opportunities for “inclusive economic development,” and the plan of the applicant to employ residents of the area to execute the project.⁴⁴⁰

The program thus prioritizes economic and transportation-related considerations. Although the program does emphasize the need to prioritize communities that are “economically disadvantaged,”⁴⁴¹ it is not clear that this phrasing takes into account the full range of impacts endured by communities segregated by highways in the past. These consequences might be manifested in pure economic “disadvantage,” but are not always that straightforward. Moreover, it is not clear whether it is possible for the planning entity

⁴³⁶ Up to \$2 million dollars, as long as this grant does not exceed 80% of the “planning activity,” *Id.* at §11509(c)(5). The annual budget for such plans is \$30 million from 2022 through 2026.

⁴³⁷ *Id.* at §11509(c)(2)(A).

⁴³⁸ *Id.* at §11509(c)(2)(B) (engagement); §11509(d)(7) (Community Advisory Board).

⁴³⁹ Up to \$5 million per removal/construction project, *Id.* at §11509(d)(5). The annual total budget to the execution of such plans gradually increases from \$65 million in 2022 to \$75 million in 2026 (*Id.* at §11101(d)(3)(B)). Added to the budget cap on planning grants (see *supra* note 436), that means that up to 15 reconstruction plans could be federally budgeted annually, while between 13 and 15 construction grants could be awarded (assuming that every project receives the maximum amount of permissible grant).

⁴⁴⁰ *Id.* at §11509(d)(4).

⁴⁴¹ *Id.* at §11509(c)(3)(C).

to take into account public transportation, both current and future, when assessing “mobility needs,” let alone pedestrian and alternative modes of transportation.

Another issue is the fact that the federal funding could go to one of several entities, aligned horizontally. Thus, although since the Highway Act of 1973 there is a trend to take the control of infrastructure design away from the state and put it in local or regional hands,⁴⁴² the Infrastructure Law still enables the funneling of federal funding to the state. It is probably yet to be seen empirically how this decision will impact the ability or willingness of cities to apply for these planning and reconstruction grants, or whether they will be preempted by their states. The case studies of Providence and New Haven discussed above have shown that this question of state control might be highly consequential in this context.

Another notable feature of the Law is its indeterminacy regarding the desired solution for urban freeways. It mentions possible solutions for these highways: to “remove, retrofit, or mitigate” them. Implicit is the option to leave the highways put. The Act does not define what constitutes retrofitting or mitigating an urban freeway. Is a general repurpose required to meet the retrofit criterion, or is a little tweak enough? Is adding a bike lane on a highway mitigating it? Is planting a tree enough?

A related but somewhat counterintuitive query is what constitutes removing a highway from the city: only a complete teardown? Perhaps capping it? Part of it? Maybe sinking it and tunneling an expressway? Does the Act perceive any of these options better than the other one, absolutely or contingently?

There is no clear-cut answer to this issue. Different situations might require varying

⁴⁴² Raymond A. Mohl and Mark H. Rose, *The Post-Interstate Era: Planning, Politics, and Policy Since the 1970s*, 11(1) J. PLAN. HIST. 3, 4 (2012).

solutions; different localities might prefer different approaches. Therefore, it is regrettable that there is no mandate for local participation in the Law. Although this legislation seems like a step in the right direction, it is yet to be seen whether this pilot program will fulfill its promise or, as its name hints, is just a pilot, dead on arrival. Livingston and Rose seem to present the latter stance when writing that “the final version [of the Law] allocated a paltry \$ 1 billion to the task of highway removal [out of the \$20 billion initially discussed] ... snubbing community advocates who have documented the ongoing harms generated by these roads in the form of pollution, social isolation, and economic deprivation.”⁴⁴³

CONCLUSION

In this paper, I examined the law and political economy of urban highways, their legal past, present, and possible futures. I looked into how these highways were constructed as part of a concentrated effort by the Highway Lobby in midcentury America to cement the dependence on cars and built to alleviate “blight” in urban cores, displacing myriad communities of color in the process. I focused on new ways surfacing today to rethink the place of these highways within American cities. Several legal and planning strategies are suggested, mainly removing, repurposing, or capping highways, with two main policy approaches to conceptually do this work: Racial Equity Impact Studies and community control.

Using the case studies of Providence and New Haven I have shown how neither of these approaches is sufficient to mitigate the full extent of the harms caused by urban freeways. REIS might be too dependent on a centralized process, and community control is a concept still too broad and prone to distortion. Thus, I suggest, we should look at this

⁴⁴³ LIVINGSTON & ROSE, *supra* note 203.

question from the prism of acknowledging our current “car-supremacy” society and instead work to foster a new sense of place for the local communities, by providing more housing solutions and transportation options to their residents.

I also briefly teased out the desired legal institutional design for such a highway-removal effort. Using the different case studies I showed that while local control might not be enough on its own (the Providence reparation program case study), a controlled state centralization might be more promising (the proposed Connecticut zoning reform). However, such state control might also be detrimental to marginalized communities within cities, as the state preemption example in the Providence case study demonstrated. Therefore, as discussed in the context of the federal grants to New Haven, a federal grant directly to localities might also have some benefits in instances where there is a need to bypass the state.

Therefore, I concluded with the Reconnecting Communities Program from the Infrastructure Law. It is yet to be seen where this program, and the Infrastructure Law generally, might lead urban America going forward. Nonetheless, it seems that acknowledging the past and its wrongs is a decent place from which to begin.