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# Architectural Exclusion: Discrimination and Segregation through Physical Design of the Built Environment

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SARAH SCHINDLER

## Architectural Exclusion: Discrimination and Segregation Through Physical Design of the Built Environment

**ABSTRACT.** The built environment is characterized by man-made physical features that make it difficult for certain individuals—often poor people and people of color—to access certain places. Bridges were designed to be so low that buses could not pass under them in order to prevent people of color from accessing a public beach. Walls, fences, and highways separate historically white neighborhoods from historically black ones. Wealthy communities have declined to be served by public transit so as to make it difficult for individuals from poorer areas to access their neighborhoods.

Although the law has addressed the exclusionary impacts of racially restrictive covenants and zoning ordinances, most legal scholars, courts, and legislatures have given little attention to the use of these less obvious exclusionary urban design tactics. Street grid layouts, one-way streets, the absence of sidewalks and crosswalks, and other design elements can shape the demographics of a city and isolate a neighborhood from those surrounding it. In this way, the exclusionary built environment—the architecture of a place—functions as a form of regulation; it constrains the behavior of those who interact with it, often without their even realizing it. This Article suggests that there are two primary reasons that we fail to consider discriminatory exclusion through architecture in the same way that we consider functionally similar exclusion through law. First, potential challengers, courts, and lawmakers often fail to recognize architecture as a form of regulation at all, viewing it instead as functional, innocuous, and prepolitical. Second, even if decision makers and those who are excluded recognize architecture's regulatory power, existing jurisprudence is insufficient to address its harms.

**AUTHOR.** Associate Professor of Law, University of Maine School of Law. This Article has benefitted greatly from the feedback received at the Sabin Colloquium on Innovative Environmental Law Scholarship at Columbia Law School, the annual meeting of the Association for Law, Property, and Society, and the junior faculty works in progress workshop at American University's Washington College of Law. I am grateful to Dmitry Bam, Justin Steil, Dave Owen, Florence Wagman Roisman, Robin Malloy, Zach Heiden, Anna Welch, Aaron Perzanowski, and Jim Kelly for their helpful comments. Special thanks to Patrick Lyons and Anthony Aloisio for excellent research assistance.



## ARTICLE CONTENTS

INTRODUCTION	1937
I. ARCHITECTURAL EXCLUSION: THEORY	1942
A. Architecture as Regulation	1942
B. Architecture as Architecture in Legal Scholarship: Racialized Space and Place, Briefly	1949
II. ARCHITECTURAL EXCLUSION: PRACTICE	1953
A. Physical Barriers to Access	1953
B. Transit	1960
1. Placement of Transit Stops	1961
2. Placement of Highway Routes, Bridge Exits, and Road Infrastructure	1965
3. Wayfinding: One-Way Streets, Dead-End Streets, Curvy Streets, and Confusing Signage	1969
4. Residential Parking Permits	1972
III. A BRIEF HISTORY OF EXCLUSION BY LAW (AND NORMS)	1973
A. Legal Regulation that Furthered Exclusion	1974
1. Judicial Disapproval	1975
a. Racial Zoning	1975
b. Racially Restrictive Covenants	1977
2. Judicial Ambivalence: Exclusionary Zoning	1979
B. Social Norms That Furthered Exclusion: Sundown Towns, “White Terrorism,” and Threats To Keep the “Other” Out	1987
C. A Clarification: Legal Exclusion Versus Architectural Exclusion	1988
IV. ARCHITECTURAL EXCLUSION IN THE COURTS: A LACK OF ATTENTION AND SUCCESS	1991
A. A Failure To Recognize Architecture as Regulation	1991
B. The Jurisprudence of Exclusion Fails To Account for Architecture	2000
1. Claims: Laws That Could Be Used To Challenge Architectural Exclusion	2000
2. Holdings: Application of Relevant Law to Architectural Exclusion	2003
	1935

V. PROBLEMS AND SOLUTIONS	2014
A. Legacy Problems and the Enduring Nature of Architecture	2014
B. Proposed Solutions: Courts and Legislators	2018
1. Judicial Solutions Are Unlikely To Be Successful	2018
2. Legislative Solutions Carry Some Promise	2019
C. An Architectural Bent on an Environmental Impact Statement	2020
D. An Architectural Inclusion Version of the Americans with Disabilities Act	2021
CONCLUSION	2023

**INTRODUCTION**

Robert Moses was known as the “Master Builder” of New York.<sup>1</sup> During the time that he was appointed to a number of important state and local offices,<sup>2</sup> he shaped much of New York’s infrastructure, including a number of “low-hanging overpasses” on the Long Island parkways that led to Jones Beach.<sup>3</sup> According to his biographer, Moses directed that these overpasses be built intentionally low so that buses could not pass under them.<sup>4</sup> This design decision meant that many people of color and poor people, who most often relied on public transportation, lacked access to the lauded public park at Jones Beach.<sup>5</sup>

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Although the Atlanta, Georgia, metropolitan area is known for its car-centric, sprawling development patterns, it has a subway system: the Metropolitan Atlanta Regional Transit Authority (MARTA).<sup>6</sup> Wealthy, mostly white residents of the northern Atlanta suburbs have vocally opposed efforts to expand MARTA into their neighborhoods for the reason that doing so would

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1. ROBERT A. CARO, *THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK* 571 (1974); PIERRE CHRISTIN & OLIVIER BALEZ, *ROBERT MOSES: THE MASTER BUILDER OF NEW YORK CITY* (2014); Paul Goldberger, *Robert Moses, Master Builder, Is Dead at 92*, N.Y. TIMES, July 30, 1981, <http://www.nytimes.com/1981/07/30/obituaries/robert-moses-master-builder-is-dead-at-92.html> [<http://perma.cc/5EAH-29NE>].
  2. These offices included “New York City Parks Commissioner, head of the State Parks Council, head of the State Power Commission and chairman of the Triborough Bridge and Tunnel Authority.” Goldberger, *supra* note 1.
  3. Langdon Winner, *Do Artifacts Have Politics?*, 109 DAEDALUS 121, 123 (1980); *see also* CARO, *supra* note 1, at 318.
  4. CARO, *supra* note 1, at 318-19; *see also* Phillip Lutz, *Where Has the Northern State Gone?*, N.Y. TIMES, Sept. 11, 1994, <http://www.nytimes.com/1994/09/11/nyregion/where-has-the-northern-state-gone.html> [<http://perma.cc/H6ST-TQAL>] (“[A] top Moses aide at the Long Island State Park Commission, Sidney M. Shapiro, . . . acknowledged that the bridges had been designed to keep out buses.”).
  5. Steven Paul McSloy, *Breaking the Power of the Power Brokers (Closing Remarks)*, 9 ST. JOHN’S J. LEGAL COMMENT. 669, 672-73 (1994) (“[T]he bridges spanning the parkway are very low. . . . [T]he bridges were deliberately designed that way in order to prevent buses of city dwellers, and particularly African-Americans, from reaching the Island’s fabled beaches.”).
  6. *See* Jason Henderson, *Secessionist Automobility: Racism, Anti-Urbanism, and the Politics of Automobility in Atlanta, Georgia*, 30 INT’L J. URB. & REGIONAL RES. 293, 297-98 (2006) (noting that the average Atlantan drives 30.5 miles each day despite the existence of a subway system).

give people of color easy access to suburban communities.<sup>7</sup> The lack of public-transit connections to areas north of the city makes it difficult for those who rely on transit—primarily the poor and people of color—to access job opportunities located in those suburbs.<sup>8</sup>

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At the request of white residents, in 1974 the city of Memphis closed off a street that connected an all-white neighborhood to a primarily black one.<sup>9</sup> Supporters of this measure argued that it would ostensibly reduce traffic and noise, in addition to promoting safety.<sup>10</sup> The U.S. Supreme Court dismissed a challenge to this action, stating that the road closure was just a “routine burden of citizenship” and a “slight inconvenience.”<sup>11</sup> Justice Marshall dissented, acknowledging that this inconvenience carried a “powerful symbolic message.”<sup>12</sup> He wrote, “The picture that emerges from a more careful review of the record is one of a white community, disgruntled over sharing its street with Negroes, taking legal measures to keep out the ‘undesirable traffic,’ and of a city, heedless of the harm to its Negro citizens, acquiescing in the plan.”<sup>13</sup> He believed that through this action, the city was sending a clear message to its black resi-

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7. See *id.* at 298-99 (noting that the “racialized animosity towards transit affectively [sic] produced full automobile dependency for most Atlantans” and that county referenda to join MARTA “failed under a cloud of racialized rhetoric and considerable movements of middle-class whites away from proximity to blacks and to separate majority white suburbs”); see also *Lawsuit Seeks Dissolution of Dunwoody, Sandy Springs, Johns Creek, Milton, Chattahoochee Hills*, ATL. J.-CONST., Mar. 29, 2011, <http://www.ajc.com/news/news/local/lawsuit-seeks-dissolution-of-dunwoody-sandy-spring/nQr28> [<http://perma.cc/WF87-PRJA>] (noting that, according to the 2010 Census, the majority of residents who live in the two counties that make up Atlanta are black, but the majority of residents in the northern suburban areas within those counties are white).
  8. See *infra* notes 118-119 (discussing reliance on public transit by the poor and people of color).
  9. *City of Memphis v. Greene*, 451 U.S. 100, 102-05 (1981); Brief for Petitioner at 8-9, *Greene*, 451 U.S. 100 (No. 79-1176), 1980 WL 339373, at \*8-9 (noting that City Council approval took place on January 29, 1974).
  10. *Greene*, 451 U.S. at 104.
  11. *Id.* at 119, 129.
  12. *Id.* at 138 (Marshall, J., dissenting). He was joined in this dissent by Justices Brennan and Blackmun.
  13. *Id.* at 136 (Marshall, J., dissenting).

dents,<sup>14</sup> and he could not understand why the Court could not see that message.

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Why have the Court, judges, and lawmakers—the entities usually tasked with crafting and enforcing antidiscrimination law—failed to find fault with these sorts of physical acts of exclusion? The most straightforward reason is that it is difficult to show the necessary intent to discriminate, especially in situations involving land use and the built environment.<sup>15</sup> This Article, however, suggests an additional reason—specifically, that those entities often fail to recognize urban design as a form of regulation at all. Scholarship on urban planning, which describes the history of city-building, is rife with tales of physical exclusion.<sup>16</sup> And although the law has addressed the exclusionary impacts of zoning ordinances and restrictive covenants, courts, legislatures, and most legal scholars have paid little attention to the use of less obvious exclusionary urban design tactics. Street grid design, one-way streets, the absence of sidewalks and crosswalks, the location of highways and transit stops, and even residential parking permit requirements can shape the demographics of a city and isolate a neighborhood from those surrounding it, often intentionally. Decisions about infrastructure shape more than just the physical city; those decisions also influence the way that residents and visitors experience the city.<sup>17</sup>

This Article examines the sometimes subtle ways that the built environment has been used to keep certain segments of the population—typically poor people and people of color—separate from others. Further, it considers the ways in which the law views and treats the exclusionary effects of these seem-

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14. Prominent legal scholar and critical race theorist Charles Lawrence agreed with Justice Marshall. Writing of *Memphis v. Greene*, he states:

[T]he peace and quiet of a white neighborhood has been weighed against the stigmatization of blacks. The decision to build the barrier issues the statement that white tranquility is more important than black pride. In the contextual reality of Memphis, the message is as clear as if the declaration were painted on the wall itself.

Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 364 (1987).

15. See *infra* Part III (discussing equal protection analysis in the context of exclusionary zoning).

16. See *infra* Part I.A (reviewing urban planning literature).

17. See Norman Williams, Jr., *Planning Law and Democratic Living*, 20 LAW & CONTEMP. PROBS. 317, 317 (1955) (describing planning as “the process of consciously exercising rational control over the development of the physical environment, and of certain aspects of the social environment, in the light of a common scheme of values, goals, and assumptions”).

ingly innocuous features of the built environment—which the Article terms “architectural exclusion”—as compared to more traditional and more obvious exclusionary practices. Although exclusion is perhaps the most important stick in the bundle of property rights, and although certain forms of exclusion can have beneficial results,<sup>18</sup> this Article focuses on forms of exclusion that result in discriminatory treatment of those who are excluded. This Article builds on Lawrence Lessig’s regulatory theory, which asserts that behavior may be regulated or constrained, in part, by “architecture.”<sup>19</sup> Lessig broadly defined architecture as “the physical world as we find it, even if ‘as we find it’ is simply how it has already been made.”<sup>20</sup> The Article also employs the term “architecture” quite broadly to encompass civil engineering, city planning, urban design, and transit routing. The decisions of those who work in these varied fields result in infrastructure that shapes the built environment. The resulting infrastructure is included in this broad definition of architecture and functions as a form of regulation through architecture.<sup>21</sup>

Part I provides a theoretical framework for analysis by focusing on the way that the built environment controls or regulates our behavior. It examines the literature that discusses infrastructure placement and design as physical and symbolic contributors to economic and social inequality, exclusion, and isolation. While these concepts are foundational to planners and architects, only a small number of legal scholars—including Lessig—have begun to consider the built environment’s regulatory role. Regulation through architecture is just as powerful as law, but it is less explicit, less identifiable, and less familiar to courts, legislators, and the general public. Architectural regulation is powerful in part because it is unseen; it “allows government to shape our actions without our perceiving that our experience has been deliberately shaped.”<sup>22</sup> This hidden power suggests that lawmakers and judges should be especially diligent

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18. See, e.g., Thomas W. Merrill, *Property and the Right To Exclude*, 77 NEB. L. REV. 730 (1998) (arguing that exclusion is the “*sine qua non*” of property rights). Some would argue that certain forms of exclusion have beneficial goals and productive ends. For example, the fence that allows children to play near a busy street excludes the children from that street, but does so for reasons that further their health and safety.

19. Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 662-63 (1998).

20. Lawrence Lessig, Commentary, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 507 (1999).

21. See Neal Kumar Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039, 1041 (2002) (defining “architecture” broadly as “the full range of activities, from building design to city planning, with which architects are concerned”).

22. Lee Tien, *Architectural Regulation and the Evolution of Social Norms*, 7 YALE J.L. & TECH. 1, 2 (2004-2005).



in analyzing the exclusionary impacts of architecture, but research demonstrates that they often give these impacts little to no consideration.<sup>23</sup>

Part II considers the practice of architectural exclusion. It details a number of ways that municipalities—through actions by their residents, their police forces, or their local elected officials—have created infrastructure and designed their built environs to restrict passage through and access to certain areas of the community. Such devices include physical barriers to access—low bridges, road closings, and the construction of walls—as well as the placement of transit stops, highway routes, one-way streets, and parking-by-permit-only requirements.

In Part III, the Article considers the way that courts have analyzed exclusion through traditional land-use methods. Unlike architectural exclusion, these traditional methods of exclusion are of central concern to modern law, in part because lawmakers and legal analysis tend to focus on regulation through law and norms. This Part provides context by briefly discussing the history of overt physical exclusion by law in the United States. It examines the laws and norms that led to racial and socioeconomic exclusion from certain parts of a given community, and it surveys judicial and legislative treatment of those traditional forms of legal regulation, including racially restrictive covenants, racial zoning, and exclusionary zoning.

Part IV continues a discussion of exclusion in the courts, but more specifically considers the application of existing legal constraints—including the Equal Protection Clause and the Civil Rights Act of 1866—to architectural exclusion. It provides examples of a small number of court cases that involve architectural exclusion and finds that even if legal decision makers were to take account of architecture as a form of regulation, our current jurisprudence appears inadequate for addressing exclusion that results from design.

The Article concludes in Part V by recognizing that architectural decisions are enduring and hard to change. While outdated laws are often overturned when the norms informing them have sufficiently evolved, our exclusionary built environment, which was created in the past, continues to regulate in the present. Judicial and legislative solutions could alleviate, at least in part, the continuing harmful effects of architectural exclusion. These might include a version of the Americans with Disabilities Act that addresses architectural exclusion on the basis of race or class, or the modification of existing environmental review statutes to include an analysis of architectural exclusion. Public education and engagement could also serve to bring more awareness to the fact that the built environment often excludes. This Article seeks to serve that end by offering examples of architectural exclusion with the hope that citizens,

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23. See *infra* Part IV.

courts, legislators, administrators, and legal scholars will look for ways to accommodate more effectively the exclusionary effects of design decisions.

## I. ARCHITECTURAL EXCLUSION: THEORY

Throughout history, people have used varied methods to exclude undesirable individuals from places where they were not wanted. People used the law by passing ordinances saying that certain individuals could not access certain locations.<sup>24</sup> Social norms encouraged some to threaten undesirable persons with violence if they were to enter or remain in certain spaces.<sup>25</sup> And cities were constructed in ways—including by erecting physical barriers—that made it very difficult for people from one side of town to access the other side.<sup>26</sup> The first two methods of discrimination have received sustained attention from legal scholars; the third form, which I refer to as architecture, has not. This Part departs from tradition by focusing on architecture instead of ordinances and social norms.

### A. Architecture as Regulation

We often experience our physical environment without giving its features much thought. For example, one might think it a simple aesthetic design decision to create a park bench that is divided into three individual seats with armrests separating those seats. Yet the bench may have been created this way to prevent people—often homeless people—from lying down and taking naps.<sup>27</sup> Similarly, upon seeing a bridge, or a one-way street, or a street sign, many people tend to think that these are just features of a place—innocuous and

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24. The Article refers to this as “legal exclusion” or “exclusion by law.” See *infra* Part III (discussing methods of legal exclusion).

25. See *infra* Part III.B (discussing exclusion through threats of violence).

26. The Article refers to this as “architectural exclusion,” which is a form of physical exclusion. See *infra* Part II (providing examples of architectural exclusion).

27. See, e.g., Kim Bell, *Metro’s Bench Dividers at Bus Shelters Seen by Some as Slap at Homeless*, ST. LOUIS POST-DISPATCH, Dec. 18, 2013, [http://www.stltoday.com/news/local/metro/metro-s-bench-dividers-at-bus-shelters-seen-by-some/article\\_fa966do7-8aac-5678-a08a-ab3c4f12a451.html](http://www.stltoday.com/news/local/metro/metro-s-bench-dividers-at-bus-shelters-seen-by-some/article_fa966do7-8aac-5678-a08a-ab3c4f12a451.html) [<http://perma.cc/VEN4-UY6M>]; Michael Van Sickler, *City Hopes Bench Armrests Will Deter Homeless*, LAKELAND LEDGER (Fla.), Nov. 27, 1997, at B1, [http://news.google.com/newspapers?nid=1346&dat=19971127&id=5UIIAAAAIBA&sjid=p\\_wDAAAAIBA&pg=2316,1406932](http://news.google.com/newspapers?nid=1346&dat=19971127&id=5UIIAAAAIBA&sjid=p_wDAAAAIBA&pg=2316,1406932) [<http://perma.cc/XJP6-TP2C>] (“The city is ordering 28 steel armrests for Munn Park benches in an attempt to keep homeless people from sleeping in the park.”).

normal.<sup>28</sup> However, a number of social scientists and planning scholars have argued that “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.”<sup>29</sup> By structuring our relationships, these features of the built environment control and constrain our behavior. The architected urban landscape regulates, and the architecture itself is a form of regulation. As this Part will detail, although many scholars of planning and urban design have addressed the idea that architecture can regulate behavior, and more specifically, exclude, these ideas have rarely been discussed in the legal literature.<sup>30</sup>

Legal scholars addressing constraints on behavior traditionally focus on regulation through law,<sup>31</sup> which is often termed simply “regulation.”<sup>32</sup> Howev-

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28. See Langdon Winner, *Do Artifacts Have Politics?*, 109 DAEDALUS 121, 123 (1980) (“In our accustomed way of looking at things like roads and bridges we see the details of form as innocuous, and seldom give them a second thought.”); see also Bernward Joerges, *Do Politics Have Artefacts?*, 29 SOC. STUD. SCI. 411, 412 (1999) (describing Winner’s observation that “certain details of form in bridges, streets and roads are habitually taken to be meaningless”).
29. Winner, *supra* note 28, at 124 (discussing Robert Moses); see also LESLIE KANES WEISMAN, *DISCRIMINATION BY DESIGN: A FEMINIST CRITIQUE OF THE MAN-MADE ENVIRONMENT* 35 (1992) (“[O]ur collective failure to notice and acknowledge how buildings are designed and used to support the social purposes they are meant to serve—including the maintenance of social inequality—guarantees that we will never do anything to change discriminatory design.”). A well-known example of this concept is Brasilia, the capital of Brazil, which was designed to be a highly stylized, modernist projection of the country’s future. See JAMES C. SCOTT, *SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED* 117-32 (1999) (describing the monotonous and anonymous nature of life in highly planned Brasilia, which lacks a vibrant street life and informal places for people to gather).
30. *But see infra* Part I.B (providing a review of the existing legal literature addressing physical architecture as regulation). Legal scholarship addressing disability discrimination has focused on environments designed in such a way that they are not accessible to disabled individuals. However, this literature and relevant court cases suggest that exclusion of disabled individuals is generally due to inattention, rather than an animus toward or intent to exclude those individuals. See, e.g., *Alexander v. Choate*, 469 U.S. 287, 295-96 (1985) (noting that the ADA was needed because disabled individuals had been neglected); *Rolf Jensen & Assocs. v. Eighth Judicial Dist. Ct.*, 282 P.3d 743, 747 (Nev. 2012) (noting that Congress “specifically designed the provisions of the ADA to prevent discrimination stemming from neglect and indifference”). As this Article will explain, architectural exclusion is often the result of an intentional decision to exclude.
31. Katyal, *supra* note 21, at 1042 (noting that “the instinctive reaction of many lawyers is to focus on legal rules, without thinking about the constraint of physical space”).
32. In the legal arena, “regulation” is generally defined as “[c]ontrol over something by rule or restriction.” BLACK’S LAW DICTIONARY 1475 (10th ed. 2014). These rules or restrictions are most often laws. Regulations are often discussed in the context of administrative law, where

er, as Lawrence Lessig has asserted, tools besides law may constrain or regulate behavior, and those tools function as additional forms of regulation.<sup>33</sup> These include norms,<sup>34</sup> markets,<sup>35</sup> and architecture.<sup>36</sup> While many legal scholars have begun to consider both norms and markets in their work, here I focus on the regulatory role of architecture.<sup>37</sup> The built environment does not fit within the definition of “regulation” as legal scholars traditionally employ that term; it is not a rule promulgated by an administrative body after a notice-and-comment period.<sup>38</sup> However, the built environment does serve to regulate human behavior and is an important form of extra-legal regulation.

The idea that architecture regulates is found at the core of much urban planning and geography scholarship, though that body of literature does not always describe architecture as “regulation.” At the most general level, it is not controversial among planning and geography scholars to assert that the built environment often is constructed in a way that furthers political goals.<sup>39</sup> More-

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the term is defined as “[a]n official rule or order, having legal force, usu[ally] issued by an administrative agency.” *Id.*; see also Administrative Procedure Act, 5 U.S.C. § 551(4), (5) (2014) (defining a “rule” as “an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy” that is created through “rule making”); *id.* § 551(6) (defining “order” as any authoritative agency action other than a rule created through an adjudication); JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION* 583-88 (2010) (discussing regulations promulgated under the Administrative Procedure Act).

33. Law “directs behavior in certain ways” and threatens individuals with sanctions if they do not comply. Lessig, *supra* note 19, at 662. Further, the legal process is generally thought to entail legitimacy, and one can easily discover which entity created a given law and the process through which it did so. Tien, *supra* note 22, at 11-12 (noting that the law is perceived as legitimate and “that legitimacy and public deliberation are integral to our notion of law”).
34. As other scholars have argued, norms constrain behavior through community enforcement, not through some official rule or source. See, e.g., Lessig, *supra* note 19, at 662; see also Richard A. Posner, *Social Norms and the Law: An Economic Approach*, 87 AM. ECON. REV. 365, 365 (1997) (defining a norm as an unofficial rule).
35. Lessig, *supra* note 19, at 663 (“Markets regulate through the device of price.”).
36. In practice, it is hard to separate these categories from one another. *Id.* at 662-63. See also Sarah B. Schindler, *Banning Lawns*, 82 GEO. WASH. L. REV. 394, 425 & nn. 212-13 (2014).
37. See, e.g., WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* (2001); R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); Jon Elster, *Social Norms and Economic Theory*, 3 J. ECON. PERSPECTIVES 99 (1989); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996).
38. See sources cited *supra* note 32 (addressing common definitions of “regulation”).
39. See Winner, *supra* note 28, at 124 (“Histories of architecture, city planning, and public works contain many examples of physical arrangements that contain explicit or implicit political purposes.”); see also LAWRENCE J. VALE, *ARCHITECTURE, POWER & NATIONAL IDENTITY* 3 (1992) (“Throughout history and across the globe, architecture and urban design have been

over, these scholars generally agree that architectural decisions will favor some groups and disfavor others.<sup>40</sup> Many would also agree that architecture can be, and is, used to exclude.<sup>41</sup> As one planning scholar acknowledged, “[r]ace is a ubiquitous reality that must be acknowledged . . . if [planners] do not want simply to be the facilitators of social exclusion and economic isolation.”<sup>42</sup>

Despite this deep theoretical understanding of the powerful role that architecture plays in crafting experience, practicing planners sometimes fail to afford sufficient weight to the concept of exclusion by design.<sup>43</sup> They tend to make decisions that focus on urban infrastructure needs without considering the impact that such decisions might have on citizens. Nicholas Blomley terms this “traffic logic”: the idea that planners and civil engineers prioritize the flow of pedestrians and traffic through a physical space, with a focus on civil engineering, rather than prioritizing equal access to a physical space for all, with a focus

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manipulated in the service of politics.”); Allyn West, *Could Glenn Beck Bring Independence to Texas?*, SWAMPLOT (Jan. 29, 2013, 3:00 PM), <http://swamplot.com/could-glenn-beck-bring-independence-to-texas/2013-01-29> [<http://perma.cc/G2HG-BPH6>] (“If you really wanna [sic] pass on the secrets, if you really wanna pass on truth, embed it in architecture.”).

40. DOLORES HAYDEN, *REDESIGNING THE AMERICAN DREAM: GENDER, HOUSING & FAMILY LIFE* (1984) (discussing the role of home design in furthering stereotypes about a woman’s “place”); EDWARD W. SOJA, *SEEKING SPATIAL JUSTICE* 46 (2010) (stating his aim to “heighten awareness of the powerful grip on our lives that comes from the political organization of space as it is imposed from above as a form of social control and maintained by the local state, the legal system, and the land market”); VALE, *supra* note 39, at 9 (“[D]ecisions about urban design may also foster mutually reinforcing alienation and empowerment by magnifying hierarchies in the outdoor public realm.”); Katyal, *supra* note 21, at 1045 (arguing that “[t]here is no form of neutral architecture.”). Of course, some may disagree. For example, Langdon Winner wrote, “To discover either virtues or evils in aggregates of steel, plastic, transistors, integrated circuits, and chemicals seems just plain wrong, a way of mystifying human artifice and of avoiding the true sources, the human sources of freedom and oppression, justice and injustice. Blaming the hardware appears even more foolish than blaming the victims when it comes to judging the conditions of public life.” Winner, *supra* note 3, at 122.
41. See, e.g., ALEXANDRA LANGE, *WRITING ABOUT ARCHITECTURE: MASTERING THE LANGUAGE OF BUILDINGS AND CITIES* 112-13 (2012); see also *The Psychological Dimension of Architectural Space*, 46 *PROGRESSIVE ARCHITECTURE* 159 (Apr. 1965) (“The history of architecture contains innumerable examples of architectural spaces that have been consciously manipulated to draw people together or to disperse them.”).
42. Rober Mier, *Some Observations on Race in Planning*, 60 *J. AM. PLAN. ASS’N* 235, 236, 239 (1994) (emphasis omitted).
43. See, e.g., *id.* at 235-36 (“Race is a powerful aspect of most planning situations in urban areas, yet it too often is the *last* way a problem, or especially an opportunity, is framed. . . . [R]ace should be the first way to frame a local planning or development problem.”) (emphasis omitted).

on civil rights.<sup>44</sup> As a result, many planning decisions facilitate exclusion within cities.<sup>45</sup>

Legal scholarship is generally less explicit than planning scholarship about the ability of the built environment to shape behavior.<sup>46</sup> Exceptions include the legal literature surrounding crime prevention through environmental design, led by Neal Katyal,<sup>47</sup> and some emerging law and geography scholarship.<sup>48</sup> However, there is a trend among some legal scholars toward using architecture as a metaphor, demonstrating a fledgling appreciation of its power to structure

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44. Nicholas Blomley, *Civil Rights Meet Civil Engineering: Urban Public Space and Traffic Logic*, 22 CAN. J.L. & SOC. 55 (2007); see also NICHOLAS BLOMLEY, *RIGHTS OF PASSAGE: SIDEWALKS AND THE REGULATION OF PUBLIC FLOW* (2011) (suggesting that the layout of sidewalks is a form of regulation that shapes interactions in society). It is, of course, possible that some planners recognize—or even intend—the likely exclusionary effects of their architectural decisions, yet make choices that will result in those outcomes. In the past, decisions made with the intent to exclude could be explained by prevailing norms. See *infra* Part III.B (discussing social norms and racism in the United States). Currently, they may be explained, in part, by Bill Fischel’s Homevoter Hypothesis, which suggests that most local government decisions can be understood by considering how a homeowner would want a municipal official to act or vote in order to maximize the homeowner’s most valuable asset—her home. See FISCHEL, *supra* note 37; see also Vicki Been et al., *Urban Land-Use Regulation: Are Homevoters Overtaking the Growth Machine?*, 11 J. EMPIRICAL LEGAL STUD. 227 (2014) (finding that the Homevoter Hypothesis applies in urban as well as suburban locations). Wealthy property owners have sufficient power, education, and organizational ability to convince their elected officials to vote in ways that will protect their property values. *Id.* Thus, in examining why a city planner or elected official would place infrastructure in an exclusionary way, one should consider how a homeowner would view the impact of the infrastructure decision on her property value. To the extent that property values are increased by racially or socioeconomically homogenous neighborhoods, this may be the very result that wealthy, white homeowners desire. See *infra* Part III.A (discussing examples of wealthy communities desiring to keep out those they view as undesirable).
45. See Catherine L. Ross & Nancy Green Leigh, *Planning, Urban Revitalization, and the Inner City: An Exploration of Structural Racism*, 14 J. PLAN. LITERATURE 367, 379 (2000) (“The planning field is not alone in its culpability for failed revitalization efforts, but the misappropriation of its tools has, perhaps more than in other fields, made it a facilitator of social exclusion and economic isolation.”).
46. *But see* Katyal, *supra* note 21 (describing the use of architecture to control crime); Norman W. Spaulding, *The Enclosure of Justice: Courthouse Architecture, Due Process, and the Dead Metaphor of Trial*, 24 YALE J.L. & HUMAN. 311, 311 (2012) (describing the relationship between “justice and the space in which it operates,” and highlighting a dearth of analysis of physical space and courthouse architecture in the context of “[t]heories of justice”).
47. See Katyal, *supra* note 21, at 1044; see also James M. Anderson et al., *Reducing Crime by Shaping the Built Environment with Zoning: An Empirical Study of Los Angeles*, 161 U. PA. L. REV. 699, 703 (2013) (noting that cities can reduce crime by shaping the built environment, and recognizing that “[t]his idea has received considerably more attention in the urban planning literature than in legal scholarship.”).
48. See *infra* note 57.

people's lives. The metaphorical use of architecture implies an underlying recognition—foundational to planners and architects—that physical design regulates and that the built environment controls human behavior. Legal scholars use architecture as an analogue in their work with the understanding that “small and apparently insignificant [architectural] details can have major impacts on people's behavior.”<sup>49</sup>

For example, Lessig briefly provides specific examples of ways in which the built environment regulates or controls:

That a highway divides two neighborhoods limits the extent to which the neighborhoods integrate. That a town has a square, easily accessible with a diversity of shops, increases the integration of residents in that town. That Paris has large boulevards limits the ability of revolutionaries to protest. That the Constitutional Court in Germany is in Karlsruhe, while the capital is in Berlin, limits the influence of one branch of government over the other. These constraints function in a way that shapes behavior. In this way, they too regulate.<sup>50</sup>

Here, Lessig acknowledges the role of physical architecture as a constraint but does not focus on it. He instead moves into an analogy that has been adopted by many intellectual property scholars: they use “code” as the digital analogue of real-world architecture to describe structures of and behavior in cyberspace.<sup>51</sup> Lee Tien builds on this work by asserting his concerns with architectural regulation in the context of high technology, describing it as “regulation intended to influence acts by shaping, structuring, or reconfiguring the practical conditions or preconditions of acts.”<sup>52</sup> And Susan Sturm uses architecture as

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49. RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 3 (2008) (“As good architects know, seemingly arbitrary decisions . . . will have subtle influences on how the people who use the building interact.”).

50. Lessig, *supra* note 20, at 507-08. Katyal discusses additional forms of regulation through architecture, or design solutions to problems:

Fast-food restaurants use hard chairs that quickly grow uncomfortable so that customers rapidly turn over; elevator designers place the numerals and floor indicator lights over people's heads so that they avoid eye contact and feel less crowded; supermarkets have narrow aisles so that customers cannot easily talk to each other and must focus on the products instead.

Katyal, *supra* note 21, at 1043.

51. See Katyal, *supra* note 21, at 1042 (“Outside of cyberlaw, contemporary legal scholars and government have not given sufficient attention to architecture . . .”).

52. Tien, *supra* note 22, at 5 (arguing that architectural regulation is “more dangerous” than legal regulation because it has less public visibility and can be used to prohibit the possibility of certain experiences, thus risking distorted norm formation).

a metaphor in her work on structural inequality within institutions of higher education.<sup>53</sup> A similar emphasis on architecture as a metaphor emerges from work on libertarian paternalism. Richard Thaler and Cass Sunstein, for example, discuss the concept of “choice architecture” and “choice architects,” recognizing that those who control and create the context in which a decision is made have influence over that decision because “there is no such thing as a ‘neutral’ design.”<sup>54</sup> Indeed, some choice architects alter not only conceptual decision-making structures but the built environment itself, suggesting that they are in fact quite similar to traditional architects. For example, a cafeteria manager who places healthier food items in a more visible and accessible location than junk food in order to nudge people toward healthier choices is guiding actions through architectural decisions. These architectural decisions create architectural constraints: features of the built environment that function to control human behavior or hinder access—the embodiment of architectural exclusion. In the case of the cafeteria, the architectural constraint is that it is physically difficult to reach or see the junk food, and thus it is harder to access.

These scholars use architectural concepts in an implicit acknowledgment that the actual physical architecture of asphalt and steel binds our actions. Thaler and Sunstein argue that choice architects influence our choices only because—and precisely because—they understand that traditional architects of the built environment influence our experience of the built environment.<sup>55</sup> Traditional architecture is not just a useful metaphor for exposing hidden regulatory systems. It *is* regulation. Consequently, it makes even more sense to apply the concept of regulation through architecture to the built environment than it does to apply it to the Internet or structuring decisions.<sup>56</sup> Although this

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53. Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 HARV. J.L. & GENDER 247 (2006); see also Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992 (2003) (describing ways in which the design of monuments serve as a metaphor for the new federalism).
  54. THALER & SUNSTEIN, *supra* note 49, at 3 (defining a “choice architect” as one who “has the responsibility for organizing the context in which people make decisions”); Eric J. Johnson et al., *Beyond Nudges: Tools of a Choice Architecture*, 23 MARKETING LETTERS 487, 488 (2012) (“While it is tempting to think that choices can be presented in a ‘neutral’ way . . . , the reality is that there is no neutral architecture.”).
  55. THALER & SUNSTEIN, *supra* note 49, at 3; see also Matthew A. Smith & Michael S. McPherson, *Nudging for Equality: Values in Libertarian Paternalism*, 61 ADMIN. L. REV. 323, 323 (2009).
  56. See Tien, *supra* note 22, at 15 (“Although architectural regulation is not inherently associated with technological change, these issues are raised most clearly in that context.”); Katyal, *supra* note 21, at 1041 (“[T]he real world may be more amenable to architectural constraints than the Internet.”).



may appear to be a banal observation, few in the legal community have discussed architecture itself as a regulatory tool.

*B. Architecture as Architecture in Legal Scholarship: Racialized Space and Place, Briefly*

Although legal scholars do not often write directly about architecture as regulation, some—especially law and geography scholars and critical race theorists—have confronted concepts like architecture, the built environment, municipal infrastructure, space, and place in the context of class and race.<sup>57</sup> As one commentator has noted:

It is hard to understate the central significance of geographical themes—space, place, and mobility—to the social and political history of race relations and antiblack racism in the United States. . . . [S]egregation, integration, and separation are spatial processes; . . . ghettos and exclusionary suburbs are spatial entities; . . . access, exclusion, confinement . . . are spatial experiences.<sup>58</sup>

For example, Lior Jacob Strahilevitz examines “exclusionary amenities,” which are features of residential developments that are generally expensive and that only appeal to certain demographic groups.<sup>59</sup> By including these features in a common interest community, a developer can deter unwanted potential residents—generally poor people and people of color—from buying homes in that development. Strahilevitz therefore recognizes that architecture and design can be employed to steer human behavior and to promote desired ends.<sup>60</sup> This Ar-

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57. For more on law and geography, see generally Gordon L. Clark, *Foreword*, in *THE LEGAL GEOGRAPHIES READER: LAW, POWER, AND SPACE*, at x (Nicholas Blomley et al. eds., 2001) (noting that this is a new field of research). Even earlier, Foucault has been “credited with conceptualizing the relationship between space, architecture, and social power.” Elise C. Boddie, *Racial Territoriality*, 58 *UCLA L. REV.* 401, 442 (2010); see Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 *HARV. L. REV.* 1841, 1857 (1994); Paul Rabinow, *Ordonnance, Discipline, Regulation: Reflections on Urbanism*, in *THE ANTHROPOLOGY OF SPACE AND PLACE* 353-61 (2003); see also Chris Philo, *Michel Foucault*, in *KEY THINKERS ON SPACE AND PLACE* 121, 126 (Phil Hubbard et al. eds., 2004) (noting that Foucault addresses “the physical divide of segregation and exclusion that inscribes into bricks and mortar a distancing of the Other from the Same” (internal citations omitted)).

58. DAVID DELANEY, *RACE, PLACE, AND THE LAW: 1836-1948*, at 9 (1998).

59. Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 *VA. L. REV.* 437, 441, 487 (2006) (providing examples such as golf courses, tennis courts, polo grounds, in-home elevators, and concierges).

60. Importantly, he also argues—in a similar vein to this Article—that extra-legal exclusion can circumvent traditional antidiscrimination laws. *Id.* at 437.

ticle builds on this work by bringing light to additional ways in which cities and communities have used design to exclude undesirable individuals writ large, not just within residential communities. We often expect certain biases in our residential neighborhoods, both due to Fischel's Homevoter Hypothesis—suggesting that homeowners are more likely than renters to vote and more likely to vote in ways that will protect their property investment—and our country's long history of intentional discrimination and exclusion.<sup>61</sup> However, people tend to believe that the plan and structures of cities are created for purposes of efficiency or with the goal of furthering the general public interest, and they overlook the ways that design can exclude.<sup>62</sup>

Legal academics have also proposed the idea that spaces themselves have racial meanings.<sup>63</sup> For example, Elise C. Boddie argues that places have racial identities based on their history of or reputation for exclusion, and that courts should consider this racial meaning for purposes of racial discrimination claims.<sup>64</sup> She further suggests that the racial meaning of a place can allow those in charge, such as police officers, to determine who belongs in that place and who does not.<sup>65</sup> Similarly, Stephen Clowney has addressed the way in which landscapes, parks, and statues create a narrative that often marginalizes African Americans.<sup>66</sup> Despite this recognition from scholars, Boddie points out that “law overlooks the racial identifiability of spaces,” and Clowney notes that “landscape is one of the most overlooked instruments of modern race-making.”<sup>67</sup>

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61. See FISCHEL, *supra* note 37 (describing the Homevoter Hypothesis); see also *infra* Part III.A.1 (describing intentional exclusion in residential communities).

62. See Blomley, *supra* note 44, at 56.

63. See, e.g., Keith Aoki, *Race, Space, and Place: The Relation Between Architectural Modernism, Post-Modernism, Urban Planning, and Gentrification*, 20 FORDHAM URB. L.J. 699 (1993) (explaining how architectural preferences influence and contribute to patterns of racial distribution); John O. Calmore, *Racialized Space and the Culture of Segregation: “Hewing a Stone of Hope from a Mountain of Despair,”* 143 U. PA. L. REV. 1233 (1995) (discussing racialized space as urban apartheid); Ford, *supra* note 57 (discussing the role of segregation in disempowerment); Richard Thompson Ford, *Geography and Sovereignty: Jurisdictional Formation and Racial Segregation*, 49 STAN. L. REV. 1365 (1997) (addressing differing legal treatment of racially segregated electoral districts and racially segregated local governments); Michael Keith & Malcolm Cross, *Racism and the Postmodern City*, in RACISM, THE CITY AND THE STATE 11 (Michael Keith & Malcolm Cross eds., 1993) (discussing “the architecture of power in the city”).

64. Boddie, *supra* note 57, at 405-06.

65. *Id.* at 409.

66. See Stephen Clowney, *Landscape Fairness: Removing Discrimination from the Built Environment*, 2013 UTAH L. REV. 1.

67. Boddie, *supra* note 57, at 414 n.63; *id.* at 401 (arguing that places “have a racial identity and meaning based on socially engrained racial biases regarding the people who inhabit, fre-

While these authors offer compelling explorations of spatial organization's ability to exclude and culturally marginalize, their critiques have not yet penetrated the mainstream of land-use or civil rights law. Law and lawmakers habitually overlook<sup>68</sup> the way that the built environment functions as an express tool of exclusion.<sup>69</sup> For example, a leading land-use casebook has a chapter called "discriminatory land use controls."<sup>70</sup> This chapter addresses discrimination against people of color, the poor, "unconventional households,"<sup>71</sup> and people with disabilities.<sup>72</sup> And while it addresses tools of exclusion such as racially restrictive covenants and exclusionary zoning, never does it mention exclusion based on features of the built environment.<sup>73</sup> Perhaps even more tell-

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quent, or are associated with particular places and racialized cultural norms of spatial belonging and exclusion"); Clowney, *supra* note 66, at 1; *see also* JAMES S. DUNCAN & NANCY G. DUNCAN, *LANDSCAPES OF PRIVILEGE: THE POLITICS OF THE AESTHETIC IN AN AMERICAN SUBURB* 4 (2003) ("A seemingly innocent appreciation of landscapes and desire to protect local history and nature can act as subtle but highly effective mechanisms of exclusion and reaffirmation of class identity.").

68. It is difficult to prove that an issue has been overlooked, as this requires proving a thing's nonexistence or underreporting. Here, I attempt it by examining places where I would expect to find mention of architectural exclusion, and not finding it there, suggest that it has been overlooked. *See, e.g.*, DOUGLAS N. WALTON, *ARGUMENTATION SCHEMES FOR PRESUMPTIVE REASONING* 119 (1996) ("In some circumstances it can safely be assumed that if a certain event had occurred, evidence of it could be discovered by qualified investigators. In such circumstances it is perfectly reasonable to take the absence of proof of its occurrence as positive proof of its nonoccurrence." (quoting IRVING COPI, *INTRODUCTION TO LOGIC* 102 (1982))).
69. *See* Boddie, *supra* note 57, at 414 n.63; *see also* Richard H. Chused, *Gendered Space*, 42 *FLA. L. REV.* 125, 125-35 (1990) (arguing that law has allowed the creation of gendered spaces); Johnson, *supra* note 54, at 488 (noting that "[c]hoice architects have significant, if perhaps underappreciated, influence, much like the architect of a building who affects the behaviors of the building's inhabitants through the placement of doors, hallways, staircases, and bathrooms").
70. ROBERT C. ELLICKSON ET AL., *LAND USE CONTROLS* 725-810 (4th ed. 2013).
71. The text uses this term as a catchall that includes, for example, extended families, homosexual couples, and unrelated college roommates living together. *Id.* at 787-94.
72. *Id.* at 725-810 (the chapter is organized into five categories, including the four mentioned in the body of the text).
73. *Id.* at 746. The text does quote Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 *MINN. L. REV.* 739, 760-61 (1993), which acknowledges "the disproportionate displacement of African-American families through urban renewal, highway, and local redevelopment projects," but this is as close as the text gets to a discussion of architectural exclusion. *See also* DAVID CALLIES ET AL., *LAND USE* 573-74 (6th ed. 2012) (discussing exclusionary zoning and stating, "Local governments are most imaginative in regulating land use in facially innocuous ways that have the effect of excluding, and all too often been intended to exclude, racial, religious and economic minorities . . . . Among the more common techniques: minimum lot area requirements, minimum floor area requirements, limitations on multifamily dwellings and manufactured housing,

ing, despite the large number of examples of architectural exclusion set forth in Part II, there are only a small number of cases addressing this phenomenon.<sup>74</sup> Finally, some legal fields have addressed racialized forms of geographic organization—for example, the environmental justice movement<sup>75</sup> and the literature addressing discrimination in the provision of municipal services.<sup>76</sup> However, architectural exclusion is different in that it is concerned with the placement and location of infrastructure that physically separates and inhibits access, not just disparities in treatment based on geographic location.

Although regulation through architecture is just as powerful as law, it is less identifiable and less visible to courts, legislators, and potential plaintiffs.<sup>77</sup> While this observation suggests that decision makers should be even more diligent in analyzing the impact of architecture, research demonstrates that they often fail to take it seriously.<sup>78</sup> To be clear, officials may understand that an architectural decision could have an exclusionary effect—they might even intend that result—but they generally do not see their decisions as a form of regula-

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minimum yard, setback and other extraordinary bulk requirements, and growth caps” but not mentioning architectural exclusion); DANIEL P. SELMI ET AL., *LAND USE REGULATION* 697-737 (4th ed. 2012) (discussing discrimination but focusing only on exclusionary zoning); STEWART E. STERK & EDUARDO M. PENALVER, *LAND USE REGULATION* 295-331 (2011) (land-use text whose section on discrimination discusses discrimination against racial and ethnic minorities, discrimination based on disability, and discrimination based on family composition, but does not address architectural exclusion).

74. See *infra* Part IV.B; see also Boddie, *supra* note 57, at 408 (“[T]he ongoing spatial isolation and marginalization of people of color as a group remains a significant problem. . . . [B]ut constitutional law has mostly ignored this context, except in cases involving overt discrimination, or where the state explicitly uses racial classifications to draw, reinforce, or create physical or jurisdictional boundaries.”).
75. See Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 *YALE L.J.* 1383 (1994); Richard J. Lazarus, *Pursuing “Environmental Justice”: The Distributional Effects of Environmental Protection*, 87 *NW. U. L. REV.* 787 (1993).
76. See Michelle Wilde Anderson, *Mapped Out of Local Democracy*, 62 *STAN. L. REV.* 931 (2010); Gershon M. Ratner, *Inter-Neighborhood Denials of Equal Protection in the Provision of Municipal Services*, 4 *HARV. C.R.-C.L. L. REV.* 1 (1968); see also *Ammons v. Dade City, Fla.*, 783 F.2d 982 (11th Cir. 1986) (holding that the city intentionally discriminated against African Americans by providing them with unequal municipal services, including street paving and storm water drainage facilities); *Dowdell v. City of Apopka, Fla.*, 698 F.2d 1181 (11th Cir. 1983) (affirming district court’s finding of discriminatory intent where the city maintained a geographically and racially segregated municipal services system).
77. Tien, *supra* note 22, at 22 (“Government action that architects social settings and equipment can regulate our behavior as effectively as can sanction-backed rules.”); see also THALER & SUNSTEIN, *supra* note 49, at 11 (using architecture in the broad sense, stating, “[S]ometimes the architecture is taken for granted and could benefit from some careful attention.”).
78. See *infra* Part IV.

tion that should be analyzed and patrolled in the same way that a law with the same effect would be. Exclusion through architecture should be subject to scrutiny that is equal to that afforded to other methods of exclusion by law.<sup>79</sup>

## II. ARCHITECTURAL EXCLUSION: PRACTICE

The architecture of the built environment directs both physical movement through and access to places. This Part details a number of ways that states and municipalities – through actions by their residents, police force, planning staff, engineers, or local elected officials – have created infrastructure and designed their built environs to restrict passage through and access to other areas of the community. A number of specific exclusionary techniques have been used to keep people out, including physical barriers to access, the siting of transit and transportation infrastructure, and the organization of residential neighborhoods. While some of these designs expressly serve to exclude those who are unwanted, others have that effect indirectly. This Part will examine a number of these methods of exclusion.

### A. *Physical Barriers to Access*

A number of localities have used physical barriers to exclude. A paradigmatic example of architectural exclusion through physical barriers is Robert Moses's Long Island bridges that were mentioned in the Introduction to this Article.<sup>80</sup> Moses set forth specifications for bridge overpasses on Long Island, which were designed to hang low so that the twelve-foot tall buses in use at the time could not fit under them.<sup>81</sup> "One consequence was to limit access of racial minorities and low-income groups" – who often used public transit – "to Jones Beach, Moses's widely acclaimed public park. Moses made doubly sure of this result by vetoing a proposed extension of the Long Island Railroad to Jones Beach."<sup>82</sup> Moses's biographer suggests that his decision to favor upper- and middle-class white people who owned cars at the expense of the poor and African-Americans was due to his "social-class bias and racial prejudice."<sup>83</sup>

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79. Because of architectural exclusion's hidden nature, one could argue that courts should be even more diligent about policing the exclusionary effects of an architectural decision than a legal one.

80. *See supra* notes 3-5.

81. Winner, *supra* note 28, at 123-24.

82. *Id.* at 124.

83. *Id.* at 123.

Instead of garnering support to pass a law banning poor people or people of color from the places in which he did not want them – which, if the intent were clear, would not be permissible today<sup>84</sup> – Moses used his power as an architect to make it physically difficult for certain individuals to reach the places from which he desired to exclude them. Although in this situation, there was at least anecdotal evidence of the architect’s intent, that sort of evidence is often not available. Instead, our environment contains low bridges that might make travel difficult for some, but we tend to view such bridges as innocuous features rather than as exclusionary objects.

A municipality that lacks sufficient connections between different parts of the community is often exclusionary because residents are deterred from traveling. For example, sidewalks make walking easier and safer, in large part by reducing the risk of pedestrian and vehicle collisions.<sup>85</sup> However, many communities lack sidewalks and crosswalks, making it difficult to cross the street or walk through a neighborhood. Sometimes this is intentional.<sup>86</sup> For example, in his book detailing continuing racism and intentionally white communities in the United States, James Loewen describes architectural exclusion in some towns where “[s]idewalks and bike paths are rare and do not connect to those in other communities inhabited by residents of lower social and racial status.”<sup>87</sup> If someone wanted to walk or bike to another area, then, it might have to be along the shoulder of a busy road or on the road itself.

Similarly, the existence of divided highway-style median barriers on local arterials makes it difficult for pedestrians to cross streets or for cars to turn

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84. See generally *infra* Part III (discussing the evolution of court decisions striking down racially discriminatory laws).

85. PATRICK J. MCMAHON ET AL., AN ANALYSIS OF FACTORS CONTRIBUTING TO “WALKING ALONG ROADWAY” CRASHES: RESEARCH STUDY AND GUIDELINES FOR SIDEWALKS AND WALKWAYS 8 (2002), [http://www.pedbikeinfo.org/collateral/PSAPtraining/gettraining\\_references\\_WalkingAlongRoadway.pdf](http://www.pedbikeinfo.org/collateral/PSAPtraining/gettraining_references_WalkingAlongRoadway.pdf) [<http://perma.cc/HB7Z-B5GH>] (determining that “the likelihood of a site with a paved sidewalk being a crash site is 88.2 percent lower than a site without a sidewalk. . . . [T]he presence of a sidewalk clearly has a strong beneficial effect of reducing the risk of a ‘walking along roadway’ pedestrian/motor vehicle crash”).

86. Often, decisions are intentionally race-based, as will be discussed in this section. However, sometimes decisions are made with the knowledge that there might be a race-based effect, but with the actual purpose of the decision not being race-based. For example, the decision to forego sidewalks in a community could have motivations other than exclusion, such as a desire to reduce impervious cover or maintain a rural feel, even if the effect is also exclusionary.

87. JAMES W. LOEWEN, SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM 254-55 (2006) (describing a number of U.S. towns that excluded African Americans, either formally or informally).

left.<sup>88</sup> In Palo Alto, traversing Highway 101 to reach affluent West Palo Alto from low-income East Palo Alto is dangerous and involves passing through numerous busy intersections; the area has one of the highest rates of car-pedestrian collisions.<sup>89</sup> The lack of secure pedestrian infrastructure makes areas more difficult to access in a safe and easy manner.

Municipalities also often use the most straightforward physical structures to exclude—walls and barriers. Walled ghettos are a well-known example of physical segregation.<sup>90</sup> Jewish people in Europe were made to live in separate, walled areas, as were Arab and European traders in China.<sup>91</sup> This form of physical exclusion by walls and barriers is nothing new.<sup>92</sup> However, it is not only a remnant of the distant past, but also exists in more modern examples.

In Detroit in 1940, a private developer constructed a six-foot-high wall—known as Eight Mile Wall—to separate an existing black neighborhood from a new white one that was to be constructed.<sup>93</sup> Historically, the Federal Housing Administration (FHA) provided financing for a new development project only

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88. *Episode 51: The Arsenal of Exclusion*, 99% Invisible Podcast (Apr. 4, 2012) (downloaded at <http://99percentinvisible.org/episode/episode-51-the-arsenal-of-exclusion> [<http://perma.cc/2ZGF-4KVF>]) (describing one-way streets that prohibit turns into a fancy neighborhood); see also Ann S. Kim, *Maine Architects Look To Make Over Misfit Street*, PORTLAND PRESS HERALD, Sept. 20, 2011, [http://www.pressherald.com/2011/09/20/architects-look-to-make-over-misfit-street\\_2011-09-20](http://www.pressherald.com/2011/09/20/architects-look-to-make-over-misfit-street_2011-09-20) [[http://perma.cc/7N\]2-WCAU](http://perma.cc/7N]2-WCAU)] (describing an arterial road with concrete median barriers that was constructed as part of urban renewal with the goal of creating a ring of multi-lane roads around the city so that cars could easily and quickly get from one side of the city to the other).
89. Bryan Goebel, *Divided by a Highway, East Palo Alto Looks To Reconnect Its West Side*, STREETS BLOG SF (Oct. 25, 2012), <http://sf.streetsblog.org/2012/10/25/divided-by-a-highway-east-palo-alto-looks-to-reconnect-its-west-side> [<http://perma.cc/B8C2-LGHP>].
90. See generally Peter Marcuse, *The Enclave, the Citadel, and the Ghetto: What Has Changed in the Post-Fordist U.S. City*, 33 URB. AFF. REV. 228, 231 (1997) (defining ghetto as a “spatially concentrated area used to separate and to limit a particular involuntarily defined population group (usually by race) held to be, and treated as, inferior by the dominant society”).
91. GARY S. BECKER & KEVIN M. MURPHY, SOCIAL ECONOMICS: MARKET BEHAVIOR IN A SOCIAL ENVIRONMENT 71 (2000).
92. *But see* Marcuse, *supra* note 90, at 229 (“Space and race have been combined in the United States today to produce a new ghetto that is different from the ghettos of the past and from the immigrant enclaves of the past and present. The U.S. ghetto today is an outcast ghetto, differing in its definition and role from the historic black ghettos in that its inhabitants are the excluded and the castaway rather than the subordinated and restricted.”).
93. Sarah Hulett, *Racial, Regional Divide Still Haunt Detroit’s Progress*, NPR (Sept. 11, 2012), <http://www.npr.org/2012/09/11/160768981/racial-regional-divide-still-haunt-detroits-progress> [<http://perma.cc/Z2EN-AZWZ>]; Steve Neavling, *Wall Built To Separate White, Black People Near 8 Mile Stays Strong, Colorful & Relevant*, MOTOR CITY MUCKRAKER (Apr. 22, 2013), <http://motorcitymuckraker.com/2013/04/22/wall-built-to-separate-white-black-people-near-8-mile-stays-strong-colorful-relevant> [<http://perma.cc/U66G-UYK9>].

if the neighborhood was sufficiently residential and racially segregated.<sup>94</sup> In the case of the Eight Mile Wall, the FHA would not finance the new housing project unless the wall was constructed because the FHA believed that the proposed new development was too close to an existing black one.<sup>95</sup> The wall still exists today—a legacy of discriminatory government policy—and though Detroit has experienced declines in segregation in recent years, this city is still the most racially segregated metropolitan area in the United States.<sup>96</sup>

Another divider was an approximately ten-foot-high, 1,500-foot-long fence that separated the racially diverse (though predominantly white) suburb of Hamden, Connecticut, from the primarily black public housing projects in New Haven.<sup>97</sup> Although the fence was finally removed in May 2014, while it was in place, residents in the public housing were extremely isolated from the

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94. See Justin P. Steil, *Innovative Responses to Foreclosures: Paths to Neighborhood Stability and Housing Opportunity*, 1 COLUM. J. RACE & L. 63, 69 n.14 (2011) (“The four-tiered underwriting system developed by the Federal Home Owners Loan Corporation (HOLC) in the early 1930’s systematically undervalued racially mixed neighborhoods and strongly discouraged lending in integrated or primarily non-white communities. The Federal Housing Authority . . . express[ed] concern about the impact of ‘incompatible racial or nationality groups’ on property values and stating that, ‘if a neighborhood is to retain stability, it is necessary that properties shall continue to be occupied by the same social and racial classes.’” (quoting GREGORY SQUIRES, *CAPITAL AND COMMUNITIES IN BLACK AND WHITE* 53 (1994))). See generally KENNETH T. JACKSON, *CRABGRASS FRONTIER* 203-18 (1985) (describing FHA and loan programs).

95. Hulett, *supra* note 93.

96. See John R. Logan & Brian J. Stults, *The Persistence of Segregation in the Metropolis: New Findings from the 2010 Census*, US2010 PROJECT 6 (2011), <http://www.s4.brown.edu/us2010/Data/Report/report2.pdf> [<http://perma.cc/CVG4-K47D>] (ranking the Detroit metropolitan area number one in black-white segregation while noting that Detroit “had substantial declines in segregation for the first time since 1980,” which “coincided with very substantial declines in the central city black population[] . . . as part of the fallout from the recession and foreclosure crisis”); see also Kyle Vanhemert, *The Best Map Ever Made of America’s Racial Segregation*, WIRED (Aug. 26, 2013, 6:30 AM), <http://www.wired.com/design/2013/08/how-segregated-is-your-city-this-eye-opening-map-shows-you> [<http://perma.cc/YBR7-QGUV>] (describing comprehensive maps made by a University of Virginia researcher using 2010 U.S. Census data to illustrate the racial makeup of major metropolitan areas, including one for Detroit that depicts Eight Mile Road as a “sharp racial dividing line”).

97. Sari Bashi, *Bad Fences*, LEGAL AFF., July-Aug. 2002, at 13 (noting that ninety percent of the residents in the housing project are African-American, while seventy-seven percent of residents in Hamden are white); Benjamin Mueller, *In Connecticut, Breaking a Barrier Between a Suburb and Public Housing*, N.Y. TIMES, July 11, 2014, <http://www.nytimes.com/2014/07/12/nyregion/in-connecticut-breaking-barrier-between-a-suburb-and-public-housing.html> [<http://perma.cc/HNJ9-EAZX>] (noting that the wall was 1500 feet long and twelve feet high).



surrounding community.<sup>98</sup> In order “to buy groceries at a Hamden shopping center three miles away,” the public housing residents would “have to travel into New Haven to get around the fence, a 7.7-mile trip that takes two buses and up to two hours to complete.”<sup>99</sup> The fence was originally erected by the city of Hamden in the 1950s to keep crime in the New Haven projects out of Hamden.<sup>100</sup> As recently as 2012, calls to remove the fence were met with resistance from Hamden residents who “described the robberies and traffic overflow they said would result from opening the fence.”<sup>101</sup> Hamden agreed to remove the fence only after the New Haven Housing Authority threatened to “sue Hamden on civil rights grounds.”<sup>102</sup> A similar eight-foot-tall spiked fence was installed in 1998 around a public housing project in Hollander Ridge in Baltimore.<sup>103</sup> This fence, which was constructed by the local housing authority with funding from the Department of Housing and Urban Development (HUD), blocked access to and through Rosedale, a contiguous, mostly white neighborhood.<sup>104</sup> The Rosedale residents wanted the fence to keep out crime and keep their property values up, and “there was a not insubstantial vocal segment of the Rosedale whose racist views were made readily apparent.”<sup>105</sup>

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98. Bashi, *supra* note 97 (“Because of the fence, West Rock is one of the country’s most isolated public housing projects. There is only one road out, and it winds past a university, a cemetery, and an Army Reserve office before reaching city streets.”).
99. Paul Bass, *New Haven-Hamden “Berlin Wall” Coming Down*, NEW HAVEN INDEP. (May 4, 2014, 3:49 PM), [http://www.newhavenindependent.org/index.php/archives/entry/new\\_haven-hamden\\_berlin\\_wall\\_coming\\_down](http://www.newhavenindependent.org/index.php/archives/entry/new_haven-hamden_berlin_wall_coming_down) [<http://perma.cc/M638-G65R>]; Ben Mueller, *What Doesn’t Love a Wall*, 45 NEW J., (2012), <http://www.thenewjournalatnyale.com/2012/12/what-doesnt-love-a-wall> [<http://perma.cc/C8UK-GKYU>].
100. Bass, *supra* note 99.
101. *Id.*
102. Associated Press, *Hamden-New Haven Fence To Come Down Today*, NBC CONN. (May 12, 2014, 3:10 PM), <http://www.nbcconnecticut.com/news/local/Hamden-New-Haven-Fence-to-Come-Down-Monday-258827651.html> [<http://perma.cc/2BST-CTD6>]; *see also* Bass, *supra* note 99 (“The federal government began a civil-rights investigation that could lead to a lawsuit against the town of Hamden over the fence, and prevent the town from receiving any federal money.”).
103. *Thompson v. U.S. Dep’t of Hous. & Urban Dev.*, 348 F. Supp. 2d 398, 428 (D. Md. 2005).
104. *Id.* at 404, 427, 428 (stating that plaintiffs, African-American residents of public housing in Baltimore County, asserted that the local housing authority’s practices resulted in segregation and discrimination in violation of their Equal Protection rights).
105. *Id.* at 429, n.56; *see also* Daniel D’Oca, *Perimeter Fence*, ARSENAL EXCLUSION & INCLUSION (Aug. 8, 2010, 10:51 AM), <http://arsenalofexclusion.blogspot.com/2010/08/perimeter-fence.html> [<http://perma.cc/EZ6S-AWJ4>]; Erin Teixeira, *Plans To Fence in Hollander Ridge Killed[;] HUD Officials Refuse To Help City, County Pay for the Project*, BALT. SUN, Aug. 28, 1996, [http://articles.baltimoresun.com/1996-08-28/news/1996241031\\_1\\_hollander-build-a-fence-roosedale](http://articles.baltimoresun.com/1996-08-28/news/1996241031_1_hollander-build-a-fence-roosedale) [<http://perma.cc/MLT4-YNUV>] (“After residents in Rosedale . . . com-

Another common version of this phenomenon is one of the most obvious forms of architectural exclusion: the walls, gates, and guardhouses of gated communities.<sup>106</sup> These architectural features serve to keep out those who are not expressly allowed in.<sup>107</sup> Although these walls are generally put in place by private developers to keep out those whom they do not want to access their communities, local governments have the power to prohibit these barriers. And while some cities have taken action to actively outlaw gated communities,<sup>108</sup> most have not.<sup>109</sup>

Local governments also take affirmative steps to install exclusionary architecture themselves. Often, cities use barriers and blockades to mold traffic patterns. For example, the concrete barriers and bollards that exist throughout the streets of Berkeley, California, were installed to calm traffic;<sup>110</sup> however, the

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plained about rising crime and decreased property values in their middle-class neighborhood, city and county officials agreed to help pay for an 8-foot-high wrought-iron fence.”).

106. See generally EDWARD J. BLAKELY & MARY GAIL SNYDER, *FORTRESS AMERICA: GATED COMMUNITIES IN THE UNITED STATES* (1997) (discussing municipal debates surrounding gated communities); SETHA M. LOW, *The Edge and the Center: Gated Communities and the Discourse of Urban Fear*, 103 *AM. ANTHROPOLOGIST* 45, 45 (2001) (noting that gated communities create “a landscape that encodes class relations and residential (race/class/ethnic/gender) segregation more permanently in the built environment”).
107. See Jerry L. Anderson et al., *A Study of American Zoning Board Composition and Public Attitudes Toward Zoning Issues*, 40 *URB. LAW.* 689, 710 (2008) (“Historically, gated communities have been seen as mostly white professional enclaves, contributing to social segregation by race and class.”); STEVEN SIEGEL, *The Public Interest and Private Gated Communities: A Comprehensive Approach to Public Policy That Would Discourage the Establishment of New Gated Communities and Encourage the Removal of Gates from Existing Private Communities*, 55 *LOY. L. REV.* 805, 811 (2009) (“Although gated communities are subject to general federal and state nondiscrimination laws, these communities nevertheless have been found to be ‘succe[ssful] in keeping out minorities and large families.’” (footnote omitted)).
108. See, e.g., LA HABRA HEIGHTS, CAL., *MUN. CODE* § 7.3.20(E)(2) (2013), <http://www.codepublishing.com/ca/lahabraheights> [<http://perma.cc/AG4V-QTV7>] (prohibiting “[g]ates or guardhouses that restrict access to residential neighborhoods, subdivisions, and multi-lot developments” in the Residential-Agricultural Zone); CARRBORO, N.C., *LAND USE ORDINANCE* art. X, § 15-149(c)(6) (1980) (prohibiting “[c]onstruction of gates that prevent access to private roads serving five or more lots or dwelling units”); 2012 *Comprehensive Plan*, *GROWTH PLAN*, COMM. 101 (June 12, 2012), [https://www1.maine.gov/dacf/municipalplanning/comp\\_plans/Kennebunkport\\_2012.pdf](https://www1.maine.gov/dacf/municipalplanning/comp_plans/Kennebunkport_2012.pdf) [<https://perma.cc/FD55-HHCA>] (“Gated communities are not in keeping with the character of Kennebunkport.”).
109. See Howard Blume, *La Habra Heights Shuts the Gates : Privacy: Council Majority Calls Action To Bar Gated Communities a Stand Against Elitism. Real Estate Industry Leaders Express Dis-may.*, *L.A. TIMES*, Sept. 20, 1990, [http://articles.latimes.com/1990-09-20/news/hl-1019\\_1\\_la-habra-heights](http://articles.latimes.com/1990-09-20/news/hl-1019_1_la-habra-heights) [<http://perma.cc/Q94N-KH6M>] (noting the rarity of municipal bans on gated communities).
110. See Transp. Div., *Traffic Calming in Berkeley*, CITY BERKELEY, <http://www.ci.berkeley.ca.us/contentdisplay.aspx?id=8238> [<http://perma.cc/2ZJG-XQMT>] (noting that traffic diverters

barriers do this by preventing people from driving down the streets on which they are placed. In Shaker Heights, Ohio, the city installed a “traffic diverter,” which was called “the Berlin Wall for black people” by nearby neighbors in Cleveland.<sup>111</sup> In some communities, the purpose of rerouting traffic is to inhibit harmful behaviors tied to drugs and crime. Concrete barriers were put in place near the highways of Bridgeport, Connecticut, to block quick access into the city by those who wanted to buy drugs.<sup>112</sup> The strategy, according to police, was that “buyers would fear ‘driving all over looped streets, stopping and turning around, trying to find drugs with the possibility of having their nice cars, their jewelry, their money ripped off as they look.’”<sup>113</sup> A similar technique was implemented in Los Angeles, which put traffic barriers in place on certain streets that allegedly provided quick escape routes for gang members who had committed crimes.<sup>114</sup>

In all these instances, the barriers and road closures were instituted, installed, and approved based on their purported relationship to public health and safety. While these barriers are often related to traffic, they have marked secondary effects: they often intentionally restrict access by a certain class of individuals (here, drug dealers and “johns”). They also make access more difficult for those unfamiliar with the area – not just those bad actors who the locality wants to keep out, but any outsider. It is quite possible that these architectural decisions contribute to racial or socioeconomic change in the

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were first installed in the mid-1960s “to keep through-traffic from running alongside San Pablo Park” and that Berkeley’s City Council adopted a Traffic Management Plan in 1975, which resulted in the installation of many additional diverters and street barriers).

111. Douglas Martin, *Fence Is Not Neighborly in a Suburb of Cleveland*, N.Y. TIMES, June 27, 1987, <http://www.nytimes.com/1987/06/27/us/fence-is-not-neighborly-in-a-suburb-of-cleveland.html> [<http://perma.cc/V9E3-PUJA>] (“The barricade and three others like it were erected by Shaker Heights in 1976 in the name of traffic control but were immediately perceived as something quite different by some Clevelanders.”).
112. See Joel Epstein & Santiago Sifre, *Bridgeport: Cutting off Access by the Suburban User: Final Report to the Office of National Drug Control Policy*, ABT ASSOCIATES INCORPORATED 4 (Sept. 15, 1993), <http://www.clintonlibrary.gov/assets/storage/Research-Digital-Library/clinton-admin-history-project/41-50/Box-50/1504630-ondcp-crime-violence-law-enforcement-1.pdf> [<http://perma.cc/FNA2-HGNG>].
113. Katyal, *supra* note 21, at 1049 n.31. In fact, one year after these barriers were erected, a qualitative ethnographic study of East Bridgeport revealed that open-air drug deals were still prevalent throughout the area. See Epstein & Sifre, *supra* note 112, at 8-10. The study showed that drivers responded by parking their cars and walking to buy drugs, and any curbed drug sales often just pushed drug dealers “to go to where the heat is not.” *Id.* at 10.
114. Katyal, *supra* note 21, at 1070 (noting that after placing those barriers, assaults and homicides decreased). In North London, the city closed off a number of roads in order to decrease prostitution-related traffic, which resulted in a decrease in crime and a more peaceful neighborhood. *Id.*

neighborhoods.<sup>115</sup> Katyal notes that traffic measures implemented in North London resulted in a neighborhood transformed “from a noisy and hazardous ‘red light’ district into a relatively tranquil residential area.”<sup>116</sup> The possibility of transformation as a result of architecture raises a related question: where did the people who were using these streets prior to the architectural intervention go? Presumably, they were pushed to a different—possibly less affluent—part of town.<sup>117</sup> This suggests that the area from which they were expunged may have had residents with sufficient political capital to organize and make this change happen.

### B. Transit

Communities also engage in architectural exclusion in the way they design and place public transit and transportation infrastructure. The siting of bus stops and subway stations changes the built environment. These routing decisions and patterns have a dramatic impact on the mobility of individuals through, and the accessibility of, different areas of the community.<sup>118</sup> Further, transit siting and infrastructure decisions are often implemented with the intention of making it more difficult for certain groups of people to access certain parts of the community.<sup>119</sup> This section will provide examples of these exclusionary transportation design decisions.

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115. Of course, these structures might also be put in place to preserve the status quo in a neighborhood that wants to maintain its current state. And although exclusionary infrastructure also affects local residents, who must often take a longer way around and thus may be seen as over-inclusive, many residents are fine with that result, so long as it keeps out “undesired” visitors. See LOEWEN, *supra* note 87, at 254 (noting that residents of one “New York city suburb ‘would rather bear the inconvenience of narrow and congested streets on a day-by-day basis than make it easier for the inhabitants of New York City to reach the town.’”).

116. Katyal, *supra* note 21, at 1070.

117. A study revealed that efforts by the City of Bridgeport to curb drug dealing and violence through building demolition and road closures resulted in forcing the drug trade from one side of a neighborhood project to the other. See Epstein & Sifre, *supra* note 112, at 8-10.

118. Regina Austin, “Not *Just for the Fun of It!*”: *Governmental Restraints on Black Leisure, Social Inequality, and the Privatization of Public Space*, 71 S. CAL. L. REV. 667, 669 (1998) (“[T]he restraints may operate not on a leisure activity itself, but on the mobility required to engage in the activity. For example, the routing patterns of some urban public transportation systems deliberately make it difficult for central-city residents to get to outlying leisure venues like shopping malls and beaches.”).

119. *Id.*; see also Thomas Sanchez et al., *Moving to Equity: Addressing Inequitable Effects of Transportation Policies on Minorities*, CIVIL RIGHTS PROJECT AT HARV. UNIV 14 (2003), <http://civilrightsproject.ucla.edu/research/metro-and-regional-inequalities/transportation/moving-to-equity-addressing-inequitable-effects-of-transportation-policies-on-minorities/sanchez-moving-to-equity-transportation-policies.pdf> [<http://perma.cc/DRZ4-L9AH>]; Jerett Yan,

1. *Placement of Transit Stops*

A present-day example of architectural exclusion comes in the form of decisions about where to place transit stops. Throughout the United States, many moderate- and high-income individuals travel—to their jobs, to events, to see friends, and to shop—in a private vehicle.<sup>120</sup> In contrast, although people of all socioeconomic groups use public transit—buses, subways, and light rail—in larger metropolitan areas, low-income people and people of color often rely more heavily on public transportation than people from other groups.<sup>121</sup> Those individuals therefore have a hard time reaching areas that are underserved by transit.

Because there are a number of benefits to living near a transit stop,<sup>122</sup> the Homevoter Hypothesis suggests that homeowners will readily lobby for

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Comment, *Rousing the Sleeping Giant: Administrative Enforcement of Title VI and New Routes to Equity in Transit Planning*, 101 CALIF. L. REV. 1131, 1133 (2013) (“The overt de jure discrimination Plessy and Parks faced is largely a relic of this nation’s past; however, transit-related disparities endure. Today, transit policy tends to favor higher-income transit riders over lower-income transit riders, and suburbs over cities.”).

120. White people are also more likely to own cars than people of color. See, e.g., Sanchez et al., *supra* note 119, at vii (“Just 7 percent of white households do not own a car, compared with 24 percent of African-American households, 17 percent of Latino households, and 13 percent of Asian-American households.”).
121. *Id.* (“Nationally, public transportation users are disproportionately minorities with low to moderate incomes. Overall, public transit users are 45 percent white, 31 percent African American, and 18 percent Latino/Hispanic.”); see also Adie Tomer et al., *Missed Opportunity: Transit and Jobs in Metropolitan America*, BROOKINGS INST. 9 (May 2011), [http://www.brookings.edu/~media/research/files/reports/2011/5/12%20jobs%20and%20transit/05\\_12\\_jobs\\_transit.pdf](http://www.brookings.edu/~media/research/files/reports/2011/5/12%20jobs%20and%20transit/05_12_jobs_transit.pdf) [<http://perma.cc/VZJ2-37JM?type=pdf>] (“[L]ow-income people are less likely to own cars and depend more on transit than other groups.”); Mark Garrett & Brian Taylor, *Reconsidering Social Equity in Public Transit*, 13 BERKELEY PLAN. J. 6, 13 (1999) (“[C]ity residents tend to be poorer, mostly minority, and more transit dependent than suburbanites.”).
122. In addition to providing mobility options to those who are unable to drive due to age, condition, or financial reasons, transit hubs aid those in private vehicles by “freeing up scarce freeway space or making it easier for babysitters, house cleaners, or other car-less service providers to reach their homes.” Strahilevitz, *supra* note 59, at 487. Further, perhaps counter-intuitively, some studies have shown that areas directly surrounding mass transit have reduced crime rates. See, e.g., Richard Block & Carolyn Rebecca Block, *The Bronx and Chicago: Street Robbery in the Environs of Rapid Transit Stations*, in ANALYZING CRIME PATTERNS: FRONTIERS OF PRACTICE 137, 147-48 (Victor Goldsmith et al. eds., 2000) (research based on the Bronx and Chicago). However, there is also some evidence that bus stop locations have been tied to crime, though this research suggests that crime is more tied to the area around the stop rather than to the existence of the stop itself. See Katyal, *supra* note 21, at 1095 n.210 (“The location of the bus stop was found to be a critical factor in predicting the crime rate; for example, those bus stops near porous alleys had crime rates that were approximately

them.<sup>123</sup> However, many communities actively push their elected decision makers not to bring transit stops to their neighborhoods. Research shows that the opposition to transit is often motivated by the desire to block access by certain “undesirable” people who ride transit (for example, people of color and the poor).<sup>124</sup> As one scholar acknowledged, “race has been a factor limiting the geography of transit.”<sup>125</sup> For example, wealthy white residents of suburban Atlanta, Georgia,<sup>126</sup> suburban San Francisco, California,<sup>127</sup> and Washington, D.C.,<sup>128</sup> have organized to oppose the locating of transit stops in their communities, at least in part because transit would enable people who live in poorer areas of the cities to easily access these wealthier areas.<sup>129</sup> Although the decision to locate a transit hub is typically made by elected local officials, those officials often act at the behest of their constituents.<sup>130</sup> When a locality is successful in its opposition, people who rely on transit to get around will not have access to those communities.<sup>131</sup>

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double those of stops not near alleys. . . . Bus stops near vacant lots also had crime rates at least double those of stops not near such lots.” (citations omitted)).

123. See FISCHER, *supra* note 37 (describing the Homevoter Hypothesis).

124. See, e.g., Henderson, *supra* note 6, at 299-300 (“In suburban Cobb County[, Atlanta], the chairman of a local anti-tax organization declared that ‘M[etropolitan] A[tlanta] R[egional] T[ransit] A[uthority]-style mass transit would lead to an increase in crime and the construction of low-income housing in Cobb County[.]’” (citation omitted)). Henderson’s research on transit in Atlanta involved interviews with elected officials and planners; he noted that “[m]ost interviewees for this research acknowledged that white racism complicated decision-making about transit. Suburban elected officials acknowledged that a substantial portion of their constituents held racist views. One county official mentioned that at public meetings in her Atlanta suburb, residents loudly protested against the MARTA bus service because blacks would steal TVs[.]” *Id.* at 300 (citation omitted).

125. *Id.*

126. Ross & Leigh, *supra* note 45, at 377.

127. Strahilevitz, *supra* note 59, at 488 n.163 (“Some white suburbs of San Francisco opted out of the Bay Area Rapid Transit system, fearing it might encourage African Americans to move in.”).

128. *Id.* at 487-88.

129. *Id.* (“[I]n the process of planning the Washington, D.C., subway, citizens in various relatively affluent areas opposed the establishment of subway stations because of concerns that inner city denizens would ride the subways into their neighborhoods. Affluent neighborhoods in other parts of the country have done likewise, foregoing otherwise desirable investments in valuable amenities like well-maintained public roads, parks, and even street signs because of fears that such amenities would attract undesirables.”).

130. See generally FISCHER, *supra* note 37.

131. See, e.g., Henderson, *supra* note 6, at 300 (“A couple in the exurban sprawl north of Atlanta stated that they moved to the county because they felt mass transit would never come there, and that ‘transit makes areas accessible for lower-income families that could otherwise not

As one scholar notes, “public transportation continues to be routed in a way that makes it difficult for some blacks to get to and from leisure venues that more affluent or more mobile persons freely enjoy.”<sup>132</sup> While particular individuals’ lack of access to any area is troubling, transit-siting decisions are also intimately connected to employment opportunities for minorities and low-income individuals.<sup>133</sup> Decisions to exclude transit stops (and those who use them) from parts of the suburbs mean that many workers who would accept minimum-wage jobs in the suburbs cannot physically access those jobs.<sup>134</sup> For example, although many jobs in the Detroit suburbs lack sufficient workers, the city and the suburbs have not coordinated their public transportation systems. Thus, those who live in the inner city—and who are mostly black—cannot easily access suburban jobs, which are located in areas that are mostly white.<sup>135</sup> Similarly, employers in some suburban Atlanta areas were forced to pay higher than their typical near-minimum wage to attract retired and teenage workers from the surrounding community because lower-income people living in the central city could not easily access the jobs.<sup>136</sup> Residents and policymakers in those areas have rejected proposals to bring Atlanta’s rapid transit network (MARTA) into their communities, which would have allowed inner-city workers easy access to these suburban jobs via public transit.<sup>137</sup> The inability to

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come out here because they don’t have transportation and that’s good[.]” (citation omitted)).

132. Austin, *supra* note 118, at 682.
133. Dr. Martin Luther King recognized this fact when he stated, “Urban transit systems in most American cities . . . have become a genuine civil rights issue—and a valid one—because the layout of rapid-transit systems determines the accessibility of jobs to the black community. If transportation systems in American cities could be laid out so as to provide an opportunity for poor people to get meaningful employment, then they could begin to move into the mainstream of American life.” Martin Luther King, Jr., *A Testament of Hope*, PLAYBOY, Jan. 1969, reprinted in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.* 313, 325 (James Melvin Washington ed., 1991).
134. See, e.g., Ross & Leigh, *supra* note 45, at 376-77; see also MICHAEL J. AUSTIN ET AL., *SERVING LOW-INCOME FAMILIES IN POVERTY NEIGHBORHOODS USING PROMISING PROGRAMS AND PRACTICES: BUILDING A FOUNDATION FOR REDESIGNING PUBLIC AND NONPROFIT SOCIAL SERVICES* 106-07 (2004), <http://cssr.berkeley.edu/pdfs/lowIncomeFam.pdf> [<http://perma.cc/WDK2-3SB8?type=live>] (“Many low-income parents must rely on public transportation to get to their jobs. As more and more employment opportunities move to suburban areas, while low-income workers remain in urban areas, the use of public transportation becomes more problematic.”).
135. Ross & Leigh, *supra* note 45, at 376-77 (noting that seventy-six percent of inner-city residents were black while ninety-one percent of suburban residents were white).
136. *Id.* at 377.
137. See Henderson, *supra* note 6, at 299 (discussing Atlanta, and noting that whites rejecting MARTA and relying on automobiles “enabled physical secession to outer suburban areas

use public transit to access the suburbs is one of the primary barriers preventing black people from obtaining suburban jobs.<sup>138</sup> Moreover, as more low-income individuals move to the suburbs, they face continued difficulty accessing jobs in their communities due to the lack of transit options within suburban communities.<sup>139</sup>

Sometimes transit will allow a person to get close to a given area, but not all the way there, leaving the rider in a dangerous situation.<sup>140</sup> This was the scenario faced by Cynthia Wiggins, a seventeen-year-old woman who was hit and killed by a dump truck while she was attempting to cross a seven-lane highway to get to the mall where she worked.<sup>141</sup> Wiggins took the bus from the inner city, where she lived, to her job at the suburban mall.<sup>142</sup> However, the mall's owners had actively resisted requests to allow the bus to stop on its property; rather, the bus stopped outside the mall on the other side of the large highway.<sup>143</sup> Documents produced during trial revealed that this transit-siting decision was motivated at least in part by race or class bias; a local transport official wrote in an internal document that "[mall decision-makers] feel it will

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while simultaneously providing a means of travel through spaces inhabited by blacks, all without having to interact with blacks"). Policymakers in particular should be cognizant of the constitutional implications of their discriminatory behavior. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. 'Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held.'" (quoting *Palmer v. Thompson*, 403 U.S. 217, 260-61 (1971) (White, J., dissenting))).

138. Keith R. Ihlanfeldt & David L. Sjoquist, *The Spatial Mismatch Hypothesis: A Review of Recent Studies and Their Implications for Welfare Reform*, 9 HOUSING POL'Y DEBATE 849, 881 (1998).
139. See Tomer et al., *supra* note 121, at 19 ("Residents of low-income suburban neighborhoods can reach just over one-in-five middle- or low-skill industry jobs in their metropolitan areas[,] . . . the types of jobs for which they may be most likely to qualify.").
140. It is not only the placement and location of individual transit stops that results in an exclusionary environment, but also the larger structure of the transit system. See, e.g., Shoai M. Chowdhury & Steven I-Jy Chien, *Intermodal Transit System Coordination*, 25 TRANSPORT. PLAN. & TECH. 257 (2002) (describing intermodal transportation networks).
141. David W. Chen, *Suit Accusing Shopping Mall of Racism over Bus Policy Settled*, N.Y. TIMES, Nov. 18, 1999, <http://www.nytimes.com/1999/11/18/nyregion/suit-accusing-shopping-mall-of-racism-over-bus-policy-settled.html> [<http://perma.cc/7LWX-5CV8>].
142. *Id.*
143. *Id.*; Kevin Collison, *Wiggins Suit Settled - Son To Get \$2.55 Million*, BUFF. NEWS, Nov. 17, 1999, <http://www.buffalonews.com/article/19991117/CITYANDREGION/311179898> [<http://perma.cc/7S8T-HYKW>] ("The first [witness] was to be Kenneth D. Cannon, the official for Galleria owner Pyramid Cos. who was the alleged architect of the mall's policy banning the Route 6 bus.").



not bring in the type of people they want to come to the mall.”<sup>144</sup> One mall retail store owner recalled a conversation with a mall official who said something like, “The people who rode the Walden Avenue bus were not the kind of people they were trying to attract to the Walden Galleria.”<sup>145</sup> The mall did, however, allow some charter buses to stop on its property.<sup>146</sup> Members of Buffalo’s black community asserted that the mall was “trying to use the highway as a moat to exclude some city residents”<sup>147</sup>—a classic example of architectural exclusion. The case settled, but it presents a stark example of the dangers inherent in exclusionary transit design.

## 2. Placement of Highway Routes, Bridge Exits, and Road Infrastructure

Bridge exits and highway off-ramps are often located so as to filter traffic away from wealthy communities. The Robert F. Kennedy Bridge (formerly known as the Triborough Bridge), as it traverses the East River from Queens to Manhattan, “makes an almost perpendicular hard right turn north, so that the traffic lets out in Harlem, not on the wealthy Upper East Side.”<sup>148</sup> According to one commentator, this terminus location was chosen due to “a combination of regard for the wealthy Upper East Side, disregard for the residents of Harlem, and plain old-fashioned graft.”<sup>149</sup> It was not selected for convenience, as most traffic would be coming from and heading to areas below 100th Street.<sup>150</sup> Similarly, the Northern State Parkway avoids the affluent North Shore area of Long Island because wealthy homeowners in the area were able

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144. Lynne Duke, *Buffalo Family Seeking Millions For Fatal Lack of a Bus Stop*, WASH. POST, Nov. 15, 1999, <http://www.washingtonpost.com/wp-srv/WPcap/1999-11/15/002r-111599-idx.html> [<http://perma.cc/8J3F-YR7H>].

145. *Id.*; see also Chen, *supra* note 141 (“[O]fficials from the Transportation Authority revealed that they had, over several years, repeatedly asked the mall to allow the bus onto the premises, but that the mall had always refused, fearful of rambunctious youths.”); Collison, *supra* note 143.

146. Chen, *supra* note 141.

147. *Id.*

148. Steven Paul McSloy, *Closing Remarks: Breaking the Power of the Power Brokers*, 9 ST. JOHN’S J. LEGAL COMMENT. 669, 671 (1994).

149. *Id.* at 671 n.17; see also *Graft*, MERRIAM-WEBSTER (2015), <http://www.merriam-webster.com/dictionary/graft> [<http://perma.cc/R2XV-L362>] (defining graft as “the acquisition of gain (as money) in dishonest or questionable ways”).

150. CARO, *supra* note 1, at 390 (“Placing the Manhattan terminus at 125th Street condemned most motorists . . . to thus add two and a half totally unnecessary miles to their every journey over the bridge.”).

to convince Moses to reroute the location of the parkway, which resulted in a five-mile detour.<sup>151</sup>

The placement of highways so as to intentionally displace poor black neighborhoods is even more familiar.<sup>152</sup> Policymakers “purposeful[ly]” decided to route highways through the center of cities, often with the intent “to destroy low-income and especially black neighborhoods in an effort to reshape the physical and racial landscapes of the postwar American city.”<sup>153</sup> Although this work was undertaken in order to make places more accessible to cars, it was also done with an eye towards eliminating alleged slums and blight in city centers.<sup>154</sup> These tactics were so common that they earned a name among critics: “white roads through black bedrooms.”<sup>155</sup>

For example, in 1954, the City of Detroit was engaged in urban renewal.<sup>156</sup> It razed the black community of Black Bottom to build the I-375 highway and new developments such as the Mies van der Rohe-designed Lafayette Park<sup>157</sup>

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151. *Id.* at 301-02; McSloy, *supra* note 148, at 672 n.18.

152. See, e.g., WILLIAM H. ITTELSON ET AL., AN INTRODUCTION TO ENVIRONMENTAL PSYCHOLOGY 348 (1974) (noting that “the construction of major highways through central cities . . . fracture[s] and fragment[s] delicate social networks”); Wesley Skogan, *Fear of Crime and Neighborhood Change*, 8 CRIME & JUSTICE 203, 206 (1986) (“[F]reeway networks driven through the hearts of many American cities . . . destroyed . . . low-income, minority neighborhoods . . .”).

153. Raymond A. Mohl, *The Interstates and the Cities: Highways, Housing, and the Freeway Revolt*, POVERTY & RACE RES. ACTION COUNCIL 1 (2002), <http://www.prrac.org/pdf/mohl.pdf> [perma.cc/ZWU6-KH6A] (“In retrospect, [this motivation] now seems apparent . . .”).

154. *Id.* at 1-2.

155. See, e.g., GERHARD FALK, TWELVE INVENTIONS WHICH CHANGED AMERICA: THE INFLUENCE OF TECHNOLOGY ON AMERICAN CULTURE 26 (2013) (“Racism was also invoked, as more and more interstate and other roads were built, some of which cut through black neighborhoods. These roads did indeed displace many established communities, as critics complained of ‘White roads through black bedrooms.’”); B. Drummond Ayres, Jr., *White Roads Through Black Bedrooms*, N.Y. TIMES, Dec. 31, 1967, at E7 (discussing a group called N[\*\*\*\*\*] Incorporated that was resisting the construction of highways through black neighborhoods in Washington D.C.).

156. See generally THOMAS J. SUGRUE, THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT (1996) (describing the extensive urban renewal efforts in Detroit and the resulting segregation of the region).

157. *Lafayette Park*, MIES VAN DER ROHE SOC’Y, <http://www.miessociety.org/legacy/projects/lafayette-park> [http://perma.cc/UST6-HQEG]; see also Ben Cosgrove, *Mies van der Rohe: Architect of the Modern World*, LIFE.COM, <http://life.time.com/culture/architect-mies-van-der-rohe-and-the-poetry-of-purpose/#ixzz3OTz8m4do> [http://perma.cc/V38W-72LS] (describing van der Rohe, a well-known modernist architect, as the “German master” “whose work so defined his time that it’s impossible to imagine certain decades and city-scapes without his influence”).

and public housing projects.<sup>158</sup> In the early 1950s, there were an estimated 140,000 black people living in Black Bottom, and while some middle-income families in the area were able to relocate to more prosperous neighborhoods, the urban renewal project forced many low-income residents into public housing.<sup>159</sup> Now Detroit is considering removing the architectural barrier of the aging I-375 highway and creating a pedestrian-friendly parkway to connect Lafayette Park with the central business district.<sup>160</sup>

This story is not unique. Local government officials and state highway planners in Miami intentionally located I-95 so that it would cut through Overtown, an inner-city black community.<sup>161</sup> Although it had previously been known as “the Harlem of the South,” Overtown became “an urban wasteland dominated by the physical presence of the expressway.”<sup>162</sup> I-10 through New Orleans was constructed along a portion of North Claiborne Avenue, which was “the center of an old and stable black Creole community.”<sup>163</sup> Highway 101 separates the Latino and black residents of East Palo Alto, California, from the west side of town.<sup>164</sup> Other examples include streets in Omaha, Nebraska;<sup>165</sup> I-

158. John Gallagher, Op-Ed, *When Detroit Paved over Paradise: The Story of I-375*, DET. FREE PRESS, Dec. 15, 2013, <http://www.freep.com/article/20131215/OPINION05/312150060/Black-Bottom-Detroit-I-375-I-75-paradise-valley-removal> [<http://perma.cc/LJ8Z-4RWL>] (“Named for the rich dark soil that French explorers first found there, the Black Bottom district in the 1940s and ‘50s housed the city’s African-American entrepreneurial class, with dozens of thriving black-owned businesses and the Paradise Valley entertainment zone, where Duke Ellington, Ella Fitzgerald and Count Basie performed.”); see also Mohl, *supra* note 153, at 4 (“The consequence of state and local route selection was that urban expressways could be used specifically to carry out local race, housing, and residential segregation agendas.”).

159. Carrie Da Via, *A Brief History of Detroit’s Black Bottom Neighborhood*, ROGUE HAA, May 18, 2012, <http://roguehaa.com/a-brief-history-of-detroits-black-bottom-neighborhood> [<http://perma.cc/VFC2-9VU8>] (“Like other urban renewal projects, significant areas of the former Black Bottom neighborhood remained vacant for over half of a decade.”).

160. John Gallagher, *No More I-375? Detroit To Study Removing Freeway in Favor of Walkable Surface Street*, DET. FREE PRESS, Nov. 24, 2013, <http://www.freep.com/article/20131124/BUSINESS06/311240072/I-375-downtown-MDOT> [<http://perma.cc/H3DA-3B5K>] (“Removing the 1960s-era freeway could sprout residential communities anew in the once-thriving historic black areas known as Black Bottom and Paradise Valley that were torn apart five decades ago by local freeway construction, the same as in cities across the nation.”).

161. Mohl, *supra* note 153, at 30.

162. *Id.*

163. *Id.* at 32.

164. Goebel, *supra* note 89 (noting that traversing Highway 101 to get to the east side is dangerous and involves passing through a busy intersection); see also George Packer, *Change the World*, NEW YORKER, May 27, 2013, <http://www.newyorker.com/magazine/2013/05/27/change-the-world> [<http://perma.cc/9W42-2R5N>] (“[P]ublic schools in poor communi-

880 in Oakland, California;<sup>166</sup> a turnpike in Delaware;<sup>167</sup> I-64 and I-77 through Charleston, West Virginia;<sup>168</sup> the list goes on.

To some extent, the placement of highways through city centers is a legacy issue, meaning that it is an issue that remains in the present because of decisions made in the past.<sup>169</sup> It was not illegal to tear apart poor neighborhoods at the time that urban renewal was in full swing, and the resultant features of the built environment are now hard to change.<sup>170</sup> However, the elimination of low-income and minority neighborhoods under the guise of clearing blighted areas is far from a legacy issue in and of itself; as the Supreme Court's decision in *Berman v. Parker* established, clearing "blight" is an acceptable use of the eminent domain power.<sup>171</sup> Notably, in the aftermath of *Kelo*, which reaffirmed the validity of takings for economic development purposes, many states passed

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ties—such as East Palo Alto, which is mostly cut off from the city by Highway 101—have fallen into disrepair and lack basic supplies.”).

165. Conversation with David Levy, Attorney, Baird Holm LLP, in Omaha, Neb. (Aug. 2013) (explaining that in the 1960s and 1970s, fairly transparent measures were taken to “wall off” the black community in North Omaha from the rest of the city; Sixteenth Street was a main thoroughfare connecting North Omaha to downtown, until the City allowed construction of a large hotel running from 15th Street to 17th Street that closed 16th Street at the (then) north edge of downtown; another such thoroughfare was 24th Street, until it was turned into a one-way street just north of downtown; further, a freeway was constructed that effectively bisected, and many say killed, the black community at the time). For a contemporary description of Omaha's black neighborhoods, see ELIA PEATTIE, *Omaha's Black Population: The Negroes of This City – Who They Are and Where They Live*, in IMPERTINENCES: SELECTED WRITINGS OF ELIA PEATTIE, A JOURNALIST IN THE GILDED AGE 58 (2005).
166. See DOUGLAS MASSEY & NANCY DENTON, *AMERICAN APARTHEID* (1998); see generally Fed. Highway Admin. Envtl. Justice Case Studies, *Cyprus Freeway Replacement Project*, U.S. DEP'T TRANSP. (Aug. 29, 2011), [http://www.fhwa.dot.gov/environment/environmental\\_justice/case\\_studies/case5.cfm](http://www.fhwa.dot.gov/environment/environmental_justice/case_studies/case5.cfm) [<http://perma.cc/9C4J-5QZV>] (noting that the decision to reconstruct a portion of I-880 in a new location after the Loma Prieta earthquake was due, in part, to considerations of the way that the highway had previously divided and isolated black communities).
167. GEORGE RENGERT & JOHN WASILCHICK, *SUBURBAN BURGLARY: A TIME AND A PLACE FOR EVERYTHING* 62 (1985) (noting that a Delaware turnpike cuts a community in half).
168. See *Triangle Improvement Council v. Ritchie*, 402 U.S. 497, 497 (1971) (writ of certiorari dismissed as improvidently granted). Interstate highways cut through Charleston, West Virginia's primarily poor, black Triangle neighborhood despite lawsuits attempting to stop them. Plaintiffs raised claims under the Civil Rights Act and the Fourteenth Amendment. See *Triangle Improvement Council v. Ritchie*, 314 F. Supp. 20, 22-26 (S.D. W. Va. 1969).
169. See *infra* Part IV.A.
170. See *Berman v. Parker*, 348 U.S. 26, 33 (1954) (holding that it is within legislative power “to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled”).
171. *Id.* at 33-34 (allowing exercise of eminent domain to eliminate blight in an area even though the property at issue was not blighted).

laws restricting the use of eminent domain; however, many of those new laws retained exceptions allowing its use to clear blight.<sup>172</sup>

### 3. *Wayfinding: One-Way Streets, Dead-End Streets, Curvy Streets, and Confusing Signage*

Another method of exclusion involves the creation and use of one-way streets. These streets function to funnel traffic away from certain areas and into others.<sup>173</sup> There are sometimes health- and safety-based reasons for the creation of one-way streets, including traffic-calming and pedestrian safety.<sup>174</sup> But

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172. See *Kelo v. City of New London*, 545 U.S. 469, 483 (2005) (holding that the taking of private property for “economic development” was a valid use of eminent domain power even though New London was “not confronted with the need to remove blight [as in *Berman*, because] . . . the area was sufficiently distressed to justify a program of economic rejuvenation”); see, e.g., ME. REV. STAT. ANN. tit. 30-A, § 5202 (2011) (defining blight); ME. REV. STAT. ANN. tit. 1, § 816(2) (2006) (generally prohibiting the condemnation of land that has residential houses or commercial structures thereon, unless there has been a finding of blight and the area is covered by a redevelopment or urban renewal plan); N.Y. GEN. MUN. LAW § 970-b (McKinney 2012) (declaring it to be the policy of the state to promote redevelopment of blighted areas, including through the use of eminent domain); OHIO REV. CODE ANN. § 163.021 (West 2007) (allowing, under certain conditions, for an agency to appropriate property it has found in a blighted area or slum); see also Will Lovell, Note, *The Kelo Blowback: How the Newly-Enacted Eminent Domain Statutes and Past Blight Statutes Are a Marginot Line-Defense Mechanism for all Non-Affluent and Minority Property Owners*, 68 OHIO ST. L.J. 609, 612 (2007) (“Because governments have retained their blight-designation powers, they may still specifically do what the recently enacted state statutes tried to prevent—take the homes of low-income households and replace them with private developments. This result has unjustly and disparately affected blacks over whites, the poor over the rich, and those with little political representation over those that are politically-connected.”).
173. See G. Wade Walker et al., *Downtown Streets: Are We Strangling Ourselves on One-Way Networks?*, TRANSP. RES. BD. CIRCULAR F-2, at 4 (Dec. 2000), [http://onlinepubs.trb.org/onlinepubs/circulars/ec019/Eco19\\_f2.pdf](http://onlinepubs.trb.org/onlinepubs/circulars/ec019/Eco19_f2.pdf) [<http://perma.cc/C6T7-Y9WW>] (discussing the experience of the “occasional visitor” motorist in a one-way street network); *Episode 51: The Arsenal of Exclusion*, *supra* note 88.
174. See, e.g., Nathaniel Hoffman, *One Way, Two Way, Yes Way, No Way*, BOISE WKLY., July 31, 2009, <http://www.boiseweekly.com/CityDesk/archives/2009/07/31/one-way-two-way-yes-way-no-way> [<http://perma.cc/DVK8-7QMQ>] (explaining benefits of one-way streets, including that “[p]edestrian safety is improved as the pedestrian has fewer directions to be concerned about at intersections. Drivers have fewer potential conflicts to handle as well so can give more attention to pedestrian safety.”). However, there is countervailing data suggesting that two-way streets result in slower traffic, which can result in a safer environment for pedestrians. See, e.g., Eric Jaffe, *The Case Against One-Way Streets*, ATLANTIC: CITYLAB (Jan. 31, 2013), <http://www.citylab.com/commute/2013/01/case-against-one-way-streets/4549> [<http://perma.cc/2ZGG-TW7W>] (“[S]peeds tend to be higher on one-way streets, and some studies suggest drivers pay less attention on them because there’s no conflicting traffic flow.”).

they also may serve to exclude by making it difficult to gain access by car into or out of certain parts of a community.<sup>175</sup> For example, Greenmount Avenue in East Baltimore separates the poor, predominantly African-American neighborhood of Waverly on its east side from the wealthy, predominantly white neighborhood of Guilford on its west.<sup>176</sup> While it is easy to access Waverly from Greenmount due to the existence of a grid pattern of two-way cross streets, that grid does not extend to the west side of Greenmount.<sup>177</sup> Rather, access to Guilford on the west is blocked by houses or bollards, and in the rare instance that there is a street crossing from the west over Greenmount, it is typically a one-way street headed east, toward Waverly.<sup>178</sup> In addition to making vehicular access difficult, one-way streets such as these are exclusionary in that they can confuse visitors, which might discourage their continued presence in a neighborhood, or make it hard for them to find their way to or from a specific home.<sup>179</sup> Many one-way streets were created during urban renewal with the stated goals of accommodating automobile traffic and allowing people to pass quickly through cities.<sup>180</sup> More recently, however, some communities have be-

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175. See *Episode 51: The Arsenal of Exclusion*, *supra* note 88 (visiting an affluent, predominantly white neighborhood in East Baltimore that uses one-way streets, dead ends, and bollards to inhibit the influx of traffic from the adjacent lower-income, predominantly black neighborhood).

176. *Id.*

177. *Id.*

178. *Id.*; see also Mark Mikin, *The United States of 2012*, *ESQUIRE* (2015), <http://www.esquire.com/the-side/feature/2012-maps-of-the-us-6647201#slide-4> [<http://perma.cc/DR6K-UHH9>] (“[O]f the eight streets that intersect Greenmount Avenue between 33rd Street and Cold Spring Lane, only one (39th Street) allows travel from east to west. Six of the streets are one-way pointing east (i.e., out of the wealthy, white side), and one of the streets (34th Street) thwarts westward movement with bollards.”).

179. Vikash V. Gayah, *Two-Way Street Networks: More Efficient than Previously Thought?*, 41 *ACCESS MAG.* 10, 11 (2012), <http://www.uctc.net/access/41/access41-2way.pdf> [<http://perma.cc/D6S9-TDFP>] (“Downtown visitors, whether they arrive by car or public transportation, prefer two-way street networks to one-way street networks because they are less confusing. Visitors driving in a two-way grid network can easily approach their destination from any direction. A one-way network may prevent drivers from approaching their destination from the most logical direction. This uncertainty can intimidate drivers and, in some cases, make them hesitant to return.”).

180. See, e.g., ALLAN R. TALBOT, *THE MAYOR’S GAME: RICHARD LEE OF NEW HAVEN AND THE POLITICS OF CHANGE* 112 (1967); Bill Landauer, *Easton Could Open Traffic on Fourth Street to Two Ways*, *MORNING CALL* (Pa.), Dec. 14, 2014, <http://www.mcall.com/news/local/easton/mc-easton-fourth-street-20141214-story.html> [<http://perma.cc/Z7MP-DLXS>] (noting that a city street became one-way during urban renewal to “move traffic through the city more quickly”).

gun to convert formerly one-way streets into two-way streets, in part to reduce confusion and increase access.<sup>181</sup>

Communities also rely on other confusion techniques to keep people out, or to make it hard for them to find their way around an area. For example, in describing Darien, Connecticut,<sup>182</sup> one of many intentionally white communities in the United States, James Loewen notes, “[e]ven street signs are in short supply in Darien, . . . making it hard to find one’s way around that elite sun-down suburb. Darien doesn’t really want a lot of visitors, a resident pointed out, and keeping Darien confusing for strangers might deter criminals—perhaps a veiled reference to African Americans.”<sup>183</sup> A similar, though perhaps less nefarious, technique has been used to keep tourists and “city folks in search of weekend homes” out of Bolinas, California.<sup>184</sup> Citizens there have, for years, been removing directional signs that the State Department of Transportation places on Highway 1 to direct drivers toward Bolinas.<sup>185</sup> In fact, in 1989, the residents of the town held a nonbinding advisory vote, and approximately

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181. Notably, these recent conversions often require city council approval, which means there is an opportunity for public participation in the process. *See, e.g.*, E-mail from Judy Crites, Office Manager, City of Charleston, to Patrick Lyons, Research Assistant, Univ. of Me. Sch. of Law (Apr. 11, 2014, 10:31:00 EST) (on file with author) (describing the process of converting one-way to two-way streets and stating, “First an internal review would be done and if feasible an outside engineering consultant would be hired to perform a comprehensive traffic study. Results would be reviewed by staff and presented to the City Council Traffic and Transportation Committee at which time a public hearing on the matter would be scheduled. After the public hearing the Traffic and Transportation Committee would vote on the matter. If approved by the Traffic and Transportation Committee, it would then move forward to City Council for consideration.”).

182. According to the 2000 Census, Darien was 95.97% white, 0.04% black, and 2.19% Hispanic. Darien was also listed ninth in CNN’s list of “top-earning towns.” John Nickerson, *Occupy Darien Set To Begin Wednesday*, DARIEN NEWS (Conn.), Dec. 21, 2011, <http://www.dariennews.com/news/article/Occupy-Darien-set-to-begin-Wednesday-2413997.php> [<http://perma.cc/TTZ5-ZK4L>] (noting the economic status of Darien and its neighboring town); *Demographics*, TOWN DARIEN, <http://darienct.gov/content/108/415/419/default.aspx> [<http://perma.cc/8XNS-VCN9>].

183. LOEWEN, *supra* note 87, at 254-55.

184. Mark A. Stein, *Road Signs? Bolinas Voters Say ‘Read Our Lips’ Instead*, L.A. TIMES, Nov. 9, 1989, [http://articles.latimes.com/1989-11-09/news/mn-1431\\_1\\_road-signs](http://articles.latimes.com/1989-11-09/news/mn-1431_1_road-signs) [<http://perma.cc/7VX7-BV84>]. This appears to have been unsuccessful, as many wealthy individuals, including some celebrities, now own homes in Bolinas. *See* Aaron Britt, *Going Coastal: Is the Elusive Bohemian Enclave of Bolinas Getting a Bit Glossier?*, S.F. CHRON., Jan. 28, 2007, <http://www.sfgate.com/bayarea/article/Going-coastal-Is-the-elusive-bohemian-enclave-2653492.php> [<http://perma.cc/XHK7-4V37>] (explaining that Bolinas has seen an influx of wealthy new homeowners, including actress Frances McDormand and her filmmaker husband, Joel Coen).

185. Stein, *supra* note 184.

three-quarters of the residents voted to prohibit road signs that would direct travelers to Bolinas.<sup>186</sup> Further, the design of many suburban communities, with their cul-de-sacs and curvy streets, makes them confusing to outsiders who cannot see what lies on the other side of the neighborhood. This street layout also gives non-residents fewer reasons to enter the neighborhood in the first place; the multiple dead end streets and cul-de-sacs of a suburban neighborhood often all branch off a single arterial road. Thus, unlike the traditional urban grid pattern, these neighborhoods lack connectivity to other parts of the community, making them useless to those who want to cut through.<sup>187</sup> Further, while perhaps successful from an exclusionary standpoint, these architectural elements often result in less efficient travel for residents.

#### 4. Residential Parking Permits

In some neighborhoods, people can park on the street only if they live in the neighborhood and have a residential parking permit or are given a guest permit by a resident.<sup>188</sup> As a result, those who do not live in or have friends in the neighborhood cannot drive in and park there. Moreover, these neighborhoods are often not easily accessible via public transportation. These exclusionary parking schemes are often imposed administratively; they do not provide a formal opportunity for non-residents—or, often, residents—to offer their input.<sup>189</sup> Although a residential permitting scheme like this allows neighborhoods to physically exclude, it also imposes bureaucratic requirements on residents such as purchasing parking permit stickers and remembering to give guest passes to visiting friends.

The Supreme Court expressly upheld the ability of cities to enact this sort of parking permit requirement. In *County Board of Arlington County v. Rich-*

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<sup>186</sup>. *Id.*

<sup>187</sup>. See, e.g., Clay Risen, *The Cul-de-Sac Ban*, N.Y. TIMES MAG., Dec. 13, 2009, <http://www.nytimes.com/projects/magazine/ideas/2009/#c-2> [<http://perma.cc/B6zT-A8MT>].

<sup>188</sup>. See, e.g., FULLERTON, CAL., MUN. CODE § 8.44.230(A) (“[I]t shall be unlawful for any person to stand or park any vehicle on any street or portion thereof so restricted by resolution of the City Council to permit parking only during all or certain portions of the day provided signs giving notice of said restriction have been posted, unless a parking permit issued by the City is displayed on the vehicle . . . .”); *Resident Parking Program*, CITY BOS., <http://www.cityofboston.gov/parking/residentparking> [<http://perma.cc/9WPH-STQ7>] (“Boston’s Resident Permit Parking Program is an initiative designed to give residents a better chance of finding an on-street parking space in their neighborhood. Many of the parking spaces on Boston’s residential streets are regulated as ‘Resident Parking Only.’”).

<sup>189</sup>. For example, in Portland, Maine, the city traffic engineer has the authority to establish parking regulations without requiring city council approval and thus, ostensibly, without formal public input. PORTLAND, ME., CODE § 28-24(g)(1) (2013); *infra* note 302.



ards,<sup>190</sup> the county had adopted a rule that restricted daytime street parking to residents with residential parking permits,<sup>191</sup> excluding commuters who had previously parked on local streets.<sup>192</sup> The Court held that such a scheme was permissible and did not violate the Equal Protection Clause, since it was purportedly enacted to reduce hazardous traffic conditions, air pollution, and noise, as well as to preserve property values and the safety of neighborhood children.<sup>193</sup> Courts have similarly upheld residency restrictions that prevent some individuals from using public facilities such as beaches, sports courts, and playgrounds on the grounds that residents' taxes and fees resulted in construction of those facilities, and so residents should be given use priority.<sup>194</sup> The effect of these types of residency requirements is often to exclude people who do not live in a given neighborhood from that neighborhood.

The examples of architectural exclusion identified in this Part are concerning in that they reveal a number of underlying problems. For example, physical exclusion prevents members of minority groups from partaking in the civic life of the community; makes it extremely difficult or physically dangerous for some people to access wealthier communities and jobs; may result in stigma or harm to dignity; can often destroy existing communities of color; and may allow groups to conceal racially discriminatory motives behind a veneer of health and safety rationales. These problems and others will be analyzed more fully in the remainder of this Article.

### III. A BRIEF HISTORY OF EXCLUSION BY LAW (AND NORMS)

This Article has demonstrated that the built environment serves to segregate and has highlighted ways in which segregation by architecture, like segregation by law, operates in a pernicious manner. The remainder of the Article

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<sup>190</sup>. 434 U.S. 5 (1977) (per curiam).

<sup>191</sup>. *Id.* at 5-6.

<sup>192</sup>. *Id.* at 6.

<sup>193</sup>. *Id.* at 7 (“A community may also decide that restrictions on the flow of outside traffic into particular residential areas would enhance the quality of life there by reducing noise, traffic hazards, and litter.”).

<sup>194</sup>. Austin, *supra* note 118, at 673. *But see* Leydon v. Town of Greenwich, 777 A.2d 552 (Conn. 2001) (allowing non-resident access to a municipal beach, finding it to be a traditional public forum); Austin, *supra* note 118, at 674 (“City of Dearborn[, Michigan,] had gone too far when it restricted access to two parks to residents and their guests . . . . Because of its disparate impact on blacks, the residency restriction was held to violate the provision of the Michigan Constitution prohibiting racial discrimination against individuals exercising their civil rights . . . [and the] proof of residency [requirement] violated the prohibition against unreasonable searches and seizures.”).

seeks to establish how legal decision makers tend to overlook the regulatory nature of architectural forms of exclusion. It does this by examining judicial consideration of physical exclusion by law and by architecture.

Before exploring the ways that courts have approached cases addressing architectural exclusion, it is important to consider the long history of legally permissible physical exclusion in the United States and the eventual intervention in these practices by legislators and courts. Legal scholars and historians have repeatedly recounted the formal laws and informal norms that furthered racial and socioeconomic exclusion in this country.<sup>195</sup> The use of “[i]nformal measures ranging from disapproval to threats and violence” to exclude African Americans have been traced back to at least the 1790s.<sup>196</sup> And the wealthy have long used formal legal methods to keep the poor and people of color out of their communities.<sup>197</sup>

This Part describes the way that *law* has historically been used to exclude “undesirable” members of a community from certain parts of the community. It analyzes the most common, explicit tools of exclusion—including racial zoning, racially restrictive covenants, and exclusionary zoning—that courts and legislators tend to view as proper topics for consideration, though they often fail to consider architecture and design as validly within their purview.

#### A. *Legal Regulation that Furthered Exclusion*

When land-use and property-law scholars consider the interplay between land-use law and the exclusion of people of color and the poor, they tend to

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195. See, e.g., A. LEON HIGGINBOTHAM, JR., *SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS* (1996); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841 (1994) (discussing the role of local governments in promoting racially identifiable space); Jerry Frug, Symposium, *The Geography of Community*, 48 STAN. L. REV. 1047, 1081-89 (1996) (describing the use of zoning and redevelopment power by municipalities to isolate communities along lines of race or socioeconomic status); Lawrence, *supra* note 14 (reconsidering the doctrine of discriminatory intent established by the 1976 decision of *Washington v. Davis*); Daniel R. Mandelker, *Racial Discrimination and Exclusionary Zoning: A Perspective on Arlington Heights*, 55 TEX. L. REV. 1217 (1977) (examining the impact of the Fourteenth Amendment on racial exclusionary zoning and calling for legislative action).

196. RICHARD R. W. BROOKS & CAROL M. ROSE, *SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS* 19 (2013).

197. J. Peter Byrne, *Are Suburbs Unconstitutional?*, 85 GEO. L.J. 2265, 2286 (1997) (reviewing CHARLES M. HAAR, *SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES* (1996) and DAVID L. KIRP, JOHN P. DWYER & LARRY A. ROSENTHAL, *OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA* (1995)) (discussing the role of the courts in addressing “the persistent use of the law by the affluent to exclude the poor and minorities from their communities”).

think about methods of exclusion from neighborhoods through the use of law—racial zoning, racially restrictive covenants, and exclusionary zoning.<sup>198</sup> This section will briefly consider each in turn, demonstrating that while courts have disapproved of racial zoning and racially restrictive covenants, they have been more ambivalent about exclusionary zoning, finding that it is generally not actionable.

### 1. *Judicial Disapproval*

#### a. *Racial Zoning*

Initially, some cities tried to use their zoning powers directly to keep out minorities.<sup>199</sup> Baltimore passed one of the first racial zoning ordinances in 1910, and the ordinance was quickly imitated by a number of Southern cities.<sup>200</sup> In 1913, Atlanta enacted a racial zoning ordinance, which like most others at the time, designated each block in the city based on the race of the majority of people living there at the time.<sup>201</sup> After those designations were made, black people could not move onto primarily white blocks.<sup>202</sup> The commonly

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198. ELLICKSON ET AL., *supra* note 70, at 725–810. Another comparison that could be made is that of physical segregation of the races in contexts other than housing under the Jim Crow laws in the early 1900s. See generally BROOKS & ROSE, *supra* note 196, at 26 (describing separation in public and commercial common spaces, including public transportation); Robert R. Weyeneth, *The Architecture of Racial Segregation: The Challenges of Preserving the Problematical Past*, 27 PUB. HISTORIAN, 11, 13 (2005) (examining the spatial system of racial segregation in the U.S. and stating that “[t]he architecture of racial segregation represented an effort to design places that shaped the behavior of individuals and, thereby, managed contact between whites and blacks”). The Supreme Court upheld the validity of “equal but separate” public transportation facilities in *Plessy v. Ferguson* in 1896, after which time Southern states expanded segregation in a variety of public spaces. *Plessy v. Ferguson*, 163 U.S. 537 (1896); BROOKS & ROSE, *supra* note 196, at 27. This resulted in the use of architecture to separate the races in two ways: “isolation and partitioning.” Weyeneth, *supra*, at 12.

199. Ross & Leigh, *supra* note 45, at 372 (describing the use of racial zoning to “exclude undesirable groups from entering” upscale communities). See generally Garrett Power, *Apartheid Baltimore Style: The Residential Segregation Ordinances of 1910–1913*, 42 MD. L. REV. 289 (1983).

200. David E. Bernstein, *Philip Sober Controlling Philip Drunk: Buchanan v. Warley in Historical Perspective*, 51 VAND. L. REV. 797, 835 (1998); Power, *supra* note 199 at 298–300. An even earlier example came from San Francisco. See *In re Lee Sing*, 43 F. 359, 359 (C.C.N.D. Cal. 1890) (describing San Francisco’s earlier ordinance that confined Chinese people to a certain part of the city).

201. CHRISTOPHER SILVER & JOHN V. MOESER, *THE SEPARATE CITY: BLACK COMMUNITIES IN THE URBAN SOUTH, 1940–1968*, at 21 (1995).

202. *Id.* The Georgia Supreme Court originally deemed the ordinance—which applied retroactively—violative of due process for infringing on the right of an individual to “acquire, enjoy, and dispose of his property.” *Carey v. City of Atlanta*, 84 S.E. 456, 460 (Ga. 1915); see

asserted reason for the passage of these ordinances was blatantly racist—“to prevent too close association of the races, which association results, or tends to result, in breaches of peace, immorality, and danger to the health.”<sup>203</sup> In support of Baltimore’s ordinance, its mayor stated that “[b]lacks should be quarantined in isolated slums in order to reduce the incidents of civil disturbance, to prevent the spread of communicable disease into the nearby White neighborhoods, and to protect property values among the White majority.”<sup>204</sup> These were commonly held views among many at the time.<sup>205</sup>

In the 1917 case *Buchanan v. Warley*,<sup>206</sup> however, the United States Supreme Court held that a similar racial zoning ordinance in Louisville, Kentucky, prohibiting the sale of property to black people, exceeded the city’s police powers and violated the Fourteenth Amendment.<sup>207</sup> While the Court’s opinion mentioned racial equality, its holding centered on the issue of property

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also *State v. Darnell*, 81 S.E. 338, 340 (N.C. 1914) (striking down Winston-Salem’s racial zoning ordinance because it interfered with “the fundamental right of every one to acquire and dispose of property by sale”). *But see Hopkins v. City of Richmond*, 86 S.E. 139, 148 (Va. 1915) (upholding Richmond’s racial zoning ordinance and holding that “the town council . . . had full authority . . . to pass an ordinance providing for separate residences for white and colored people within its limits, that the ordinance passed was a reasonable exercise of this power, and that it does not conflict with the fourteenth amendment”). Yet once Atlanta’s ordinance was amended to “exclude[] from its operation vested rights existing at the time of its adoption,” that court upheld its constitutionality. *Harden v. City of Atlanta*, 93 S.E. 401, 402-03 (Ga. 1917), *overruled by Lee v. Warnock*, 96 S.E. 385 (Ga. 1918) (“Segregation is not imposed as a stigma upon either race, but in order to uphold the integrity of each race and to prevent conflicts between them resulting from close association. An ordinance designed to accomplish this purpose will be upheld, notwithstanding that to some extent the use of property may be somewhat restricted . . .”).

203. *Hopkins*, 86 S.E. at 144; *see also Buchanan v. Warley*, 245 U.S. 60, 73-74 (1917) (“It is said such legislation tends to promote the public peace by preventing racial conflicts; that it tends to maintain racial purity; that it prevents the deterioration of property owned and occupied by white people . . .”).
204. Christopher Silver, *The Racial Origins of Zoning in American Cities*, in *URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY: IN THE SHADOWS* 23, 27 (June Manning Thomas & Marsha Ritzdorf eds., 1997) (quoting Baltimore Mayor J. Barry Mahool).
205. David Pilgrim, *What Was Jim Crow?*, FERRIS STATE U. JIM CROW MUSEUM RACIST MEMORABILIA (Sept. 2000), <http://www.ferris.edu/jimcrow/what.htm> [<http://perma.cc/T4JR-Y57J>].
206. 245 U.S. at 82 (holding that the “attempt to prevent the alienation of the property in question to a person of color was not a legitimate exercise of the police power of the State” and thus violated the Due Process Clause of the Fourteenth Amendment).
207. *See id.* (“We think this attempt to prevent the alienation of the property in question to a person of color was not a legitimate exercise of the police power of the state, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing state interference with property rights except by due process of law.”).

rights and due process.<sup>208</sup> Undeterred, a number of Southern cities, including Atlanta, New Orleans, and Charleston, hired well-known planning professionals to design new racial zoning ordinances that could withstand judicial scrutiny after *Buchanan*.<sup>209</sup> These attempts were unsuccessful; courts struck them down.<sup>210</sup> Having been blocked from using public law in a directly discriminatory way, those intent on exclusion turned to other methods.<sup>211</sup>

*b. Racially Restrictive Covenants*

Many community members relied on private law and adopted racially restrictive covenants, and these covenants became a common way to keep minor-

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208. See Joel Kosman, *Toward an Inclusionary Jurisprudence: A Reconceptualization of Zoning*, 43 CATH. U. L. REV. 59, 76 (1993) (“The Court’s finding disregarded the more pernicious effect of the ordinance—the exclusion of an unempowered group, not merely from buying or selling property, but from the opportunity to ascend to social and economic levels already claimed by the empowered group.”).
209. SILVER & MOESER, *supra* note 201, at 21-22; see also Boddie, *supra* note 57, at 428 n.161 (recognizing that racial zoning “continued with some force for decades thereafter”). For example, Robert Whitten, who drafted many early zoning ordinances and comprehensive plans, proposed a post-*Buchanan* plan, cast in the language and context of comprehensive planning, that zoned Atlanta so as to expressly separate residential districts by race. See LEEANN LANDS, *THE CULTURE OF PROPERTY: RACE, CLASS, AND HOUSING LANDSCAPES IN ATLANTA, 1880-1950*, at 143 (2011) (describing Whitten’s work with zoning codes in New York and Cleveland).
210. See, e.g., *Harmon v. Tyler*, 273 U.S. 668, 668 (1927) (invalidating a New Orleans, Louisiana ordinance), *rev’g Tyler v. Harmon*, 104 So. 200 (La. 1927); *City of Richmond v. Deans*, 37 F.2d 712, 713 (4th Cir. 1930) (invalidating a Richmond, Virginia ordinance), *aff’d*, 281 U.S. 704 (1930); *Allen v. Oklahoma City*, 52 P.2d 1054 (Okla. 1935) (invalidating an Oklahoma City ordinance); *Smith v. City of Atlanta*, 132 S.E. 66 (Ga. 1926); see also ELLICKSON ET AL., *supra* note 70, at 93 (discussing a racial zoning ordinance in Ohio that was struck down); SILVER & MOESER, *supra* note 201, at 22 (“It was a widely held tenet of planning in the 1920s that controlled growth of black neighborhoods was necessary to produce a socially better city. Even though the explicit racial designations in the city’s zoning plan had to be removed, the ‘controlled segregation’ objective of race-based planning guided public policy and private real estate decisions in Atlanta over the ensuing decades.”); Bruno Lasker, *The Atlanta Zoning Plan*, 48 SURVEY 114, 114-115 (Apr. 22, 1922).
211. SILVER & MOESER, *supra* note 201, at 22 (“Even without the powerful legal tool of zoning, white and black Atlantans proved adept at guiding the process of black residential growth in conformity with the prescription in the 1922 plan through the use of deed restrictions and an assortment of racially sensitive real estate practices.”); see also E. Bernard West, *Black Atlanta—Struggle for Development: 1915-1925*, at 25-48 (May 1976) (unpublished M.A. thesis, Atlanta University), <http://digitalcommons.auctr.edu/cgi/viewcontent.cgi?article=2085&context=dissertations> [<http://perma.cc/W2EH-GRF6>] (examining the numerous obstacles blocking black Atlanta’s development).

ities out of certain neighborhoods for many years.<sup>212</sup> Restrictive covenants typically limit what homeowners in a given neighborhood can do with, on, or to their property; they not only restrict the original parties to the contract but also encumber future owners because they “run with the land.”<sup>213</sup>

While a typical restrictive covenant might forbid a homeowner from painting her house with polka dots or planting anything other than grass in the front yard, racially restrictive covenants typically stated that a homeowner could not sell or rent her home to anyone other than a white person.<sup>214</sup> Courts initially viewed racially restrictive covenants as legal; in *Corrigan v. Buckley*,<sup>215</sup> the Court noted that the covenants were merely private contracts concerning private property and involved no state action.<sup>216</sup>

Not only did the Supreme Court give these covenants the imprimatur of acceptability, but the covenants were also recorded and thus became an official part of a property’s chain of title.<sup>217</sup> Their legality allowed these covenants to become “institutionalized and internalized,” and therefore very hard to challenge.<sup>218</sup> That said, many legal scholars at the time vigorously opposed the

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212. Kevin Fox Gotham, *Urban Space, Restrictive Covenants and the Origins of Racial Segregation in a US City, 1900-50*, 24 INT’L J. URB. & REGIONAL RES. 616 (2000) (using a case study of Kansas City, Missouri, to examine efforts undertaken by community builders and homeowner associations who used racially restrictive covenants to create racially homogeneous neighborhoods).

213. See, e.g., BROOKS & ROSE, *supra* note 196, at 55; see also Shelley Ross Saxer, *Shelley v. Kramer’s Fiftieth Anniversary: “A Time for Keeping; A Time for Throwing Away”?*, 47 U. KAN. L. REV. 61 (1998) (arguing for alternatives to fighting private racial discrimination beyond state action theory).

214. Gotham, *supra* note 212, at 617.

215. 271 U.S. 323 (1926).

216. *Id.* at 330-31. In discussing strategy before the appeal to the Supreme Court, some urged the NAACP to argue that court enforcement of the covenants was effectively state action and thus unconstitutional (the argument that would, twenty years later, win over the court). See STEPHEN GRANT MEYER, *AS LONG AS THEY DON’T MOVE NEXT DOOR: SEGREGATION AND RACIAL CONFLICT IN AMERICAN NEIGHBORHOODS* 46 (2001) (describing the strategy suggested by NAACP lawyer Louis Marshall). However, the NAACP instead focused on an argument that the covenants constituted a violation of the Civil Rights Act of 1866 and resulted in disease, crime, and overcrowding. *Id.* at 46; cf. BROOKS & ROSE, *supra* note 196, at 55 (asserting that the NAACP continuously used the state action line of argument in all cases up to and including *Shelley v. Kramer*). See generally CLEMENT E. VOSE, *CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES* (1959).

217. BROOKS & ROSE, *supra* note 196, at 211 (discussing the “respectable legal form” of racially restrictive covenants).

218. *Id.* at 212.

Court's treatment of racially restrictive covenants in *Corrigan*.<sup>219</sup> Practicing real estate lawyers also expressed concern about the legal validity of racially restrictive covenants, even after the Court's decision.<sup>220</sup> Some worried that courts would hold the covenants to be unreasonable restraints on alienation and consequently strike them down.<sup>221</sup>

In 1948, the Court decided *Shelley v. Kraemer*,<sup>222</sup> famously holding that racially restrictive covenants could not be enforced because such enforcement would constitute state action.<sup>223</sup> There are also now federal statutory prohibitions against racially restrictive covenants,<sup>224</sup> and some states require homeowners' associations to affirmatively renounce any lingering recorded racially restrictive covenants.<sup>225</sup>

## 2. *Judicial Ambivalence: Exclusionary Zoning*

After being blocked from using public- and private-law exclusionary techniques, some municipalities found ways to use zoning more indirectly to keep out residents they viewed as undesirable. Exclusionary zoning is a method whereby municipalities' zoning regulations require large lot sizes, square-footage minimums for buildings, or occupancy restrictions that make property unaffordable to or impractical for use by poor people or those who live with large or extended families.<sup>226</sup> While these exclusionary tactics are often directed

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219. One author cites a string of twelve law review articles, three student notes, and one book that were written in the aftermath of the *Corrigan* case questioning its holding. See VOSE, *supra* note 216, at 275 n.45.

220. BROOKS & ROSE, *supra* note 196, at 55-56 (discussing concerns of real estate developers and their attorneys).

221. *Id.* at 56; *see also* Kemp v. Rubin, 69 N.Y.S.2d 680, 685 (Sup. Ct. 1947) ("Such a covenant has been held not to be an unlawful restraint upon alienation."). *But see* L.A. Inv. Co. v. Gary, 186 P. 596, 597 (Cal. 1919).

222. 334 U.S. 1 (1948).

223. *Shelley*, 334 U.S. at 20.

224. For example, the federal Fair Housing Act of 1968 prohibits discrimination on the basis of race (as well as religion, gender, national origin, and, now, disability) with respect to sale and rental of most property, and prohibits the creation of racial covenants. 42 U.S.C. § 3604 (2012).

225. BROOKS & ROSE, *supra* note 196, at 228 (describing California and Missouri laws); CAL. CIV. CODE §§ 12955(l), 6606 (West 2014); MO. REV. STAT. § 213.041 (2014).

226. The idea behind large-lot zoning is that poor people will not be able to afford to build or buy a house on such a large lot. Occupancy restrictions might limit the number of bedrooms permitted in a structure, which effectively keeps out larger families. *See* Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767, 767 (1969) (describing exclusionary zoning as "zoning that raises the price of res-

at low-income people, they are arguably also racially motivated given the high correlation between race and class.<sup>227</sup> Sometimes forms of exclusionary zoning are less well-known yet have the same effect—for example, prohibiting people from operating “lower-income” home businesses such as barber shops and child-care facilities in residential homes but allowing uses such as in-home insurance practices.<sup>228</sup>

Those supporting exclusionary zoning practices are often purportedly motivated by the desire to preserve property values,<sup>229</sup> but sometimes their motivations do not seem all that different from the more nefarious ones that were set forth in support of racial zoning.<sup>230</sup> There is much evidence to suggest the use of facially race-neutral exclusionary zoning as a strategy to further racial homogeneity and to exclude racial minorities.<sup>231</sup> For example, citizens who supported the repeal of a zoning ordinance in Ohio allowing construction of a

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idential access to a particular area, and thereby denies that access to members of low-income groups”); Byrne, *supra* note 197, at 2265 n.2 (“Exclusionary zoning’ generally refers to zoning laws that aim for a social effect.”).

227. Using the ideas concerning “intersectionality” as a basis, this Article considers the impact that exclusion has on both socioeconomically disadvantaged individuals and people of color. See generally Leslie McCall, *The Complexity of Intersectionality*, 30 SIGNS 1771, 1782 (2005) (“Although broad racial, national, class, and gender structures of inequality have an impact and must be discussed, they do not determine the complex texture of day-to-day life for individual members of the social group under study, no matter how detailed the level of disaggregation.”). Of course, courts apply different levels of scrutiny to race and class, but they cannot be separated in this discussion, as “economic segregation is not only the easiest but also the most effective form of racial and ethnic segregation.” Williams, *supra* note 17, at 330; see also Wayne Batchis, *Suburbanization and Constitutional Interpretation: Exclusionary Zoning and the Supreme Court Legacy of Enabling Sprawl*, 8 STAN. J. C.R. & C.L. 1, 37 (2012) (“Wealth and race share an unfortunate correlation in America; and while the relationship is not as strong as it once was, minorities in America are still saddled with a disproportionate share of poverty and economic despair.”); Byrne, *supra* note 197, at 2277 (“Although it is sometimes asserted that exclusionary practices result merely from the pursuit of economic self-interest by suburban residents, the history of suburban expansion makes the conclusion that it is also driven by a desire for racial isolation inescapable.”).
228. Ross & Leigh, *supra* note 45, at 373 (describing these types of zoning ordinances that have exclusionary effects).
229. Byrne, *supra* note 197, at 2277.
230. Suburbanites “fear that when poor people move next door crime, drugs, blight, bad public schools and higher taxes inevitably follow. They worry that the value of their homes will fall and the image of their town will suffer. It does not help that the poor are disproportionately black and Latino.” David L. Kirp, Op-Ed *Here Comes the Neighborhood*, N.Y. TIMES, Oct. 19, 2013, <http://www.nytimes.com/2013/10/20/opinion/sunday/here-comes-the-neighborhood.html> [<http://perma.cc/A82U-3AAS>]. Regardless of the motivation, the results are still exclusionary.
231. Strahilevitz, *supra* note 59, at 465-66 (describing exclusionary zoning as “well documented and widely practiced”).



low-income housing project expressed concerns at public meetings “that the development would cause crime and drug activity to escalate, that families with children would move in, and that the complex would attract a population similar to the one of Prange Drive, the City’s only African-American neighborhood.”<sup>232</sup>

Although many legal scholars have critiqued the practice of exclusionary zoning,<sup>233</sup> it is still quite widespread. This form of exclusion passes legal muster in a way that outright discrimination does not;<sup>234</sup> no modern court has found exclusionary zoning to be a violation of federal constitutional requirements.<sup>235</sup> It is hard to see how standard federal constitutional arguments would work in the context of exclusionary zoning,<sup>236</sup> especially because housing is not a fun-

232. *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 192 (2003).

233. See, e.g., Batchis, *supra* note 227 (discussing the relationship between exclusionary zoning and urban sprawl); Byrne, *supra* note 197 (examining exclusionary zoning in the context of the *Mount Laurel* decisions); Sager, *supra* note 226 (examining the application of the Equal Protection Clause to exclusionary zoning); see also Ross & Leigh, *supra* note 45 at 372-73 (discussing exclusionary zoning’s role in racial segregation).

234. See GARY S. BECKER & KEVIN M. MURPHY, *SOCIAL ECONOMICS: MARKET BEHAVIOR IN A SOCIAL ENVIRONMENT* 72 (2000) (“Such hidden discrimination is hard to detect.”).

235. *But see* ELLICKSON ET AL., *supra* note 70, at 741 (“In the early 1970s, several federal courts applied the Equal Protection Clause to exclusionary zoning practices that stopped short of drawing explicitly racial classifications. . . . Soon thereafter, however, the Equal Protection Clause ceased to be a viable weapon against exclusionary, but not explicitly racial, land use controls.” (internal citations omitted)). Exclusionary zoning has been found to violate some state constitutions, and some states have attempted to curb it through legislation. See, e.g., CAL. GOV’T CODE §§ 65300, 65302 (West 2014) (requiring a housing element as part of comprehensive planning); OR. REV. STAT. § 197.312 (2013) (preventing local governments from disallowing in residential zones “attached or detached single-family housing, multi-family housing for both owner and renter occupancy or manufactured homes”); *S. Burlington Cnty. NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1975), *appeal dismissed & cert. denied*, 423 U.S. 808 (1975); Harold A. McDougall, *From Litigation to Legislation in Exclusionary Zoning Law*, 22 HARV. C.R.-C.L. L. REV. 623 (1987). However, it is still quite common in much of the country. Rolf Pendall, *Local Land Use Regulation and the Chain of Exclusion*, 66 J. AM. PLAN. ASS’N 125 (2000) (determining that low-density, exclusionary zoning resulted in fewer rental housing units, and thus fewer residents of color); Jonathan Rothwell & Douglas S. Massey, *The Effect of Density Zoning on Racial Segregation in U.S. Urban Areas*, 44 URB. AFF. REV. 779 (2009) (finding a significant relationship between low-density zoning and racial segregation).

236. See McDougall, *supra* note 235, at 623-24 (“The entry barriers to federal litigation on exclusionary zoning matters, as established by the United States Supreme Court, are quite high . . .”). While racial animus might be behind many exclusionary zoning decisions, most elected officials know not to mention it in the context of a public meeting or to use it as a justification for the decision. See, e.g., Byrne, *supra* note 197, at 2277; see also *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (suggesting that it is not difficult for governments to shield bad motivations behind legitimate reasons). Thus, although race is a suspect classification, it is typically difficult to establish that an exclusionary decision was race-based.

damental right,<sup>237</sup> wealth is not a suspect classification,<sup>238</sup> and the Court has suggested that zoning restrictions do not interfere with the fundamental right to travel.<sup>239</sup> As Lawrence Gene Sager explained:

Zoning ordinances that operate to exclude the poor may have been enacted with exactly that purpose in mind; it is also entirely possible in any given instance that no exclusionary intent was involved. While the extent to which other legitimate ends of government are served by an ordinance is of course relevant to its constitutional validity, . . . [i]t will be assumed that no [discriminatory] purpose is identifiable. The ease with which this sort of motive may be disguised and the understandable judicial reluctance to pry into motive makes this a realistic basis for inquiry.<sup>240</sup>

To the extent the Supreme Court has spoken to the issue of exclusionary zoning, it has made constitutional challenges to exclusionary ordinances quite difficult.<sup>241</sup> The Court held in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*<sup>242</sup> that discriminatory intent is necessary to invalidate governmental action in the context of exclusionary zoning; a plaintiff must prove intentional discrimination to trigger strict scrutiny.<sup>243</sup> Since *Washington*

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237. *Lindsey v. Normet*, 405 U.S. 56, 74 (1972).

238. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17-18 (1973).

239. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); see also *Associated Home Builders, Inc. v. City of Livermore*, 557 P.2d 473 (Cal. 1976) (discussing an exclusionary zoning ordinance and stating that “[b]oth the United States Supreme Court and this court have refused to apply the strict constitutional test to legislation, such as the present ordinance, which does not penalize travel and resettlement but merely makes it more difficult for the outsider to establish his residence in the place of his choosing”). But see *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 450 (1985) (applying rational basis review and striking down a zoning ordinance that prohibited group homes for mentally disabled individuals as violative of the Equal Protection Clause because the ordinance was based on “irrational prejudice” against the mentally retarded); Richard Fielding, *The Right to Travel: Another Constitutional Standard for Local Land Use Regulation?*, 39 U. CHI. L. REV. 612 (1972) (suggesting that exclusionary zoning violated the freedom of travel of prospective residents).

240. Sager, *supra* note 226, at 782.

241. *Id.* at 767 (writing in 1969, and noting that, at that time, exclusionary zoning was “a problem that has thus far been ignored by the Supreme Court”). The Court finally spoke to the issue, at least generally, in 1977 in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

242. 429 U.S. 252 (1977).

243. *Id.* at 265; see also ELLICKSON ET AL., *supra* note 70, at 763.

*v. Davis*,<sup>244</sup> legal scholars have explained how difficult it is to prove intentional discrimination. That is true even in cases challenging more traditional legal regulations like zoning ordinances;<sup>245</sup> proving that infrastructure decisions were made with the intent to discriminate is even more unlikely.<sup>246</sup> Indeed, in *Memphis v. Greene*,<sup>247</sup> which was decided shortly after *Arlington Heights*, the Court was unwilling to find evidence of discriminatory intent in the face of clear disparate impact.<sup>248</sup>

244. 426 U.S. 229, 239 (1976) (holding that even if a “law or other official act” has a racially discriminatory effect, the plaintiff must also show that there was a discriminatory intent in order to prevail in an equal protection case).

245. See, e.g., Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1152 (1991) (finding that intent cases are rarely litigated, and stating, “[t]he Court in *Davis* disparaged the importance of demonstrated, racially disproportionate effects, prompting a flurry of criticism that continues. This criticism assumes that an intent standard will rarely be satisfied and that, while it governs, many racial wrongs will remain unproven and therefore unrighted”); Lawrence, *supra* note 14, at 319 (“Improper motives are easy to hide. And because behavior results from the interaction of a multitude of motives, governmental officials will always be able to argue that racially neutral considerations prompted their actions.”); Catharine A. MacKinnon, *Disputing Male Sovereignty: On United States v. Morrison*, 114 HARV. L. REV. 135, 137 (2000) (noting that with respect to “the Court’s equal protection jurisprudence – the ‘intent’ requirement [] has made it increasingly difficult to hold states responsible for equal protection violations committed by state actors”); Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 309 (1997) (describing “[t]he Court’s demanding standard for identifying acts of intentional discrimination”); Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2454 (2003) (“[I]n cases stretching from *Milliken v. Bradley* through *Washington v. Davis* . . . the Court has – in most though not all contexts – made it increasingly difficult to prove discriminatory intent[.]”).

246. In *Arlington Heights*, the Court recognized that intent could be shown through circumstantial evidence, including “historical background of the decision,” a “specific sequence of events” leading up to the decision being challenged, “[d]epartures from the normal procedural [and substantive] sequence,” and legislative and administrative history. 429 U.S. at 267-68.

247. 451 U.S. 100 (1981).

248. Justice Marshall recognized this in his dissent, stating that “[t]his case is easier than the majority makes it appear. Petitioner city of Memphis, acting at the behest of white property owners, has closed the main thoroughfare between an all-white enclave and a predominantly Negro area of the city. The stated explanation for the closing is of a sort all too familiar: ‘protecting the safety and tranquility of a residential neighborhood’ by preventing ‘undesirable traffic’ from entering it. Too often in our Nation’s history, statements such as these have been little more than code phrases for racial discrimination. These words may still signify racial discrimination, but apparently not, after today’s decision, forbidden discrimination.” *Greene*, 451 U.S. at 135-36 (Marshall, J., dissenting).

Given these facts, it is likely that most exclusionary zoning claims would be examined under a rational basis standard.<sup>249</sup> And in the *Village of Belle Terre v. Boraas*,<sup>250</sup> the Supreme Court upheld an exclusionary zoning ordinance after applying rational basis review.<sup>251</sup> It will always be difficult for a plaintiff to overcome rational basis review.<sup>252</sup> This is especially true in the context of land use because local governments make land-use decisions pursuant to their police powers, which have been interpreted quite broadly;<sup>253</sup> it is not difficult to find legitimate, rational justifications—typically relating to health, safety, or welfare—for most zoning ordinances.<sup>254</sup>

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249. To the extent that a claim concerns discrimination in the context of housing, a plaintiff might have an easier time succeeding with a claim under the Fair Housing Act (FHA), 42 U.S.C. §§ 3601-3619 (2012). There, one need only prove the discriminatory effects of a housing program or decision on a minority group. See, e.g., *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 936 (2d Cir. 1988) (agreeing with the Seventh and Third Circuits that a defendant must show that their actions furthered a legitimate government interest and that no alternative would serve that interest with less discriminatory effect); *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 558 F.2d 1283, 1290 (7th Cir. 1977) [hereinafter *Arlington Heights II*] (holding that “a showing of discriminatory effect without a showing of discriminatory intent” is under some circumstances sufficient to establish a violation of section 3604(a)). The Supreme Court will take up the issue this term. *Inclusive Communities Project, Inc. v. Tex. Dept. of Hous. and Cmty. Affairs*, 747 F.3d 275, 282 (5th Cir. 2014), cert. granted, 82 U.S.L.W. 3686 (U.S. Oct. 2, 2014) (No. 13-1371).

250. 416 U.S. 1 (1974).

251. *Id.* at 7.

252. Under the rational basis test, the government must offer only a legitimate governmental interest. Such review rarely leads to the invalidation of the law because it is relatively easy for the government to show some legitimate purpose, and courts are highly deferential to the government’s justifications. See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 718 (4th ed. 2013) (“There is a strong presumption in favor of laws that are challenged under the rational basis test.” (citing *McGowan v. Maryland*, 366 U.S. 420, 425-426 (1961))). See generally *id.* at 717-40 (offering a detailed discussion of rational basis review).

253. “[T]he [*Memphis v. Greene*] Court saw the city’s decision as justified by the importance of discretion to local governments, specifically noting that local governments need ‘wide discretion’ in making the policy decisions that govern traffic patterns.” *Selmi*, *supra* note 245, at 308 (quoting *Greene*, 451 U.S. at 126).

254. Taken together: (a) proving intent is extremely difficult; (b) not all architectural exclusion is exclusion based on race (much of it is based on class, though intersectionality suggests that the two are often related); and (c) not every instance of architectural exclusion is intentional. But to the extent an architectural decision has discriminatory or exclusionary effects, that should be enough for the courts to take notice, as it is still pernicious. See, e.g., *Lawrence*, *supra* note 14, at 319 (“[T]he injury of racial inequality exists irrespective of the decisionmakers’ motives. . . . Are blacks less prisoners of the ghetto because the decision that excludes them from an all-white neighborhood was made with property values and not race in mind?”).

While no state has forbidden exclusionary zoning via statute,<sup>255</sup> some state courts have placed limitations on it.<sup>256</sup> An especially well-known and far-reaching example of this comes from the New Jersey Supreme Court's decision in *South Burlington County NAACP v. Township of Mount Laurel (Mount Laurel I)*.<sup>257</sup> In that case and its successor,<sup>258</sup> the court invalidated exclusionary zoning practices based on the general welfare provision in the state constitution.<sup>259</sup> The court interpreted this provision so that "general welfare" applied to the state as a whole, and appropriate zoning was required to advance the state's general welfare.<sup>260</sup> Therefore, the court held that every municipality that wanted to develop more housing in the state had to provide its fair share of the region's needed affordable housing.<sup>261</sup> Of note, although the plaintiffs pled both

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255. Some states, however, have adopted statutes that address exclusionary zoning by encouraging or promoting affordable housing. *See, e.g.*, New Jersey Fair Housing Act of 1985, N.J. STAT. ANN. §§ 52:27d-301 to -329.19 (West 2013) (creating an administrative agency responsible for determining regional need for low-income housing); CAL. GOV'T CODE § 65300 (West 2013) (requiring comprehensive plans with a housing element); The Massachusetts Low and Moderate Income Housing Act, MASS. GEN. LAWS ch. 40B, §§ 20-23 (2013) (providing incentives to developers who reserve a portion of their constructed units for low- and moderate-income households). *See generally* Rachel G. Bratt, *Overcoming Restrictive Zoning for Affordable Housing in Five States: Observations for Massachusetts*, CITIZENS' HOUSING & PLAN. ASS'N (2012), <http://www.chapa.org/sites/default/files/BrattOvercomingRestrictiveZoning112012.pdf> [<http://perma.cc/9ALZ-FP33>].
256. Byrne, *supra* note 197, at 2266 ("No state has statutorily barred exclusionary zoning, nor have many state courts expressed any apprehension about it. A few states have hedged the practice with restrictions, or offered limited remedies to the excluded. And then there is New Jersey." (footnote omitted)).
257. *S. Burlington Cnty. NAACP v. Township of Mount Laurel (Mount Laurel I)*, 336 A.2d 713 (N.J. 1975). Byrne mentions a few other courts that have considered exclusionary zoning: "Britton v. Town of Chester, 595 A.2d 492 (N.H. 1991) (relying in part on *Mount Laurel* cases to require in New Hampshire a builder's remedy less stringent than that in New Jersey); *Township of Willistown v. Chesterdale Farms, Inc.*, 341 A.2d 466 (Pa. 1975) (relying in part on *Mount Laurel I* to find a Pennsylvania township zoning ordinance that provided for apartment construction on only 80% of the 11,589 acres in the township unconstitutionally exclusionary)." Byrne, *supra* note 197, at 2266 n.4; *see also* *Nat'l Land & Inv. Co. v. Kohn*, 215 A.2d 597, 613 (Pa. 1965) (holding large minimum lot size to be unconstitutional); *cf.* *Appeal of Kravitz, Inc.*, 460 A.2d 1075, 1082 (Pa. 1983) (upholding an ostensibly exclusionary zoning ordinance because locality was not a place where future development was logical).
258. *S. Burlington Cnty. NAACP v. Township of Mount Laurel (Mount Laurel II)*, 456 A.2d 390 (N.J. 1983).
259. *See Mount Laurel I*, 336 A.2d at 725-28.
260. Byrne, *supra* note 197, at 2271.
261. *Mount Laurel I*, 336 A.2d at 724.

race and economic discrimination, the court based its opinion on the economic grounds alone.<sup>262</sup>

While *Mount Laurel I* suggests the possibility that exclusionary zoning could be struck down more broadly throughout the country, this seems unlikely; despite the successful outcome and aftermath of *Mount Laurel I*,<sup>263</sup> other states have not readily followed suit.<sup>264</sup> It is unclear precisely why more state courts and legislators have not mandated affordable housing. One possibility is political: affordable housing is unpopular in many affluent communities.<sup>265</sup> Further, unlike racial zoning and racially restrictive covenants, which clearly exclude on the basis of race, exclusionary zoning is fuzzier. While its intent and effect certainly result in the exclusion of certain groups, exclusionary zoning does not inherently prohibit or forbid people of color, or even low-income individuals, from entering or living in the community. Rather, it just makes it exceedingly unlikely that those groups of individuals will be able to live in those areas. In this way, exclusionary zoning has more in common with architectural exclusion than it does with racial zoning and restrictive covenants. While exclusionary zoning and architectural exclusion make access much more difficult for certain groups, these practices do not mandate exclusion.

The bottom line seems to be that the Supreme Court has been fairly active and responsive in striking down laws that create “formal racial barriers” – racial zoning, racially restrictive covenants, Jim Crow laws requiring physical separa-

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262. *Id.* Of course, “economic segregation is not only the easiest but also the most effective form of racial and ethnic segregation . . .” Williams, *supra* note 17, at 330.

263. Although its implementation has taken an extremely long time, analysis suggests that it has been widely successful. See, e.g., Kirp, *supra* note 230 (noting that the housing development was not approved until 1997, and was not built until 2000, but that “this affordable housing has had zero impact on the affluent residents of that community – crime rates, property values and taxes have moved in step with nearby suburbs – while the lives of the poor and working-class families who moved there have been transformed” (citing DOUGLAS S. MASSEY ET AL., CLIMBING MOUNT LAUREL: THE STRUGGLE FOR AFFORDABLE HOUSING AND SOCIAL MOBILITY IN AN AMERICAN SUBURB (2013) (positively evaluating the Ethel Lawrence Homes, the affordable housing project in Mt. Laurel))).

264. See, e.g., ELLICKSON ET AL., *supra* note 70, at 778 (“Most state courts continue to attach a presumption of validity even to municipal land use controls that admittedly exclude lower-cost housing (absent evidence of a racially discriminatory purpose) . . .”).

265. See, e.g., Erin Durkin, *City Plans To Attack Economic Segregation by Moving Poor into Middle-Class Neighborhoods, Richer into Poverty Spots*, N.Y. DAILY NEWS, May 21, 2014, <http://www.nydailynews.com/new-york/city-plans-attack-economic-segregation-article-1.1801477> [<http://perma.cc/3E5M-B3XG>] (noting that the New York City Council housing chairman “anticipated some resistance [to the plan to build affordable housing in wealthy areas] from affluent New Yorkers unhappy about low-income developments in their neighborhoods . . .”).

tion in public places<sup>266</sup> – but not so when considering other “less obvious forms of discrimination” – including (to some extent) exclusionary zoning and architectural exclusion.<sup>267</sup> Although it is possible that in the future, the court may become more active in these latter areas, it is doubtful due to current Equal Protection jurisprudence and intent requirements.<sup>268</sup>

*B. Social Norms That Furthered Exclusion: Sundown Towns, “White Terrorism,” and Threats To Keep the “Other” Out*

One reason that restrictive covenants and zoning for exclusion were so common is that they were preceded by a long history of norms in support of segregation in the United States<sup>269</sup>: “The dominating normative ideas in neighborhood segregation were first that minority neighbors would undermine white property values, and second that white residents owed it to their neighbors to keep that from happening.”<sup>270</sup> These norms existed before their exclusionary legal counterparts,<sup>271</sup> and even after the law no longer expressly enforced those norms, the norms themselves served as a form of regulation. As racial zoning fell out of favor, its “eventual demise . . . did not undermine the underlying social norms. The norms were based in a belief that Providence created racial barriers, and violence was natural to prevent integration.”<sup>272</sup>

The book *Sundown Towns* identifies large numbers of ordinances and customs that purportedly made it illegal for African Americans to live in certain communities.<sup>273</sup> Even after they were technically illegal, these ordinances were

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266. For more on Jim Crow laws, see *supra* note 198.

267. See Boddie, *supra* note 57, at 413; see also Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 286 (1997) (analyzing “the Court’s reluctance to see discrimination in any but the most obvious situations”).

268. See Batchis, *supra* note 227, at 40 (“The Court’s trajectory on zoning matters would thus seem unlikely to change in the foreseeable future.”).

269. See Leonard S. Rubinowitz & Imani Perry, Book Review Essay, *Crimes Without Punishment: White Neighbors’ Resistance to Black Entry*, 92 J. CRIM. L. & CRIMINOLOGY 335, 375 (2002) (“The social norms of residential racial segregation were at the core of the structure of twentieth century racial subordination.”). *But see* MASSEY & DENTON, *supra* note 166, at 30-31, 51 (noting that racial segregation was much less common before the 1910s and suggesting that federal programs exacerbated the norm of segregation).

270. BROOKS & ROSE, *supra* note 196, at 212.

271. *Id.* at 19 (“[I]t took some time before white claims to own the neighborhoods moved beyond informal measures . . . and jelled into the legal form of racially restrictive covenants.”).

272. Rubinowitz & Perry, *supra* note 269, at 375.

273. JAMES W. LOEWEN, *SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM* 228-79 (2005). For example:

enforced with threats and violence on the part of white residents to drive existing minorities out of their communities, and to keep new ones from moving in.<sup>274</sup> Scholars describe the “white terrorism” endured by African Americans, which “was the everyday reality, and it induced a widespread state of fear in the African American community.”<sup>275</sup> These norms are resilient; such harassment continues today in some areas. For example, the Sixth Circuit recently indicated that city officials, including police officers, may have taken part in an intimidation and harassment campaign to induce African Americans to move elsewhere.<sup>276</sup> An important point here is that law could be used to restrain and condemn these norm-based discriminatory practices and regulations; legislatures could craft laws to outlaw such discriminatory behavior, and strong enforcement of those laws could ensure that harassers are punished accordingly. Law could be used to overcome or disrupt exclusionary architectural practices as well.

C. *A Clarification: Legal Exclusion Versus Architectural Exclusion*

Before moving on to an analysis of architectural exclusion in the courts, it is important to briefly solidify the distinction between that form of exclusion and the foregoing material in this Part, which has primarily focused on legal, or law-based, forms of exclusion. Legal exclusion concerns the use of traditional

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In Syracuse, Ohio . . . no Negro is permitted to live, not even to stay overnight under any consideration. This is an absolute rule in this year 1905, and has existed for several generations. The enforcement of this unwritten law is in the hands of the boys from 8 to 20 years of age . . . [.]

*Id.* at 228 (quoting *For White Men Only*, FAIRMONT FREE PRESS (W. Va.), Dec. 7, 1905).

Some working-class or multiclass sundown suburbs have passed ordinances requiring teachers, firefighters, police officers, and other city workers to live within their corporate limits. Thus they can be assured that all their employees will be white. . . . In turn, African Americans are ineligible to be hired for future openings, since they would first have to move in to be considered.

*Id.* at 253.

274. BROOKS & ROSE, *supra* note 196, at 23 (noting that “informal and illegal violence and threats remained as powerful constraints”); LOEWEN, *supra* note 273, at 257-77; MEYER, *supra* note 216, at 14 (“Anxious whites used violence and intimidation to keep African Americans off their blocks. Blacks saw their homes bombed or stoned.”).
275. RUTH THOMPSON-MILLER ET AL., JIM CROW’S LEGACY: THE LASTING IMPACT OF SEGREGATION 4 (2015).
276. Hidden Village, LLC v. City of Lakewood, 734 F.3d 519, 526 (6th Cir. 2013) (“[A] jury could conclude that the officials targeted the organization’s black members in particular . . . . [A]lthough the program had white clients, none of them reported police harassment to [the director]; all complaints of police harassment came from black clients.”).



legal tools like ordinances and covenants to exclude people from certain locations, whereas architectural exclusion uses physical features of the built environment to do so. Tools of legal exclusion are enforced by law enforcement officials, agencies, self-policing, and vigilante action, while architectural exclusion is enforced by its very presence, which physically inhibits or hinders passage. However, because so much of the built environment was created pursuant to laws, it is hard to decouple the two completely.<sup>277</sup>

For example, legal exclusionary tools such as zoning and covenants were primarily aimed at preventing certain races or classes of people from living or owning property in a given area,<sup>278</sup> and the legacy of those laws remains; many neighborhoods continue to be segregated nearly a century later.<sup>279</sup> In contrast, architectural exclusion is broader in that it prevents ease of access to or passage through a given location. A wall doesn't mean that a person *cannot* enter a community or other space; it just makes it more difficult for him to do so. Notwithstanding this important distinction, many examples of architectural exclusion described in Part II—especially the urban-suburban transit divide and the suburban use of confusing street designs—result in exclusion precisely because the individuals being excluded do not live in the same neighborhood as those doing the excluding. In these instances, architectural exclusion is possible because of the legacy of legal exclusionary practices.<sup>280</sup> The interaction between the two forms of exclusion is perhaps less pronounced in the context of certain physical architectural barriers, such as low bridges or difficult pedestrian crossings, which will have an impact regardless of residential segregation.<sup>281</sup>

Finally, architectural exclusion is perhaps less connected to the highly important values that we associate with private property ownership; zoning and covenants implicate the right to exclude from private property in a way that

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277. See, e.g., Schindler, *supra* note 36, at 425 (noting that, in the context of land use, “legal intervention into architecture . . . all but guarantees that there are no pure design solutions”).

278. Strahilevitz recognized this, stating that “[e]xclusionary zoning would be adequate to keep the poor from *living* in these communities.” Strahilevitz, *supra* note 59, at 488.

279. See, e.g., Editorial, *The Death of Michael Brown: Racial History Behind the Ferguson Protests*, N.Y. TIMES, Aug. 12, 2014, <http://www.nytimes.com/2014/08/13/opinion/racial-history-behind-the-ferguson-protests.html> [<http://perma.cc/94JQ-RBBM>] (discussing the protests and racial divide in Ferguson, Missouri, and noting that, “[u]ntil the late 1940s, blacks weren’t allowed to live in most suburban St. Louis County towns, kept out by restrictive covenants”).

280. See *supra* Part IV.A (discussing legacy issues).

281. That said, although the placement and location of these physical barriers would have the same effect on anyone who must pass under or through them, it may be more or less likely that a person would need to pass under or through them based on the place that the person lives, and where he or she is heading.

rights of access to or passage through a public place do not.<sup>282</sup> In the private property context, society places value on the right to exclude.<sup>283</sup> In contrast, we tend to believe that public spaces should be open to all, and thus we do not value exclusion in that context.<sup>284</sup> De jure residential segregation historically required and allowed individuals to exclude in a way that is no longer permissible.<sup>285</sup> So while we value the right to exclude others from private property, we place limits on the extent of and reasons for that exclusion.<sup>286</sup> De jure residential segregation also resulted in architectural constraints to support and further that segregation.<sup>287</sup> Many examples of architectural exclusion addressed above were constructed while de jure segregation was still in force—often with the intent of furthering that segregation—and remain in place today. Although most segregation by law is no longer permissible, its remnants—the legacy of that segregation—continue to exclude individuals from public spaces. Thus, we are faced with a gap between the value that we purportedly place on exclusion (it is valued in private but not public spaces) and the exclusion that we see on the ground: our public streets and bridges, which should be equally accessible to all, are often not. Architectural exclusion is pernicious in that it is invisible to most, and yet it continues to solidify otherwise defunct forms of legal exclusion.

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282. The right to exclude is “one of the most essential sticks in the bundle of rights that are commonly characterized as property.” *Dolan v. City of Tigard*, 512 U.S. 374, 393 (1994) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).

283. *Id.*

284. See, e.g., *Hague v. CIO*, 307 U.S. 496, 515 (1939) (“Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public . . . .”); Marc Jonathan Blitz, *The Fourth Amendment Future of Public Surveillance: Remote Recording and Other Searches in Public Space*, 63 AM. U. L. REV. 21, 25 (2013) (“[T]he open and public space that we share with others—in streets, public squares, and parks—is not a private environment. We cannot exclude fellow citizens from this space . . . .”); Haochen Sun, *Fair Use As A Collective User Right*, 90 N.C. L. REV. 125, 168 (2011) (“[T]angible public space is the open arena where people share common resources that are not held in exclusive possession by any single person.”).

285. See *supra* Part III.A.

286. Sometimes necessity or need results in courts bending the right to exclude. See *State v. Shack*, 277 A. 2d 369, 374-75 (N.J. 1971) (holding that the right to exclude does not include the right to bar access of governmental employees providing services to migrant workers).

287. See *supra* Part II.

#### IV. ARCHITECTURAL EXCLUSION IN THE COURTS: A LACK OF ATTENTION AND SUCCESS

A review of the limited case law and scholarly literature in this and related areas suggests that there are two barriers to finding exclusionary architecture to be an illegal form of regulation. The first is the failure of courts, legislatures, and citizens to recognize that architecture regulates. The result is that many examples of architectural exclusion likely go unchallenged or are dismissed. The second is that, even if challengers and decision makers come around to understanding the idea of architecture as regulation, our existing jurisprudence is insufficient to invalidate<sup>288</sup> this form of exclusion.<sup>289</sup> Existing legal protections located in the federal Constitution and federal statutes have led courts to invalidate some traditional methods of exclusion, including racial zoning and racially restrictive covenants, but they have generally not been sufficient to curb exclusionary zoning.<sup>290</sup> This Part offers support for the argument that existing legal protections are likely insufficient to deal with the problem of architectural exclusion. This is true despite the fact that “questions of racial equity . . . are so vastly more salient in today’s moral universe” – and better answers to those questions are now more commonly accepted – than they were at the time that racial covenants and racial zoning were frequently used.<sup>291</sup> These two barriers contribute to the relative dearth of cases and scholarly articles addressing architectural exclusion.<sup>292</sup>

##### A. A Failure To Recognize Architecture as Regulation

There are a number of reasons that potential challengers, courts, and legislators might not take architectural exclusion into account, but key among these is that architecture and law are, in many ways, fundamentally different as regulatory tools. Specifically, architecture is less explicitly regulatory than is law.

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288. Invalidation of architectural exclusion could take the form of preventing its initial construction or of reconfiguring existing examples.

289. This is because of the difficulty of proving intent, especially in the context of architecture and land use, and because not all exclusionary decisions are based on race. *See, e.g., supra* notes 266-268 and accompanying text.

290. *See supra* Part III.A. Much dialogue surrounding the development of civil rights law in the United States focuses on actions that have a non-discriminatory justification, which could be pretextual. Architectural exclusion fits within that dialogue.

291. BROOKS & ROSE, *supra* note 196, at 57.

292. I say “relative” in comparison to the number of cases that the courts have heard concerning other civil rights issues, and specifically, for example, school desegregation.

Lessig refers to this as architecture “hid[ing] its pedigree.”<sup>293</sup> As another commentator notes, “architectural regulation operates surreptitiously and may not even be perceived as governmental action. Architectural regulation thus allows government to shape our actions without our perceiving that our experience has been deliberately shaped, engendering a loss of moral agency.”<sup>294</sup> If individuals are unaware that architecture is deliberately shaping their behavior, they may be less likely to bring a legal challenge against exclusion that results from architecture because they might not perceive the architecture as the reason for the exclusion, or as something that can or should be challenged in a court of law.<sup>295</sup>

For example, when someone crosses the road at one particular point instead of another, or must walk a long distance to reach a bridge to cross over a highway, she is not likely consciously aware that an actual person or persons made intentional decisions so that she would have to follow a certain path of access.<sup>296</sup> And even if one realizes that these architectural decisions were deliberate, it is hard to know *who* actually made those design choices.<sup>297</sup> The “career” of a law is clearer than that of architectural regulation.<sup>298</sup> Indeed, public participation in the creation of laws is often more explicit and better understood than participation in the architectural decisions that result in infrastructure and the built environment.<sup>299</sup> Unlike laws, architecture

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293. See LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 98 (1999).

294. Tien, *supra* note 22, at 2, 5 (“Architecture . . . can affect us directly without our being aware of what it does. . . . Its effects are normatively significant because we often are not aware that architecture is deliberately being used to constrain our action.”). Ironically, this is why some scholars, including Sunstein, are drawn to the idea of architectural regulation: it preserves a sense of freedom. See generally THALER & SUNSTEIN, *supra* note 54.

295. If the intent to discriminate is clear or obvious, even architecture could be actionable in court. But it rarely will be obvious, and we often don’t even think to look for the intent because we don’t think that architecture regulates.

296. “Architecture operates ‘much more [on the] subconscious than [the] conscious. . . . [Y]ou live in architecture, and it affects you whether you’re even conscious of it.” Katyal, *supra* note 21, at 1072 (quoting Avrel Seale, *Architect Lawrence W. Speck and “The Vision Thing,”* TEX. ALCALDE, July-Aug. 1999).

297. “Often, we simply have no clue as to who made the key design decisions regarding our settings or equipment.” Tien, *supra* note 22, at 10.

298. *Id.*

299. In describing a criticism of both architecture and “nudge,” or “choice architecture,” as a form of regulation, one commentator notes that the “problem is that regulators perform this substitution [for the coercive function of law] without reintroducing the procedural safeguards that usually attend the passage, interpretation, and enforcement of laws.” Ryan Calo, *Code, Nudge, or Notice?*, 99 IOWA L. REV. 773, 777 (2014). With respect to public participation in the creation of laws, see generally CARY COGLIANESE ET AL., TRANSPARENCY AND PUBLIC PARTICIPATION IN THE RULEMAKING PROCESS V (2008), <http://www.hks.harvard.edu>

does not necessarily have to pass through a political process. . . . [T]he executive—the local police department or attorney general—does not serve as a check on the legislature. And if the change makes [a certain] behavior impossible or unlikely, if there is no law to interpret or apply, then the judiciary has neither need nor opportunity to get involved.<sup>300</sup>

Here, it is useful to make a comparison to exclusionary zoning,<sup>301</sup> which unlike architectural exclusion, is clearly a form of regulation by law.<sup>302</sup> Zoning occurs through standard political processes and is well recognized by courts as a form of regulation subject to their oversight. That said, exclusionary zoning presents an interesting point of comparison: it occupies a middle ground be-

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/hepg/Papers/transparencyReport.pdf [http://perma.cc/U2EU-KDC4] (noting that federal administrative agencies adopt procedures that provide notice to the public and encourage participation with the aim to improve the quality and legitimacy of the rulemaking process); KARL T. KURTZ, *LEGISLATURES AND CITIZENS: PUBLIC PARTICIPATION AND CONFIDENCE IN THE LEGISLATURE 2* (1997), [http://www.ncsl.org/documents/public/trust/LegCitizens\\_PublicParticipation\\_Kurtz2.pdf](http://www.ncsl.org/documents/public/trust/LegCitizens_PublicParticipation_Kurtz2.pdf) [http://perma.cc/27QQ-AFTC] (“In a democracy, the more people involved the better the result.”). That said, many cities do hold public meetings when considering road reconfiguration or the placement of transit stops. However, some of those decisions are eventually determined through administrative processes. *See, e.g.,* Sanchez et al., *supra* note 119, at ix (“State departments of transportation and Metropolitan Planning Organizations are responsible for planning transportation . . . . Although these agencies are required to seek out and consider the needs of low-income and minority households, there are no effective mechanisms to ensure their compliance with this requirement.”).

300. Calo, *supra* note 299, at 781 (noting that architecture “can, but need not, be subject to the same procedural safeguards as law” and that “[o]ne branch of government (say a city council) can decide to change the architecture of a road . . . and simply hire a contractor to carry out the decision”). On the other hand, some might argue that architectural decisions are more visible than legal decision making because certain choices about infrastructure and architecture are made at the local level, by institutions or councils to which citizens might have more access than the federal or state legislature.

301. *See supra* Part III.A.2.

302. *See supra* Part III.C. Zoning ordinances are adopted by elected bodies, whereas architectural or infrastructural decisions are often administrative, and thus lack the imprimatur of law. The extent to which this is true, however, is highly location dependent. For example, the city of Portland, Maine, gives the city traffic engineer the authority to establish parking regulations—including residential parking designations—without requiring city council approval. PORTLAND, ME., CODE § 28-24(g)(1) (2013) (demonstrating that because authority regarding “no parking any time” and metered parking changes are the only exceptions listed regarding the city traffic engineer’s authority to establish parking regulations, all other types of parking determinations—such as residential parking—do not appear to require amendment to the traffic schedule by the city council. § 28-24(g)(1)(i-ii) (2013)). In contrast, the city of Charleston, South Carolina, requires any change in permit parking to be approved by the city council before it can be implemented. CHARLESTON, SC., CODE § 19-268; *see also* E-mail from Judy Crites, Office Manager, City of Charleston, to Patrick Lyons, Research Assistant, Univ. of Me. Sch. of Law (Apr. 11, 2014, 10:31:00 EST) (on file with author).

tween racial zoning and restrictive covenants on the one hand, where the court has forcefully acted to strike down exclusionary practices, and architectural exclusion on the other, where it has not. And although exclusionary zoning is mostly not actionable,<sup>303</sup> there have been many law review articles discussing it, and it is covered in depth in land-use casebooks.<sup>304</sup> This is not true of architectural exclusion, although it is also mostly not actionable under current jurisprudence. This raises the question: why is exclusionary zoning covered by scholars and courts, while architectural exclusion is mostly not? Perhaps this difference is due in part to the fact that exclusionary zoning is a form of legal exclusion, which is more readily challenged by aggrieved citizens and which is more recognizable to courts and scholars.<sup>305</sup>

In addition to the fact that architecture is a less express means of regulation than is law, architectural constraints are experienced differently than are legal constraints. As Lessig notes in the context of cyberlaw, “constraints of architecture in real space—railroad tracks that divide neighborhoods, bridges that block the access of buses, constitutional courts located miles from the seat of the government—they are experienced as conditions on one’s access to areas of cyberspace.”<sup>306</sup> A person therefore experiences architecture physically; the physical design of the built environment affects a person’s ability to travel or move around in that environment.<sup>307</sup> Law constrains behavior, while architecture constrains physical movement and hence behavior.<sup>308</sup>

The physical nature of architectural regulation also relates to the ways in which the temporal constraints imposed by law differ from those imposed by

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303. See *supra* Part III.A.2; see also ELLICKSON ET AL., *supra* note 70, at 778 (“Most state courts continue to attach a presumption of validity even to municipal land use controls that admittedly exclude lower-cost housing (absent evidence of a racially discriminatory purpose), and merely require that the controls be rationally related to some permissible governmental objective.”). But see *supra* note 194 (discussing successful disparate impact claims under the FHA).

304. See, e.g., ELLICKSON ET AL., *supra* note 70, at 758-94 (noting, in the section titled, “Discrimination Against Low- and Moderate-Income Housing,” that in the 1970s “reformers harbored considerable hope that the Supreme Court’s interpretation of the U.S. Constitution would lead to the demise of zoning that had the effect of excluding lower-cost housing for poor or working-class families . . . the Supreme Court refused to cooperate”).

305. See *supra* Part III.C (discussing legal versus architectural exclusion).

306. Lessig, *supra* note 20, at 509.

307. Nick Scharf, *Life Through a Lens: A “Lessigan” Model for Understanding Digital Copyright Infringement?*, 16 J. INTERNET L. 18, 26 (2012) (“The modality of ‘architecture’ represents the physical burdens in existence . . .”).

308. Tien, *supra* note 22, at 4 (describing architectural regulation as “government action directed at the real-world conditions of human activity, tangible or intangible, which in turn affects what people can or are likely to do”).

architecture: law regulates both before and after the fact, while architecture regulates only before the fact, as a “present constraint” on action.<sup>309</sup> For example, say that there is a large wall along a line that divides public property from private property. Law controls after the fact here in that if you scale the wall, or somehow enter the private property, you are trespassing; you are breaking the law and can be sanctioned for doing so—through arrest, jail time, or a fine.<sup>310</sup> After you have crossed the line, and broken the law, the law’s sanctions may be enforced against you. But law also regulates before the fact. For example, you may decide not to scale the wall, and not to enter the private property, because of the existence of the law. Assuming you know about the law and its sanctions, it influences—or constrains—your behavior. You may decide that the action—scaling the wall or entering the private property—is insufficiently valuable to run the risk of the sanction. Because violation of the law comes with after-the-fact sanctions, the consequences of law-breaking explicitly play into your before-the-fact decision-making process. Notably, norms also constrain in this way: perhaps you would face social sanctions from your neighbors if you scaled the wall, as it might be “unneighborly” to enter another’s private property.<sup>311</sup>

In contrast, let us assume that the wall is very high and smooth; it is so high and smooth that it cannot be scaled without very expensive equipment and a high level of skill. And it is solid and goes on for miles; there is no way through this wall, and getting around it would require a long journey. The wall separates the public from the private property in this location; you will not be able to enter the private property unless you have the equipment, skill, and time to circumvent the wall. This is an architectural constraint: the existence of the wall stops you—before the fact—from entering the private property. While you had to undergo a relatively complex thought process to conclude that you should not climb the wall because of the *legal* consequences of doing so, your decision not to climb the wall because it is *physically difficult* to do so is a more intuitive—perhaps even subconscious—process of reasoning. Although the existence of the wall constrains and shapes behavior just as much as, if not more than, law, we often do not consider the existence of the wall—the architecture itself—to be a form of regulation. One reason for this is likely that it is not something people—including judges and legislators—naturally consider to be within the purview of a court of law or a legal analysis.

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309. *Id.* at 3, 7 (citing LESSIG, *supra* note 293, at 237).

310. See LESSIG, *supra* note 293, at 237 (discussing law and norms as after-the-fact regulation, and architecture as a present constraint on action). Of course, law may also serve a deterrent function.

311. *Id.* (noting that norms and law prevent a person from breaking into a neighbor’s home to access her air conditioning, while a lock on the door is a form of architectural constraint).

Another differentiating factor between architecture and law relates to the way in which each is disobeyed and the consequences for doing so. As I have already mentioned, when a person disobeys a law, she acts in the face of a rule that says she cannot do something, and then she suffers after-the-fact sanctions.<sup>312</sup> In contrast, “[d]isobedience of architectural regulation . . . involves either [1] exit from the architected system or [2] circumvention of the architected constraint.”<sup>313</sup> In the context of the built environment, it is often quite difficult to physically circumvent an architectural constraint.<sup>314</sup> This is because the physical environment is enduring and often hard to change. For example, if an area without access to public transportation has only a single bridge connecting one community with another, and that bridge is three miles away, a person without access to personal transportation who is physically able-bodied could ostensibly walk the distance to the bridge. However, that person would also need to have the time to do so. On the other hand, she could seek to bypass the architectural constraint by finding transportation—asking a friend for a ride or borrowing a bicycle.<sup>315</sup> With respect to the first option, “exit from the architected system,” a person would have to leave the excluded community entirely in order to disobey the architectural constraint.<sup>316</sup>

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312. *Id.*

313. Tien, *supra* note 22, at 10.

314. For example, we do not need laws to prevent large buildings from being stolen; their architecture protects them and effectively prohibits their theft. Lessig, *supra* note 20, at 523 (“We have special laws to protect against the theft of autos, or boats. We do not have special laws to protect against the theft of skyscrapers. Skyscrapers take care of themselves. The architecture of real space . . . protects skyscrapers much more effectively than law. Architecture is an ally of skyscrapers (making them impossible to move); it is an enemy of cars, and planes (making them quite easy to move).”).

315. Of course, breaking the law and circumventing the architectural constraint are sometimes one and the same; examples are going the wrong way down a one-way street or parking in a residential parking permit zone without such a permit.

316. Because excluded communities are often also poor or underserved, exit is not always a real choice. See, e.g., ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970) (discussing exit and voice). Indeed, part of architectural exclusion is that a person actually cannot get out (or in)—either due to physical barriers that make it difficult or the lack of transit options. Further, the lack of a true ability to exit is one of the strongest arguments against Tiebout’s theory, which suggested that communities provide different goods and services that appeal to different types of people and that people will seek out a community that provides them with the most appealing goods and services. Compare Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956), with Nick Gill & Andrés Rodríguez-Pose, *Do Citizens Really Shop Between Decentralized Jurisdictions?: Tiebout and Internal Migration Revisited*, 16 SPACE & POLITY 175 (2012) (noting that analysis of other nations suggests that there is only a weak link between migration among jurisdictions and decentralization), and Kenneth Bickers & Richard N. Engstrom, *Tiebout Sorting in Metropolitan Areas*, 23 REV. POL’Y RES. 1181 (2006) (finding



Although regulation through architecture is different from legal regulation in all of these ways, the two share some key features. Most importantly, just as law has been used to shape behavior, design has been used across time and civilizations to perpetuate desired systems of belief.<sup>317</sup> Although we easily recognize that the law has this function, the idea that architecture also shapes tastes is much less common in the legal literature.<sup>318</sup> However, the idea of architecture as social control is foundational to social science fields such as geography, environmental psychology, and planning.<sup>319</sup> Further, research supports the notion that the built environment communicates;<sup>320</sup> it functions as a symbol, expressing the views of those who create it and imposing those views on those who interact with it each day.<sup>321</sup> The philosopher Martin Heidegger, in discussing buildings and the built environment, noted our tendency to consider architecture as merely architecture, as opposed to—or at least prior to—symbolic expression. He wrote:

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random sorting among municipalities in the Houston and Atlanta metropolitan areas). However, in order to uproot and move to a more appealing community, a person needs resources, including money and job flexibility.

317. Katyal, *supra* note 21, at 1043 (“Research in architectural theory and environmental psychology reveals that architects influence, in subtle ways, the paths by which we live and think.”).
318. See *supra* Part I; see also SCOTT, *supra* note 29, at 117-32; Boddie, *supra* note 57, at 442 (“The theory that space might be used for social control may be foreign to constitutional law . . .”); Katyal, *supra* note 21, at 1087 (“The theory of how architecture shapes tastes has been developed within the field of environmental psychology and has been largely ignored by law schools due to their focus on the use of legal codes to regulate conduct.”).
319. See *supra* Part I.A; see also EDWARD T. HALL, *THE HIDDEN DIMENSION* 4 (1966) (“[B]oth man and his environment participate in molding each other. Man is now in the position of actually creating the total world in which he lives . . . . In creating this world he is actually determining *what kind of an organism* he will be. This is a frightening thought in view of how very little is known about man. It also means that, in a very deep sense, our cities are creating different types of people in their slums, mental hospitals, prisons, and suburbs.”); Boddie, *supra* note 57, at 442; Katyal, *supra* note 21, at 1131-32.
320. JOHN ZEISEL, *SOCIOLOGY AND ARCHITECTURAL DESIGN* 26 (1975) (describing how the built environment “express[es] individual group affiliation . . . [and] send[s] informal public messages”).
321. See, e.g., Katrina Fischer Kuh, *Capturing Individual Harms*, 35 HARV. ENVTL. L. REV. 155, 166 (2011) (“The capacity of local governments to change the physical architecture of communities is an important way that local governments influence individual lifestyles and behaviors . . . .”); see also 9 + 1 *Ways of Being Political: 50 Years of Political Stances in Architecture and Urban Design*, MUSEUM MODERN ART, <http://www.moma.org/visit/calendar/exhibitions/1313> [<http://perma.cc/E72E-2XG5>] (“The political potential of architecture was one of the founding credos of the avant-garde in the early 20th century. Yet today it is commonly believed that this potential has been overwhelmed by economic realities and by the sense that architecture, by its very nature, is symbiotic with existing power structures.”).

People think of the bridge as primarily and really *merely* a bridge; after that, and occasionally, it might possibly express much else besides; and as such an expression it would then become a symbol . . . . But the bridge, if it is a true bridge, is never first of all a mere bridge and then afterward a symbol.<sup>322</sup>

This sentiment certainly brings to mind Moses's Long Island bridges,<sup>323</sup> which existed not just to carry people over the expressway but also to exclude people from Jones Beach at the end of the expressway. Another architectural scholar writing on the subject noted that buildings are not just buildings, but "*mediating objects* through which we create a world for ourselves and enter into a dialogue with the world around us."<sup>324</sup> Though research suggests that design functions in this way, "we usually do not stop to inquire whether a given device might have been designed and built in such a way that it produces a set of consequences logically and temporally *prior* to any of its professed uses."<sup>325</sup>

Despite the fact that both law and design control behavior, many fail to view the important symbolism or purpose behind many architectural decisions.<sup>326</sup> For this reason, people aggrieved by architecture may be less likely to think of bringing a lawsuit to challenge its injustices. Further, some courts simply do not see a role for judges in the context of decisions about the built

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322. Martin Heidegger, *Building Dwelling Thinking*, in POETRY, LANGUAGE, THOUGHT 143, 153 (Albert Hofstadter trans., Harper & Row 1971). Foucault, in his discussions of the Panopticon, noted that "architecture can shape tastes. When architecture 'is no longer built simply to be seen . . . but to permit an internal, articulated and detailed control[;] . . . architecture . . . operate[s] to transform individuals.'" Katyal, *supra* note 21, at 1131-32 (quoting MICHEL FOUCAULT, DISCIPLINE AND PUNISH 171 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1975)).

323. Caro, *supra* note 1, and accompanying text.

324. Gunter A. Dittmar, *Architecture as Dwelling and Building Design as Ontological Act*, CLOUD CUCKOO LAND 5 (1998), [http://www.cloud-cuckoo.net/openarchive/wolke/eng/Subjects/982/Dittmar/dittmar\\_t.html](http://www.cloud-cuckoo.net/openarchive/wolke/eng/Subjects/982/Dittmar/dittmar_t.html) [<http://perma.cc/V72S-RMPA>]; see also Joerges, *supra* note 28, at 412 ("Architects, for instance, may want people to communicate, and can then design their office buildings accordingly."). This idea of designing a space to foster certain types of discussions or interactions was examined in the work of architect and artist Lebbeus Woods. See *Lebbeus Woods - Biography*, EUR. GRADUATE SCH., <http://www.egs.edu/faculty/lebbeus-woods/biography> [<http://perma.cc/J8ZL-6LJB>] ("Woods works independently and creates various conceptual and experimental projects based on his theoretical positions regarding the role of architecture as a political force in society.").

325. Winner, *supra* note 28, at 125.

326. Architectural features often appear as mere design choices to uninformed observers. AMOS RAPOPORT, THE MEANING OF THE BUILT ENVIRONMENT: A NONVERBAL COMMUNICATION APPROACH 139 (1982) (noting that in parts of the Middle East, sloped roofs are viewed as a status symbol and flat roofs as a symbol of poverty; those who have sloped roofs are giving up space that could otherwise be used for sleeping and working).

environment.<sup>327</sup> For example, in Nashville, Tennessee, white members of the business community along with state highway officials decided to direct highway I-40 through the black community in North Nashville, even though such a route was indirect.<sup>328</sup> A federal lawsuit, brought by black and white citizens with interests in North Nashville, failed to stop the construction of the highway.<sup>329</sup> The plaintiffs raised due process and equal protection claims, alleging “that construction of the highway segment as planned will cause substantial damage to the North Nashville community, erecting a physical barrier between this predominantly Negro area and other parts of Nashville.”<sup>330</sup> However, the district court held that “[m]ost of the evidence presented by plaintiffs goes to the wisdom and not to the legality of the highway department’s decision.”<sup>331</sup> The court of appeals affirmed, finding no denial of due process or equal protection in the selection of the route, and instead determined that the “routing of highways is the prerogative of the executive department of government, not the judiciary” and that the “minimizing of hardships and adverse economic effects is a problem addressing itself to engineers, not judges.”<sup>332</sup> One could view this as a prime example of a court suggesting that architecture is not its business; the court failed to see this architectural decision as a regulatory decision with which it should be concerned. Rather, it saw the architectural decision as an issue for planners, engineers, and the executive—rather than the legislative or judicial—branches of government.<sup>333</sup>

327. Similarly, research also suggests that most courts do not consider the racial setting or community history and demographics (referred to as “racial territoriality”) underlying decisions and actions that take place in a given community. See Boddie, *supra* note 57.

328. Mohl, *supra* note 153, at 31; see also HELEN LEAVITT, SUPERHIGHWAY—SUPERHOAX 177-80 (1970); Richard J. Whalen, *The American Highway: Do We Know Where We’re Going?*, SATURDAY EVENING POST, Dec. 14, 1968, at 22-24, 57-58. This decision was made at a nonpublic meeting. Mohl, *supra* note 153, at 31.

329. See *Nashville I-40 Steering Comm. v. Ellington*, 387 F.2d 179 (6th Cir. 1967).

330. *Id.* at 181.

331. *Id.* (quoting memorandum opinion of district court). When a court determines that a given issue goes to wisdom and not legality, it has determined that the issue at hand either does not implicate legal matters, or it does not violate the law. See, e.g., *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 795 F. Supp. 175, 182 (W.D. Va. 1992), *aff’d*, 18 F.3d 269 (4th Cir. 1994), *rev’d*, 515 U.S. 819 (1995) (finding that “the plaintiffs’ complaints about the Guidelines are more properly directed at the wisdom and not the legality of the restrictions. . . . [because] the Board’s Guidelines are reasonable and do not violate any of the plaintiffs’ constitutional rights”); see also Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 76 (2007) (“The ‘properly limited’ role of the courts in a democratic society is to rule only on the legality, and not on the wisdom, of the decisions of political officials.”).

332. 387 F.2d at 185.

333. Of course, one could argue that courts regularly defer to administrative agencies when those agencies possess expertise on a given matter; perhaps the same reasoning applies to the

*B. The Jurisprudence of Exclusion Fails To Account for Architecture*

*1. Claims: Laws That Could Be Used To Challenge Architectural Exclusion*

In some instances, the barrier to striking down architectural exclusion is not a public or court that fails to recognize the regulatory nature of architecture, but rather the failure of our existing discrimination and exclusion jurisprudence to address architectural exclusion adequately. (Indeed, it is often insufficient for addressing legal forms of exclusion more generally.<sup>334</sup>) When analyzing exclusion through traditional legal methods, such as those addressed in Part III, plaintiffs and courts tend to focus on a few common provisions. If the government is the perpetrator of the alleged offensive action, then plaintiffs rely on the Equal Protection Clause of the U.S. Constitution<sup>335</sup> and, to a lesser extent, the Due Process Clause<sup>336</sup> and the Thirteenth Amendment.<sup>337</sup> When the plaintiff's claim is her attempt to secure property rights or status as a homeowner or renter, it is also common to see claims relying on statutes,<sup>338</sup> includ-

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court's willingness to defer to engineers and planners in the case of architectural decisions. However, it is also possible that the court here is not deferring to the administrators about design decisions merely because they have expertise in those matters, but because it does not view those design decisions as legal issues at all.

334. See, e.g., *supra* Part III.A.2 (explaining that existing jurisprudence is often insufficient for addressing exclusionary zoning).
335. U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”); see, e.g., *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 458 (1988); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Warth v. Seldin*, 422 U.S. 490 (1975); *James v. Valtierra*, 402 U.S. 137, 141–43 (1971).
336. See, e.g., *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977); *Holmes v. New York City Hous. Auth.*, 398 F.2d 262 (2d Cir. 1968).
337. See, e.g., *City of Memphis v. Greene*, 451 U.S. 100, 124–29 (1981); *Palmer v. Thompson*, 403 U.S. 217, 226–27 (1971); *Crenshaw v. City of Defuniak Springs*, 891 F. Supp. 1548, 1556–57 (N.D. Fla. 1995); *Atkins v. Robinson*, 545 F. Supp. 852, 880 (E.D. Va. 1982), *aff’d*, 733 F.2d 318 (4th Cir. 1984).
338. See, e.g., *Sanchez et al.*, *supra* note 119, at ix (“Civil rights laws such as Title VI of the Civil Rights Act of 1964 . . . provide some legal protections for minority communities faced with discriminatory transportation policies. Enforcement of these protections, however, has been limited and should be increased. Currently there are no generally accepted measures or standards by which to gauge whether transportation planning and outcomes of transportation policies are equitable, and it is extremely difficult to enforce any requirements for equitable transportation policies.”).

ing section 1982 of the Civil Rights Act of 1866<sup>339</sup> and the Fair Housing Act.<sup>340</sup> Plaintiffs often raise state constitutional claims as well.<sup>341</sup> These same claims arise in the context of architectural exclusion, with varying degrees of success.<sup>342</sup>

To the extent that courts have examined issues of architectural exclusion,<sup>343</sup> they have often done so in the context of transportation—road closures,<sup>344</sup> road design,<sup>345</sup> and the structure of transit systems.<sup>346</sup> As the cases below suggest, claims concerning architectural exclusion often sound in equal protection and section 1982.<sup>347</sup> A successful equal protection claim requires a plaintiff to show that race was a reason for an exclusionary decision. However, as Elise Boddie recognized, “[t]he requirement that plaintiffs prove discriminatory intent to

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339. Section 1982 of the Civil Rights Act of 1866 states that “[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.” 42 U.S.C. § 1982 (2012); ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION § 27:8 (Westlaw) (noting that “exclusionary zoning cases often include a § 1982 claim”).

340. The Fair Housing Act makes it unlawful to “otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin,” which could apply to architectural exclusion that blocks access to a person’s home. 42 U.S.C. § 3604(a) (2012); SCHWEMM, *supra* note 339, § 27:8 (“Though § 1982 remains available to curb public discrimination, the Fair Housing Act has now become the principal weapon against government land-use restrictions that are racially discriminatory.”). However, the examples of architectural exclusion in this Article are broader than claims surrounding access to housing; they speak to access to and through entire communities. *See, e.g.*, Southend Neighborhood Improvement Ass’n v. Cnty. of St. Clair, 743 F.2d 1207, 1209, 1212 (7th Cir. 1984) (suggesting that section 3604(a) requires a strong connection between the activity that is challenged and evidence that the activity will result in the denial or unavailability of housing).

341. McDougall, *supra* note 235, at 623-24.

342. While a complete analysis of all of these claims is beyond the scope of this Article, this section will examine a few cases that address architectural exclusion and glean lessons from these claims.

343. What follows is not a complete list of every case that has considered architectural exclusion. Rather, it represents a diligent effort to locate cases addressing issues relevant to the theme of this Article.

344. *See, e.g.*, City of Memphis v. Greene, 451 U.S. 100, 123 (1981). Some road closure cases involve challenges to actions by private parties by their neighbors. *See, e.g.*, Evans v. Tubbe, 657 F.2d 661 (5th Cir. Unit A Sept. 1981); Jennings v. Patterson, 460 F.2d 1021, 1022 (5th Cir. 1972).

345. Greer v. City of Chicago, No. 95-C-6338, 1996 WL 169414 (N.D. Ill. Apr. 9, 1996).

346. *See, e.g.*, Labor/Cmty. Strategy Ctr. v. Los Angeles Cnty. Metro. Transp. Auth., 564 F.3d 1115 (9th Cir. 2009); N.Y. Urb. League, Inc. v. New York, 71 F.3d 1031 (2d Cir. 1995); Comm. for a Better N. Phila. v. Se. Pa. Transp. Auth., 1990 U.S. Dist. Lexis 10895 (E.D. Pa. 1990), *aff’d*, 935 F.2d 1280 (3d Cir. 1991).

347. *See infra* Part IV.B.2.

establish an equal protection claim and cramped judicial interpretations of intent have significantly narrowed the practical scope and significance of constitutional law for redressing persistent racial inequality.”<sup>348</sup> Again, this is true not just in the case of architectural exclusion, but also with respect to more traditional, legal forms of exclusion.<sup>349</sup>

In the architectural exclusion cases discussed below, successful plaintiffs tend to prevail on claims under section 1982.<sup>350</sup> To allege a violation of section 1982, a plaintiff must show that the conduct of the defendants has impaired her property (or contract) interest.<sup>351</sup> Cases suggest that a plaintiff will be more likely to succeed if she can demonstrate that she has been intentionally discriminated against,<sup>352</sup> although the Supreme Court has not ruled out the possibility that discriminatory effect might be sufficient.<sup>353</sup> Section 1982 cases are explicitly about race as opposed to socioeconomic status; a poor, white plaintiff would not have a claim under section 1982. Further, the plaintiffs in the cases I examined are often members of racial or ethnic minorities who own or lease proper-

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348. Boddie, *supra* note 57, at 411 (footnote omitted). Unless the discriminatory intent behind an exclusionary architectural decision is made quite clear, it is generally not actionable. Even if there is discriminatory intent, in the context of infrastructure decisions, that intent is generally mixed in with more legitimate reasons. Even in the context of exclusion by law, it is quite common that “the applicable law or ordinance was facially neutral though its impact was felt exclusively or disproportionately by blacks.” Austin, *supra* note 118, at 672.

349. See *supra* Part III.C (discussing architectural and legal exclusion).

350. See *supra* note 339.

351. See *City of Memphis v. Greene*, 451 U.S. 100, 123 (1981) (“[T]he threshold inquiry under § 1982 must focus on the relationship between the [defendant’s conduct] and the property interests of the [plaintiff].”). This provision relates more to property transfers and holdings than access. One problem with using section 1982 in the context of architectural exclusion is that it relies on the African-American plaintiff’s possession of a stake in a piece of property. Architectural exclusion, understood broadly, is more about restricting access, regardless of where the excluded person lives. That said, it will often be the case that the access restriction is imposed between a black neighborhood and a wealthy, white one. If that is the case, the statute has more applicability. Of course, it does not apply to situations that exclude poor people who are not people of color.

352. See, e.g., *Gallagher v. Magner*, 619 F.3d 823, 839 (8th Cir. 2010), *cert. granted*, 132 S. Ct. 548 (2011), *cert. dismissed*, 132 S. Ct. 1306 (2012) (“Appellants’ claims pursuant to 42 U.S.C. §§ 1981, 1982, and 1985 are duplicative with their FHA disparate treatment claim, as the underlying constitutional violations for these claims require a showing of discriminatory intent.”); *Jackson v. Okaloosa Cnty.*, 21 F.3d 1531, 1543 (11th Cir. 1994) (“[P]laintiffs who make claims under § 1982 . . . have been required to allege that some intentional discrimination took place.”).

353. See Schwemm, *supra* note 339, §§ 27:4, 27:8, 27:19 (“The Supreme Court has not yet decided whether § 1982 includes a discriminatory effect standard.”).

ty and who are challenging small-scale examples of exclusionary architecture.<sup>354</sup> The line of section 1982 cases suggests that plaintiffs who are trying to bring a claim based not on a right of property ownership or possession, but rather on a right of access to or through a place (the broader concept of architectural exclusion addressed in this Article), might have less success using the Civil Rights Act; these plaintiffs would have to demonstrate, for example, that their exclusion was a result of the place that they lived, and therefore resulted in the impairment of a property or contractual interest.<sup>355</sup>

## 2. *Holdings: Application of Relevant Law to Architectural Exclusion*

The highest-profile case addressing architectural exclusion was the Supreme Court's analysis of a road closure in *City of Memphis v. Greene*.<sup>356</sup> In that case, the city of Memphis closed off a street that connected a white neighborhood, Hein Park, to a black neighborhood, after white residents petitioned for the road's closure.<sup>357</sup> The given reasons for the street closing were to reduce traffic through the white neighborhood; to increase safety for children in the neighborhood; and to reduce "traffic pollution" like noise and trash.<sup>358</sup> This "traffic pollution" was allegedly coming from the adjacent black neighborhood.<sup>359</sup> While the white residents initially petitioned for the closure of four streets, the city denied that request and determined that the closing of a single street was sufficient to remedy the complaints.<sup>360</sup> The physical manifestation of the city's decision to close the street involved granting a portion of land to the property owners who lived at the far north end of the street to be closed and erecting a barrier at "the precise point of black-white neighborhood separa-

354. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 438 (1968) ("[Section] 1982 operates upon the unofficial acts of private individuals . . ."); SCHWEMM, *supra* note 339, § 27:14 (noting that "[s]ome plaintiffs, such as black homeseekers who are the direct objects of the defendant's discrimination, are so obviously the intended beneficiaries of § 1982 that their standing is beyond question"); *id.* § 27:15 (noting that "minority homeseekers have standing to sue under § 1982 whenever a developer, landlord, homeowners' group, or any other defendant denies them the right to buy, rent, or negotiate for housing"); *see also* *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969) (holding that a white homeowner who wanted to rent his house to an African-American tenant had standing under section 1982 when defendants interfered with his actions).

355. *See infra* notes 371-373 and accompanying text.

356. 451 U.S. 100 (1981).

357. *See id.* at 102-05.

358. *Id.* at 104.

359. *Boddie*, *supra* note 57, at 416.

360. *Greene*, 451 U.S. at 103-04 (noting that the city denied the residents' request to close all four streets "[a]fter receiving objections from the police, fire, and sanitation departments").

tion.”<sup>361</sup> So the owners of this new property also gained the right to exclude others, including pedestrians, from the property (exclusion being an essential stick in the bundle of rights), and the physical barrier that was erected was sufficient to keep out motor vehicles.<sup>362</sup>

The plaintiffs—individuals and civic associations who sued on behalf of a class of black people who “own or stand to inherit property” in the black neighborhood affected by the closing—raised section 1982 and 1983 and Thirteenth and Fourteenth Amendment claims.<sup>363</sup> The Sixth Circuit found that the road closure constituted a badge of slavery in violation of the Thirteenth Amendment and that the plaintiffs were entitled to a remedy under section 1982.<sup>364</sup> That court held that the street closing would negatively affect black members of the community while benefiting white members; that the barrier between the white and black neighborhoods would limit contact between those groups; that the closure was racially motivated; and that evidence showed that the black homes would depreciate in value.<sup>365</sup> The Supreme Court overturned the Sixth Circuit, finding that the circuit court made its decision based on factual determinations that were not supported by the record,<sup>366</sup> and dismissed the plaintiffs’ claims.<sup>367</sup>

The Court found that there was “no evidence that the closing was motivated by any racially exclusionary desire.”<sup>368</sup> Rather, the Court acknowledged the legitimate tranquility and safety-related traffic concerns espoused by City Council members and residents at the public hearings.<sup>369</sup> Consequently, because it found discriminatory intent lacking, the Court quickly dismissed the equal protection claim.<sup>370</sup>

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361. Boddie, *supra* note 57, at 416.

362. *Greene v. City of Memphis*, 610 F.2d 395, 396 (6th Cir. 1979) (noting that it is unclear whether the new owners of the property will bar all foot traffic, but that “the proposed conveyance will leave them with the absolute right to do so if they wish”).

363. 451 U.S. at 105 n.6.

364. 610 F.2d at 405.

365. *See* 451 U.S. at 109-10 (explaining the holding of the lower court).

366. *See, e.g., id.* at 117-19 (discussing the lack of sufficient evidence regarding effects on property values).

367. *Id.* at 128-29.

368. *Id.* at 114.

369. *Id.* at 114-16, 119. Both here and in the context of the forthcoming analysis, it is possible that the Court was not saying that architectural exclusion can never be unconstitutional, but rather that it did not want to turn every single architectural decision into a question of federal law.

370. *Id.* at 119.



Turning to the section 1982 claim, the Court said that the key inquiry concerned the relationship between the closing of the street and the plaintiffs' property interests. The Court noted that "if the street closing severely restricted access to black homes," that type of property infringement would violate section 1982 "because blacks would then be hampered in the use of their property."<sup>371</sup> However, in the case at hand, the only injury was that the black residents could not travel on one particular public street and had to use others instead; this injury was not an "impairment to the kind of property interests" protected by section 1982.<sup>372</sup> This reasoning suggests the statute would not necessarily assist those whose rights of access through or to certain places were being hindered by the city in a way that was unrelated to their ownership or possession of property, which is often the case in the context of architectural exclusion.<sup>373</sup> Further, although the Court did not tie this point directly to its section 1982 analysis, the majority also found that, although the road closing would primarily affect black drivers, "the extent of the inconvenience [was] not great."<sup>374</sup> This suggests that the Civil Rights Act would protect those who owned or leased property only if their access was severely restricted, and not if the access restriction were slight.

Indeed, the *Greene* Court distinguished a similar Fifth Circuit case, *Jennings v. Patterson*, on the grounds that the restriction in *Greene* was not "severe," whereas the barricade in *Jennings* "severely" restricted the access of the black neighbors to their property.<sup>375</sup> In *Jennings*, the defendants, who were white, constructed a barricade on the road on which their houses were located.<sup>376</sup> This barricade prevented their black neighbors from using the western half of the road, which required them to travel an additional two miles to reach town.<sup>377</sup> In contrast, the sole white resident of that neighborhood was offered an easement to pass through the barricade.<sup>378</sup> The city refused to remove the barri-

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371. *Id.* at 123.

372. *Id.* at 124.

373. For example, Moses's low bridges did not adversely affect a property interest; rather, they adversely affected individuals who were reliant on public transit.

374. *Greene*, 451 U.S. at 111-12, 120-24; see also *Southend Neighborhood Improvement Ass'n v. Cnty. of St. Clair*, 743 F.2d 1207, 1212 (7th Cir. 1984) (holding that "[t]he impact of an allegedly wrongful activity clearly must be more than negligible to constitute a cognizable claim").

375. *Greene*, 451 U.S. at 123 n.36; see *Jennings v. Patterson*, 488 F.2d 436 (5th Cir. 1974).

376. *Jennings v. Patterson*, 460 F.2d 1021, 1022 (5th Cir. 1972).

377. *Jennings*, 488 F.2d at 439.

378. *Id.*

cade.<sup>379</sup> The *Jennings* court held that “[c]learly, these persons, because they are black, have been denied the right to hold and enjoy their property on the same basis as white citizens,”<sup>380</sup> and so found a violation of various provisions of the Civil Rights Act, including section 1982.<sup>381</sup>

Justice Marshall, who was joined in dissent in *Greene* by Justices Brennan and Blackmun, would have interpreted section 1982 more broadly and would have found a violation based on the facts in *Greene*.<sup>382</sup> He stated: “[U]ntil today I would have thought that a city’s erection of a barrier, at the behest of a historically all-white community, to keep out predominantly Negro traffic, would have been among the least of [section 1982’s] prohibitions.”<sup>383</sup> Unlike the majority, Justice Marshall appears to take into account the racial geography at play in Hein Park, considering “the street closure against the backdrop of the protracted history of racial segregation and racial separateness in Memphis,” as opposed to viewing the street closure as an isolated incident.<sup>384</sup>

Finally, the majority found that the inconvenience that resulted from the road closure did not measure up to the type of restraint on liberty that the Thirteenth Amendment meant to eliminate.<sup>385</sup> The Court stated that “the fact that most of the drivers who will be inconvenienced by the action are black” is of “symbolic significance,”<sup>386</sup> but failed to afford weight to that symbolism.<sup>387</sup> There are two problems with this line of reasoning. First, as Justice Marshall noted, just because an act is symbolic does not mean that courts are free to ig-

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379. *See id.* at 441.

380. *Id.* at 442.

381. 42 U.S.C. §§ 1981-1983, 1985 (2012). The court found that the plaintiffs were injured, in part, because they were denied “convenient access to downtown.” *Jennings*, 488 F.2d at 442.

382. *See City of Memphis v. Greene*, 451 U.S. 100, 136-55 (Marshall, J., dissenting).

383. *Id.* at 153.

384. Boddie, *supra* note 57, at 456-57; *see also Greene*, 451 U.S. at 137 (Marshall, J., dissenting) (“[A]s the District Court found, Hein Park ‘was developed well before World War II as an exclusive residential neighborhood for white citizens and these characteristics have been maintained.’”); THOMAS ROSS, *JUST STORIES: HOW THE LAW EMBODIES RACISM AND BIAS* 43 (1996) (describing Hein Park as “all-white, a situation first established by a set of racial covenants that precluded the sale of any property to anyone of another race”).

385. The goal of the Thirteenth Amendment is to “abolish slavery of whatever name and form and all its badges and incidents; to render impossible any state of bondage; to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another’s benefit.” *Bailey v. Alabama*, 219 U.S. 219, 241 (1911).

386. *Greene*, 451 U.S. at 128.

387. *Cf. Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (“To separate them from others . . . solely because of their race generates a feeling of inferiority as to their status in the community . . .”).

nore it.<sup>388</sup> Further, the majority failed to recognize that the harm was in fact more than merely symbolic and stigmatizing.<sup>389</sup> The road closure resulted in physical exclusion and directly regulated the behavior of individuals who lived in the predominantly black neighborhood. Whether the inconvenience of having to drive along another street is onerous or not, it required a change in behavior. Justice Marshall seems to have understood this point in a way that the majority did not.

*Greene* also suggests that the Court hewed to Blomley's idea of "traffic logic," wherein traffic engineers and city administrators are primarily interested in traffic flow and do not focus on the exclusionary effects of their decisions, though exclusion might be the result.<sup>390</sup> Here, the majority found that

[a]lmost any traffic regulation – whether it be a temporary detour during construction, a speed limit, a one-way street, or a no-parking sign – may have a differential impact on residents of adjacent or nearby neighborhoods. Because urban neighborhoods are so frequently characterized by a common ethnic or racial heritage, a regulation's adverse impact on a particular neighborhood will often have a disparate effect on an identifiable ethnic or racial group.<sup>391</sup>

There is a lot to unpack here. First, the Court referred to examples of architectural exclusion as "traffic regulation[s]."<sup>392</sup> In doing so, the Court seemed to acknowledge (as did the plaintiffs who brought this lawsuit) that design decisions can regulate, but the Court also downplayed these forms of regulation and suggested that they were not something that the Court needed to consider seriously. The majority used traffic logic to characterize traffic restrictions as innocuous; it ignored the idea that these restrictions might have pernicious undertones and failed to acknowledge a key tenet of urban planning scholarship – that our built environment often "embod[ies] a systematic social inequality."<sup>393</sup> Further, the court ignored the underlying reasons that neighborhoods often share a "common ethnic or racial heritage."<sup>394</sup> When the majority

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388. *Greene*, 451 U.S. at 152-53 (Marshall, J., dissenting) ("[I]t defies the lessons of history and law to assert that if the harm is only symbolic, then the federal courts cannot recognize it.").

389. *Id.* ("It is simply unrealistic to suggest, as does the Court, that the harm suffered by respondents has no more than 'symbolic significance' . . .").

390. Blomley, *supra* note 44, at 55.

391. *Greene*, 451 U.S. at 128.

392. *Id.*

393. Winner, *supra* note 3, at 124.

394. See *Greene*, 451 U.S. at 128; PAUL HARRIS, *BLACK RAGE CONFRONTS THE LAW* 72 (1997) ("[T]he [Greene] Court closes its eyes and ears to segregated housing patterns, racial hostil-

states that “the inconvenience of the drivers is a function of where they live and where they regularly drive—not a function of their race,”<sup>395</sup> it forgets that the location where these individuals live and drive is *itself* a function of their race: the white neighborhood at issue in this case was originally created to be an exclusively white neighborhood through the use of racially restrictive covenants.<sup>396</sup>

This case presents an example of architectural exclusion that was recognized by plaintiffs, who thought to bring a lawsuit, but it also demonstrates that our current jurisprudence, as applied by the Court, is likely insufficient to remedy the problem. In one sense, the majority’s holding in *Greene* follows a long line of exclusion-by-law cases that fail due to a lack of intent and likely reflects little more than the fact that the Supreme Court’s approach to discrimination is generally more restrictive than it could be.<sup>397</sup> But at base, *Greene* is not merely an example of a city using its laws to keep individuals out.<sup>398</sup> Rather, it is an example of a white community accomplishing its goal of keeping out black neighbors through the use of an architectural device—the barrier—rather than through the use of an impermissible legal device like a racially restrictive covenant or express zoning ordinance.<sup>399</sup>

Justice Marshall was able to see the exclusionary built environment in a way that the majority of his colleagues on the Court could not. He focused on “the significance of the barrier itself,” not just the legitimate traffic and safety

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ity, and the power of the white property owners to get the City of Memphis to do its racist bidding.”); see also *supra* Part III (examining the laws and norms that led to racial and socioeconomic exclusion from certain parts of a given community and surveying judicial and legislative treatment of those traditional forms of legal regulation).

395. *Greene*, 451 U.S. at 128.

396. ROSS, *supra* note 384, at 43 (“After the legal demise of [racially restrictive] covenants, private understandings maintained the exclusive character of Hein Park.”).

397. Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 338 (1997) (claiming that the Supreme Court takes a limited view of discrimination).

398. Others, in addition to the majority, seemed to view it this way. For example, an amici stated, “The sanctioning by this Court of the closing of West Drive may very well signal to white communities all over the country that municipal zoning power is available to physically exclude ‘undesirable elements,’ definable in racial terms, and thereby create a virtually all white ‘oasis’ in the midst of a rapidly deteriorating nether world.” Brief for the Affirmative Action Coordinating Center et al. as Amici Curiae at 2-3, *Greene*, 451 U.S. 100 (No. 79-1176), 1980 WL 339376. But here, this was not merely a zoning law that made it difficult for these individuals to access a place; it was physical exclusion.

399. See Brief for Respondents Owens, Cross, and Burse at 3-4, *Greene*, 451 U.S. 100 (No. 79-1176), 1980 WL 339375 (noting that a black civic association’s petition to the City Council stated that “this closing symbolize[d] in unmistakable terms a white neighborhood shutting its door on its adjacent Black and integrated communities”).

justifications for it.<sup>400</sup> Perhaps this is because he was “able to see through legal complexities and grasp real human suffering underneath the abstraction.”<sup>401</sup> Or, as the first black Supreme Court Justice, perhaps he understood implicit racial bias better than did his colleagues.<sup>402</sup> It is known that Justice Marshall believed his colleagues to be insensitive to issues pertaining to racism: ““You can’t name one member of this Court who knew anything about Negroes before he came to this Court.” Most of all, he resented the unwillingness of some of his colleagues to embrace minority preferences as a way of redressing past injustice.”<sup>403</sup> Regardless, Justice Marshall’s views did not carry the day, and the majority opinion set a precedent that makes architectural exclusion claims unlikely to be successful in subsequent cases with similar facts.

For example, in a similar situation, the city of Roanoke, Alabama, determined that a road had to be rerouted so that an industrial facility could be built.<sup>404</sup> The rerouting increased the travel distance between a black residential community and other points in the city.<sup>405</sup> The plaintiffs, black property owners, alleged substantive civil rights claims under the Thirteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and section 1982. The Eleventh Circuit recognized that the city was going through a period of racial unrest due to police brutality and economic difficulties in the black community, but it upheld the district court’s finding that under the totality of the circumstances, the plaintiff failed to prove any discriminatory intent, which would have been required for the equal protection claim. The court further held that because the case involved a road closing, the plaintiff’s Thirteenth Amendment and section 1982 claims were directly controlled by *Greene* and thus failed.<sup>406</sup>

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400. *Greene*, 451 U.S. at 140 (Marshall, J., dissenting).

401. John O. Calmore, *The Law and Culture-Shift: Race and the Warren Court Legacy*, 59 WASH. & LEE L. REV. 1095, 1119 (2002) (noting that Marshall’s dissent in *Greene* was representative of him serving as the Court’s conscience).

402. See also R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803 (2004) (recognizing that antidiscrimination law is limited in its ability to address stigma and implicit biases). See generally Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465 (2010) (discussing implicit bias).

403. HOWARD BALL, *A DEFIANT LIFE: THURGOOD MARSHALL AND THE PERSISTENCE OF RACISM IN AMERICA* 205 (1998) (quoting JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 261 (1994)).

404. *Terry Properties, Inc. v. Standard Oil Co.*, 799 F.2d 1523 (11th Cir. 1986).

405. *Id.* at 1528.

406. *Id.* at 1536.

However, the Fifth Circuit determined that plaintiffs raised valid claims under section 1982 in *Evans v. Tubbe*.<sup>407</sup> In *Evans*, the plaintiff, who was black, owned property that could be accessed only by a road that passed through the defendant's property.<sup>408</sup> The plaintiff alleged that the defendant constructed a gate across his property and gave a key to all of his white neighbors who required the road for access to their properties, but not to the plaintiff.<sup>409</sup> According to the court, section 1982, which protects property interests, would prohibit the defendant "from allowing whites but not blacks to traverse his land to obtain access to their property."<sup>410</sup>

Therefore, in instances in which black plaintiffs own property, and their access to or from that property is limited in a way that is different from white residents' access, they may have some success challenging architectural barriers using section 1982. However, past successes have generally occurred in situations involving black homeowners challenging small-scale, individual road closures. Moreover, successful plaintiffs seem to be able to easily prove intent to treat white residents differently (and better than) black residents; justifications based on "traffic logic" are less persuasive in cases such as these. In contrast, as is evidenced in the cases below, the same approach might not be successful when plaintiffs are challenging broader, larger infrastructural elements in their communities. Importantly, and perhaps due in part to the failure to recognize architecture as a regulatory tool, few of these types of cases have been heard and decided. Further, it is unclear where and how courts will draw the line between limitations on access that are "severe" and those that are merely "inconveniences."<sup>411</sup>

One example of a challenge to a broader, allegedly discriminatory infrastructure design falls into the line of cases in which advocates for transit equity have attempted to challenge systems that more heavily fund or subsidize forms of transit used by white people, while underfunding those used by people of color. The only successful case of this nature, which resulted in a consent decree,<sup>412</sup> is *Labor/Community Strategy Center v. Los Angeles County Metropolitan*

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407. 657 F.2d 661 (5th Cir. Unit A Sept. 1981).

408. *Id.* at 662.

409. *Id.*

410. *Id.* at 662 n.2.

411. See *supra* note 11 and accompanying text; *supra* note 375 and accompanying text.

412. "A consent decree is a settlement, in the form of a court order, containing injunctive relief in which the trial court agrees to maintain jurisdiction over the case." Thomas M. Mengler, *Consent Decree Paradigms: Models Without Meaning*, 29 B.C. L. Rev. 291, 292 (1988).

*Transportation Commission* (the Bus Riders Union case).<sup>413</sup> In that case, the Union alleged that the Metropolitan Transportation Authority (MTA) discriminated against the poor and people of color who lived in Los Angeles County, in violation of the Fourteenth Amendment and the Civil Rights Act.<sup>414</sup> The Union alleged that the MTA spent “a disproportionately high share of its resources on commuter rail services, whose primary users were wealthy non-minorities, and a disproportionately low share on bus services, whose main patrons were low income and minority residents.”<sup>415</sup> Before the consent decree was entered, the district court certified a class of “[a]ll poor minority and other riders of MTA buses who are denied equal opportunity to receive transportation services because of the MTA’s operation of a discriminatory mass transportation system.”<sup>416</sup>

When architectural exclusion cases of this sort do not settle, and move forward on constitutional claims, they face the same problems that run-of-the-mill exclusion-by-law discrimination cases face—the difficulty of proving intent. In an unpublished case, *Greer v. City of Chicago*, the U.S. District Court for the Northern District of Illinois dismissed the federal claims, including due process and equal protection claims, brought by a plaintiff challenging the City of Chicago’s placement of cul-de-sacs and a median.<sup>417</sup> The plaintiff alleged that the location of these architectural features was chosen to separate the Jackson Park Highlands neighborhood from the rest of the South Shore.<sup>418</sup> The opinion does not reveal the race or socioeconomic status of the plaintiff, but the court held that the plaintiff failed to allege that the government intentionally discriminated against him or treated him differently due to his membership in a certain class.<sup>419</sup>

413. See Yan, *supra* note 119, at 1137 (noting that “[t]ransit justice advocates have developed two lines of substantive equity cases,” the first “focus[ing] on the distribution of subsidies across transit lines, typically alleging that transit agencies favored rail lines with predominantly white riderships used to commute between suburbs and central cities over bus lines with predominantly minority riderships used primarily for short, intra-city trips,” and second “examin[ing] the siting of transit lines themselves” (citing Findings of Fact and Conclusions of Law re: Preliminary Injunction, Labor/Cmty. Strategy Ctr. v. L.A. Cnty. Metro. Transp. Comm’n, No. CV 94-5936 (C.D. Cal. Sept. 21, 1994))).

414. Labor/Cmty. Strategy Ctr. v. L.A. Cnty. Metro. Transp. Auth., 564 F.3d 1115, 1117 (9th Cir. 2009).

415. *Id.*

416. *Id.*

417. See *Greer v. City of Chicago*, No. 95-C-6338, 1996 WL 169414, at \*1-2 (N.D. Ill. Apr. 9, 1996).

418. See *id.* at \*1.

419. See *id.* at \*2.

Although the *Greer* opinion gives no details about the reasons for the architectural decisions, newspaper articles hint at the intent behind the City's challenged design: one reporter suggested that Mayor Daley had plans to "block off residential streets with cul-de-sacs and iron gates to reduce drive-by shootings and other crimes,"<sup>420</sup> while another stated that the cul-de-sacs and traffic circles were installed in the area to reduce traffic volume and speed.<sup>421</sup> While the intent behind the architecture might legitimately relate to traffic calming and crime prevention,<sup>422</sup> another article asserts that these architectural devices were installed with the more nefarious intent to exclude on the basis of race and class: "[T]he barriers [were] designed to keep less well-off blacks on the other side of the [subway] tracks. And . . . some of the well-to-do-blacks whose beautiful North Beverly homes reflect their economic status are just as happy to let their poorer brethren stay far away."<sup>423</sup> Regardless of the actual intent, the effect—as felt by members of the community—was that low-income African-Americans would be "isolate[d]"<sup>424</sup> and "put . . . in a cage."<sup>425</sup>

The elected City Council—which handled many land-use issues in the community—made these architectural decisions in conjunction with the Chicago Department of Transportation.<sup>426</sup> In allowing those architectural elements to remain in place, the *Greer* court stated that "municipal decisions regarding land use are given considerable deference, even under an equal protection anal-

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420. Cheryl W. Thompson, *Cul-de-sac Plan Jeered on South Side*, CHI. TRIB., Jan. 24, 1993, [http://articles.chicagotribune.com/1993-01-24/news/9303171874\\_1\\_chase-criminals-mayor-richard-daley-lawrence-bloom](http://articles.chicagotribune.com/1993-01-24/news/9303171874_1_chase-criminals-mayor-richard-daley-lawrence-bloom) [<http://perma.cc/SPX5-Z453>].

421. Cindy Richards, *Cul-de-sacs and Circles Divert Cars, Not Criticism*, CHI. TRIB., May 15, 1998, [http://articles.chicagotribune.com/1998-05-15/news/9805150290\\_1\\_cul-de-sacs-traffic-circles-parallel-street](http://articles.chicagotribune.com/1998-05-15/news/9805150290_1_cul-de-sacs-traffic-circles-parallel-street) [<http://perma.cc/66F9-Y827>] (noting that "traffic volume has been reduced in those areas [including parts of the South Side] by 50 percent since [cul-de-sacs] were installed").

422. Sometimes those undertaking exclusionary architectural actions, such as members of a city council, might not be acting with obvious intent or animus, due in part to the background of unconscious racism in the United States. Lawrence noted, in relation to *Memphis v. Greene*, that "[i]ndividual members of the city council might well have been unaware that their continuing need to maintain their superiority over blacks, or their failure to empathize with how construction of the wall would make blacks feel, influenced their decision." Lawrence, *supra* note 14, at 357 (citation omitted); *see also id.* at 357 n.185 (noting that "Justice Stevens' opinion in *Memphis* is itself an example of how a decision need not involve self-conscious racial animus to be race-dependent").

423. Pat Somers Cronin, Op-Ed, *The Road (or Cul-de-sac) to Disaster*, CHI. TRIB., May 21, 1998, [http://articles.chicagotribune.com/1998-05-21/news/9805210086\\_1\\_cul-de-sacs-fire-board-police-board](http://articles.chicagotribune.com/1998-05-21/news/9805210086_1_cul-de-sacs-fire-board-police-board) [<http://perma.cc/4DX5-W9U3>].

424. Thompson, *supra* note 420.

425. Cronin, *supra* note 423.

426. Richards, *supra* note 421.



ysis,” citing *Memphis v. Greene*.<sup>427</sup> This statement implies that the court may have viewed *Greer* as a standard land-use case, not one that was more specifically about architecture. Regardless, the plaintiff’s failure to prove intentional discrimination was fatal to his equal protection claim.<sup>428</sup>

In a similar case, *Thompson v. Department of Housing and Urban Development*, plaintiffs, who were African-American residents of public housing in Baltimore County, alleged that the construction of a fence around the Hollander Ridge public housing project was a violation of their Equal Protection rights.<sup>429</sup> They claimed that the fence was constructed to “physically . . . separate” the black residents of Hollander Ridge from the adjacent white neighborhood, Rosedale.<sup>430</sup> Many Rosedale residents were concerned about public safety and wanted separation from the high levels of crime at Hollander Ridge;<sup>431</sup> the court noted that on the days when the elderly residents of the housing project would receive social security and welfare checks, the high-rise area of the complex was effectively an “open air drug and sex market.”<sup>432</sup> The court acknowledged that the fence did achieve a physical separation and also recognized that the “troubled” relationship between the residents of Hollander Ridge and Rosedale was due, at least in part, “to racial animus harbored by some of the Rosedale residents.”<sup>433</sup>

The court addressed the intent and motives of the local elected officials, the local housing authority, and HUD, all of whom undertook actions that resulted in construction of the fence. The court found that the local elected officials were acting in response to the concerns of their constituents. However, the court did not believe that those officials had discriminatory motives for seeking the fence, although “they were responding to a group of constituents, some of whom did have such motives.”<sup>434</sup> The court further found that the housing authority and HUD were both acting for legitimate nondiscriminatory reasons.<sup>435</sup>

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427. *Greer v. City of Chicago*, No. 95-C-6338, 1996 WL 169414, at \*2 (N.D. Ill. Apr. 9, 1996) (citing *Memphis v. Greene*, 451 U.S. 100 (1981)).

428. *Id.* As this Article has addressed, discriminatory effect alone is not enough in the context of an equal protection claim. See *supra* note 244 and accompanying text.

429. 348 F. Supp. 2d 398, 411 (D. Md. 2005).

430. *Id.* at 428.

431. *Id.* at 429; Teixeira, *supra* note 105.

432. *Thompson*, 348 F. Supp. 2d at 429.

433. *Id.* at 428 n.56.

434. *Id.* at 431.

435. *Id.* at 431-32 (finding that, for example, they believed the fence would be an amenity to the senior housing they planned to build on the site in the future, functioning like a fence around a gated community).

Thus, the court held that the plaintiffs could not make out a claim of intentional discrimination.<sup>436</sup>

Synthesizing these cases and considering them alongside the more traditional methods of exclusion discussed in Part III – racial zoning, racially restrictive covenants, and exclusionary zoning – it appears that the judicial treatment of different methods of exclusion will depend on a number of factors. These include whether the constraint is being imposed on a legal right of access or a physical right of access; whether the constraint is being put in place by a governmental actor or a private actor; the extent to which the method is a legacy issue or ongoing; and whether it was undertaken with an overtly racially discriminatory purpose, merely has discriminatory or exclusionary effects, or whether there were mixed motives. The bottom line is that (a) few of these cases have even been brought due to a failure to consider architecture as regulation; and (b) those that have been brought face the same types of challenges that more traditional methods of exclusion, such as exclusionary zoning, face in the courts.

## V. PROBLEMS AND SOLUTIONS

### A. *Legacy Problems and the Enduring Nature of Architecture*

There is some question as to whether the problems discussed in this Article are merely legacy problems (that is, present physical manifestations of policies that are now defunct), problems that are still ongoing, or a bit of both. Answering this question is important not only to understand the severity of the problem more fully, but also for the purposes of considering appropriate solutions. Certainly, many of the examples of architectural exclusion discussed herein are associated with the urban renewal and highway projects of the 1950s and 1960s. Those projects are no longer being carried out and are now viewed by many as mistakes.<sup>437</sup> Additionally, while most forms of exclusion by law have been declared illegal and the laws repealed, the architecture built in re-

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436. *Id.* at 432.

437. See, e.g., Charles E. Cohen, *Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings*, 29 HARV. J. L. & PUB. POL'Y 491, 547-48 (2006) (describing the mistake of urban renewal); Robert C. Ellickson, *The Law and Economics of Street Layouts: How a Grid Pattern Benefits a Downtown*, 64 ALA. L. REV. 463, 491 (2013) (referring to urban renewal-related superblocks as a "mistake in policy"); Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 953 (2003) ("Despite the enthusiasm of 'slum clearance' proponents, whose viewpoint the Supreme Court accepted with vigor in *Berman v. Parker*, urban renewal generally is considered an abysmal failure.").

sponse to those laws remains in place. That said, exclusionary zoning is still quite common, and the exclusionary placement of transit stops and transit infrastructure is ongoing.<sup>438</sup>

Even if architectural exclusion is predominantly a legacy problem, there is still value in pointing out historical issues, especially when they are issues that constrain present behavior and of which the law does not take account. Further, even if some more progressive cities and planning departments now consider some of these issues in making decisions about the built environment, the legacies of the past continue to regulate in the present.<sup>439</sup> Architecture is enduring; the layout of cities is hard to change.<sup>440</sup> As Eduardo M. Peñalver notes, “The durability of land-use decisions’ consequences and the finite quantity of land mean that the decisions that current owners make about how to use their land will reverberate for generations.”<sup>441</sup> Our roads, bridges, and structures are built in place and made to withstand time and the elements; removal and redevelopment are very expensive.<sup>442</sup> And while courts and legislators typically

438. See *supra* Part II.A.

439. Moreover, the government must now comply with the mandates of the National Environmental Policy Act (NEPA) when undertaking large projects involving federal funding, such as many transportation projects involving highways, bridges, and transit stop placement. 42 U.S.C. § 4321 (2012). Although NEPA is often criticized for lacking “teeth”—it is an information-forcing statute, not one that requires specific actions as a result of the information discovered—it does require consideration of the “human health, economic, and social effects” that a project will have on low-income and minority communities in some instances. William J. Clinton, *Memorandum for the Heads of All Departments and Agencies*, WHITE HOUSE (Feb. 11, 1994), <http://www.dot.ca.gov/ser/vol1/sec1/ch1fedlaw/EO12898.pdf> [<http://perma.cc/RN2E-FCR4>]; Sanchez et al., *supra* note 119; see also Exec. Order No. 12,898, 59 Fed. Reg. 7629 (1994) (providing that “each Federal agency shall . . . identify[] and address[] . . . disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations”).

440. “[U]nlike fashions, which come and go, the enduring nature of architecture is seen by the Gothic and Renaissance examples still standing (and in use!) today . . . .” See *History*, CAL. ARCHITECTS BD., [http://www.architect.ca.gov/architects\\_in\\_demand/history.shtml](http://www.architect.ca.gov/architects_in_demand/history.shtml) [<http://perma.cc/7B3Y-6689>]; cf. Lebbeus Woods, *Inevitable Architecture*, LEBBEUS WOODS (July 9, 2012, 9:38 PM), <http://lebbeuswoods.wordpress.com/2012/07/09/inevitable-architecture> [<http://perma.cc/UK7L-RXRR>] (“Most architects dislike the idea of buildings’ decay and work hard to avoid it by the careful selection of materials, systems, and methods of assembly that will withstand the forces of nature continually attacking them, chiefly those of weather.”).

441. Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 853 (2009).

442. See, e.g., Ryan Cooper, *Why Is It So Expensive To Build a Bridge in America?*, WK., Mar. 10, 2014, <http://theweek.com/article/index/257684/why-is-it-so-expensive-to-build-a-bridge-in-america> [<http://perma.cc/2TRV-P7R5>] (“U.S. infrastructure isn’t just a tad higher than the next most expensive country—we pay something like twice as much as our closest peer.”); Angie Schmitt, *Why Are American Infrastructure Projects So Expensive?*, STREETS BLOG (Aug.

eliminate old laws upon deciding that they are no longer valid—such as the eradication of racial zoning and the removal of old racially restrictive covenants from chains of title—it is much more difficult to remove exclusionary architecture from the built environment. This is one reason that many courts do not require people to tear down structures that were constructed in violation of ordinances; violators often pay a fine instead. The built environment continues to regulate; as a legal matter, nothing is currently *forcing* municipalities to confront the continuing harms that result from those past architectural decisions. This is a problem because “there are no meaningful lines between that which the state tolerates, that which it encourages, and that which it effectuates.”<sup>443</sup> Further, these decisions are problematic because public infrastructure and public spaces are such important and dominant features of the built environment.<sup>444</sup>

There are a number of reasons that even legacy effects of the exclusionary built environment are problematic and should be ameliorated. First, as many commentators have noted, a person who is physically excluded from a place often feels stigmatized and degraded;<sup>445</sup> preventing stigma was key to the Court’s holding in *Brown v. Board of Education*.<sup>446</sup> Indeed, a key element of the civil rights movement was to further and promote “unencumbered movement” as an important right.<sup>447</sup> When certain groups of people are intentionally kept out

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29, 2012), <http://streetsblog.net/2012/08/29/why-are-american-infrastructure-projects-so-expensive> [<http://perma.cc/8GFX-6NRX>] (“The state of Wisconsin is preparing to spend \$1.7 billion on an interchange. Kentucky and Indiana are getting ready to spend \$2.6 billion on a bridge. The Portland region will spend at least \$3.2 billion on its own bridge/highway. And New York’s car-centric Tappan Zee Bridge replacement is projected to cost in the range of \$5 billion. Part of the reason these projects cost so much is that they involved rolling major road widenings into what should be simpler infrastructure fixes.”).

443. Sager, *supra* note 226, at 770 (1969).

444. The federal government owns and manages approximately 635 to 640 million acres of land in the United States. ROSS W. GORTE ET AL., CONG. RESEARCH SERV., FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 1 (2012). Although much of that land is far from cities and undeveloped, publicly owned “[c]ity streets and sidewalks account for about one-quarter of developed urban land . . . .” Katyal, *supra* note 21, at 1095. Thus, the government controls a large portion of the U.S.-built environment, and the decisions it makes in creating these spaces can have dramatic impacts on populations.

445. Boddie, *supra* note 57, at 420.

446. 347 U.S. 483, 494 (1954) (recognizing that segregation “generates a feeling of inferiority as to [black students’] status in the community. . . .”); Lawrence, *supra* note 14, at 350-51 (discussing the role of stigma in *Brown*).

447. Boddie, *supra* note 57, at 420 n.114; see also Timothy Zick, *Constitutional Displacement*, 86 WASH. U. L. REV. 515, 517 (2009) (“[T]here is no more fundamental liberty than the freedom to choose one’s own place. The loss of that freedom can result in severe forms of not only personal, but constitutional, displacement.”).

of, or made to have a hard time accessing, certain parts of a community, it limits their freedom and harms their dignity.<sup>448</sup>

Similarly, extensive research has explored the “geography of opportunity,” which suggests that the place in which a person grows up and lives has a dramatic impact on her future earning ability and educational attainment.<sup>449</sup> The mechanisms through which neighborhoods have an impact on future outcomes for their residents are much debated, but part of the effect likely results from the lack of political power and access to public resources and institutions that often come with residence in a low-income neighborhood.<sup>450</sup> The geography of opportunity provides insight into the social costs of segregation in housing and the built environment, which tends to heavily affect racial minorities; their exclusion “engenders their absence from valuable social networks.”<sup>451</sup>

Finally, because the built environment exists as a result of direct decisions by policymakers who are employed by the state (or municipality), it is effectively the state that has created the exclusion. As Reva Siegel has reminded us, on an antisubordination conception of equal protection “it is wrong for the state to engage in practices that enforce the inferior social status of historically oppressed groups.”<sup>452</sup> By failing to actively alleviate the continuing harms caused by the exclusionary environment, the state allows those practices to continue. However, because there is at present no affirmative duty for the state

448. Boddie, *supra* note 57, at 423 (“Because they belong to one space but not another, their dignity as individuals is spatially contingent.”); *see also* Schuette v. Coalition To Defend Affirmative Action, 134 S. Ct. 1623, 1676 (2014) (Sotomayor, J., dissenting) (“Race matters because of . . . the silent judgments that reinforce that most crippling of thoughts: ‘I do not belong here.’”); Zick, *supra* note 447, at 517 (discussing freedom).

449. *See, e.g.*, XAVIER DE SOUZA BRIGGS, *THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA* (2005); George C. Galster & Sean P. Killen, *The Geography of Metropolitan Opportunity: A Reconnaissance and Conceptual Framework*, 6 HOUSING POL’Y DEBATE 7 (1995); James E. Rosenbaum et al., *How Do Places Matter? The Geography of Opportunity, Self-Efficacy and a Look Inside the Black Box of Residential Mobility*, 17 HOUSING STUD. 71 (2002); Gregory D. Squires & Charis E. Kubrin, *Privileged Places: Race, Uneven Development and the Geography of Opportunity in Urban America*, 42 URB. STUD. 47 (2005).

450. *See generally* Robert J. Sampson, *Moving to Inequality: Neighborhood Effects and Experiments Meet Social Structure*, 114 AM. J. SOC. 189 (2008) (discussing causal claims for the effect of neighborhoods on employment outcomes); Squires & Kubrin, *supra* note 449, at 47 (arguing that poor education, housing, and other resources in neighborhoods contribute to future poor employment opportunities).

451. Strahilevitz, *supra* note 59, at 489.

452. Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1472-73 (2004); *see also* Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) (noting that the separation of black students “solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone”).

to act to remove legacy exclusionary architecture, there is likely no current state action that could be challenged in court.

Although no laws currently force local governments to reconsider or reconfigure their exclusionary infrastructures, cities and states do have the opportunity, and perhaps even the incentive, to significantly alter the built environment and remedy some of the impacts of architectural exclusion. The nation's infrastructure is in substantial decline and in need of major revitalization; many of the roads and bridges in the United States were put in place over fifty years ago, and these systems are becoming overwhelmed or worn out.<sup>453</sup> Moreover, there are substantial economic incentives to revitalize the country's failing infrastructure, and numerous initiatives have been undertaken in recent years to address these issues.<sup>454</sup> For example, more than \$91 billion of capital is invested annually to improve the nation's highways and roads.<sup>455</sup> Consequently, there exists an opportunity for localities to address the impacts of architectural exclusion as part of the much-needed rebuilding and repairing of outdated infrastructure.

Without large-scale rebuilding, architecture and the built environment are durable and hard to change. Therefore, it will likely be more difficult to eradicate existing exclusionary infrastructure than to prevent the creation of future barriers to access, assuming that citizens, city planners, elected officials, judges, and lawmakers begin to take the ideas expressed here into consideration. The solutions proposed below will discuss ways to alleviate the harms of existing architectural exclusion and ways to prevent it in the future.

### *B. Proposed Solutions: Courts and Legislators*

#### *1. Judicial Solutions Are Unlikely To Be Successful*

Courts could take action to address the harms associated with architectural exclusion. However, as was detailed above, current civil rights law does not

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453. 2013 Report Card for America's Infrastructure, AM. SOC'Y CIV. ENGINEERS 3 (Mar. 2013), <http://www.infrastructurereportcard.org/a/documents/2013-Report-Card.pdf> [<http://perma.cc/X69J-GPU4>].

454. *Id.* at 3 ("Six infrastructure sectors benefited from either an increase in private investment, targeted efforts in cities and states to make upgrades or repairs, or from a one-time boost in federal funding."); *id.* at 4 ("[I]nvesting in infrastructure is essential to support healthy, vibrant communities . . . [and] is also critical for long-term economic growth, increasing GDP, employment, household income, and exports.").

455. *Id.* at 48-50. Moreover, in the United States \$12.8 billion is spent annually on bridge construction and refurbishment, over \$75 billion has been invested in railroads since 2009, and over \$52 billion has been spent on public transit since 2008. *Id.* at 6-7, 53.

show much promise for architectural exclusion claims. It is possible that the courts could change course by adopting a more modernized or progressive view of the Equal Protection Clause, or by imposing a higher level of scrutiny in cases that involve architectural exclusion claims. Courts could also issue injunctive relief if evidence of architectural exclusion is severe. This would require a locality to modify the built environment to remove exclusionary barriers to access.

However, this is all quite unlikely given the current political and judicial climate. Recall that most courts do not even find fault with exclusionary zoning, which is a form of regulation by law.<sup>456</sup> Some commentators have therefore suggested that the exclusionary zoning problem is one that should be solved by legislatures rather than courts. For example, Daniel R. Mandelker concluded that “the federal courts should not expansively read the fourteenth amendment to require a wholesale judicial review of exclusionary zoning practices absent proof of discriminatory racial intent. Congressional, rather than judicial, correction of racially segregative zoning is urged as a more attractive alternative.”<sup>457</sup> Perhaps the same could be said for exclusionary architecture: this is a problem that local (or state) governments should attack, not the courts. Those legislative or administrative solutions could force consideration of architectural exclusion in new design, could be applied retroactively to force removal of exclusionary architecture in some cases, and could provide a statutory cause of action in the event that decisions are made in violation of their mandates. However, even a statutory solution would require legislators and administrative staff to take seriously the idea of architecture as regulation.

## 2. *Legislative Solutions Carry Some Promise*

Elected officials at the federal, state, or local level could take actions that would alleviate some of the harms imposed by the exclusionary built environment. These solutions could address legacy effects of exclusionary architecture by forcing reformation of certain existing discriminatory infrastructure,<sup>458</sup> requiring consideration of architectural exclusion in the funding or construction

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456. See *supra* Part III.A.2 (discussing exclusionary zoning).

457. Daniel R. Mandelker, *Racial Discrimination and Exclusionary Zoning: A Perspective on Arlington Heights*, 55 TEX. L. REV. 1217, 1219 (1977). Of course, this approach has not seen much traction since the time of Mandelker’s writing.

458. Katyal suggests that governments could “redesign city streets to reduce crime . . . [by altering] the placement of bus stops and other public transit facilities so that they are not near alleys and other easy escape routes.” Katyal, *supra* note 21, at 1095. The same infrastructure could be altered so that it no longer divides and cuts off neighborhoods, and instead increases access.

of new infrastructure, and providing a route for potential plaintiffs to sue in the future if a locality fails to comply with the new requirements set forth in the law. This legislative solution could be modeled on similar statutory requirements in related areas, including environmental law and disability law.

*C. An Architectural Bent on an Environmental Impact Statement*

When undertaking large projects, administrators are often required to conduct a detailed environmental review pursuant to state or federal law.<sup>459</sup> This analysis could be expanded to include consideration of a proposed project's impacts on the exclusion of certain underrepresented groups, including poor people and people of color.<sup>460</sup> Indeed, one could arguably read some existing state environmental statutes to incorporate those concerns into an analysis of a proposed project's social impacts, including impacts on neighborhood character and socioeconomics.<sup>461</sup> This approach would allow actors to concern themselves with the exclusionary effects of architectural design choices rather than with the motivations underlying those choices.

A similar approach has been used to address environmental justice concerns: President Clinton issued an executive order<sup>462</sup> calling for numerous federal agencies to ensure that the environmental effects of their policies and programs would not disproportionately affect minorities and the poor.<sup>463</sup> However, the executive order is non-binding and legally unenforceable.<sup>464</sup> Ac-

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459. See, e.g., National Environmental Policy Act, 42 U.S.C. §§ 4321-4347 (2012); California Environmental Quality Act, CAL. PUB. RES. CODE §§ 21000-21189.3 (West 2012).

460. Similarly, perhaps inclusiveness could be used as a screening criterion for projects that require grants, including those for housing, transportation, or community development.

461. This was the argument made in *Chinese Staff & Workers' Ass'n v. Burden*, 910 N.Y.S.2d 761 (N.Y. App. Div. 2011).

462. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994).

463. For a detailed overview of Executive Order 12,898 and its efficacy, see generally Amanda K. Franzen, *The Time Is Now for Environmental Justice: Congress Must Take Action by Codifying Executive Order 12898*, 17 PENN. ST. ENVTL. L. REV. 379 (2009). The order directs that each Federal agency "[t]o the greatest extent practicable and permitted by law . . . shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations." Exec. Order No. 12,898, 59 Fed. Reg. at 7629.

464. Exec. Order No. 12,898, 59 Fed. Reg. at 7632-33 (noting that it is "not intended to, nor does it create any right, benefit, or trust responsibility, substantial or procedural, enforceable at law or equity by a party against the United States"). Moreover, the order states that it should not be "construed to create any right to judicial review involving compliance or non-compliance of the United States, its agencies, its officers, or any other person." *Id.* at 7633.



cordingly, agencies are not forced to give any particular weight to environmental justice concerns and their effects in their analysis for rulemaking.<sup>465</sup> The executive order “relies entirely on internal enforcement, does not create a right to sue the government or allow for judicial remedies when agencies fail to comply with the executive order . . . [resulting] in a major weakness of the executive order . . . [which] is possibly the principal reason it has not had a greater impact.”<sup>466</sup> An amendment to the text of the environmental review statutes requiring this kind of exclusionary analysis would have a stronger impact, especially in states like California and New York, where state-level Environmental Policy Acts require mitigation of significant environmental effects.<sup>467</sup> That said, an architectural exclusion analysis with a mitigation obligation might make in-fill development even more difficult than it already is; there is a risk that such a requirement could be used defensively by opportunistic opponents who want to avoid change (which might result in further entrenching an exclusive status quo).<sup>468</sup>

#### *D. An Architectural Inclusion Version of the Americans with Disabilities Act*

In considering the legal regulation of exclusion, it is useful to make a comparison to the disability rights movement, which “pointed out the countless ways in which machines, instruments, and structures of common use—buses, buildings, sidewalks, plumbing fixtures, and so forth—made it impossible for many handicapped persons to move about freely, a condition that systematically excluded them from public life.”<sup>469</sup> Indeed, the disability rights literature echoes many of the same concerns raised in this Article. For example, speaking of disabled individuals, Robin Paul Malloy stated, “in order to be a full participant in one’s community, one must be able to enjoy reasonable access to the

465. See Joshua Glasgow, *Not in Anybody’s Backyard? The Non-Distributive Problem with Environmental Justice*, 13 BUFF. ENVTL. L.J. 69, 113 (2005).

466. Franzen, *supra* note 463, at 389–90 (highlighting the failures of the order by showing how the Bush Administration was able to roll back many of the gains made in environmental justice during the 1990s through cuts to the EPA’s budget regarding environmental justice oversight, including Superfund).

467. See, e.g., California Environmental Quality Act, CAL. PUB. RES. CODE §§ 21000–21189.3 (West 2012); New York State Environmental Quality Review Act, N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to -0117 (McKinney 2015).

468. See, e.g., Todd Nelson, *Save Tara and the Modern State of the California Environmental Quality Act*, 45 LOY. L.A. L. REV. 289, 292–93 (2011) (“CEQA challenges have become an effective tool to block projects that opponents deem undesirable, even if the reasons for their opposition are seemingly unrelated to environmental impacts.”).

469. Winner, *supra* note 28, at 126; see also *supra* note 30 (summarizing cases suggesting that the ADA was needed due to the neglect of disabled individuals’ needs).

spaces and places that make up civic life.”<sup>470</sup> This reasoning should extend beyond access for individuals with disabilities to all individuals, including poor people and people of color.<sup>471</sup> A statute like the Americans with Disabilities Act (ADA) aimed at architectural exclusion would seem to make sense: currently the ADA prohibits the construction of a separate entrance for disabled individuals,<sup>472</sup> but the city of New York is allowing developers to construct apartment buildings with “poor doors” – a separate entrance for low-income tenants in mixed-income buildings.<sup>473</sup>

Despite these similarities, there are important differences between the disability rights movement and the ideas behind architectural exclusion. First, there is general consensus that individuals with disabilities were excluded by infrastructure that resulted more from “long-standing neglect than from anyone’s active intention.”<sup>474</sup> Indeed, the ADA does not require intent to find discrimination.<sup>475</sup> This distinction between neglect and intent raises important questions. For example, why does it seem that the law is more protective in the context of neglect, which is less malicious? Or is it not so much the intent versus neglect distinction, but rather that the law cares more about disabled individuals than about racial minorities or poor people? Is this a function of who has a better ability to organize? Or is it because many white, wealthy people have disabled individuals in their own families? Second, many examples of architectural exclusion occur at a citywide, infrastructural scale, while much of

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470. Robin Paul Malloy, *Inclusion by Design: Accessible Housing and Mobility Impairment*, 60 HASTINGS L.J. 699, 710 (2009).

471. Interestingly, many individuals with disabilities self-identify as members of a distinct minority group consisting of people with disabilities. Harlan Hahn, *Antidiscrimination Laws and Social Research on Disability: The Minority Group Perspective*, 14 BEHAV. SCI. & L. 41, 48 (1996).

472. The main entrance must be made accessible if possible. See *Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities*, U.S. ARCHITECTURAL & TRANSP. BARRIERS COMPLIANCE BD. § 4.13 (2002), <http://www.access-board.gov/attachments/article/1350/adaag.pdf> [<http://perma.cc/W6RS-DFKQ>]. Similarly, the Fair Housing Amendments Act of 1988 prohibits discrimination in the sale or rental of housing due to a handicap, and Congress intended the Act to be a “clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream.” H.R. REP. NO. 100-711, at 18 (1988).

473. Some city officials say that they will revise the zoning code to disallow future poor doors. See Janet Babin, *New York Skyscraper’s Separate ‘Poor Door’ Called A Disgrace*, NPR (July 30, 2014, 4:59 AM), <http://www.npr.org/2014/07/30/336322608/new-york-skyscrapers-separate-poor-door-sparks-outrage> [<http://perma.cc/V6PJ-YD2B>].

474. Winner, *supra* note 28, at 125.

475. 42 U.S.C. § 12183(a)(1) (2012) (asserting that, under the ADA, discrimination includes “a failure to design and construct facilities for first occupancy . . . that are readily accessible to and usable by individuals with disabilities”).

the ADA's work has resolved problems within individual buildings. Similarly, architectural exclusion and the barriers to access it entails are somewhat more amorphous than barriers to access for disabled individuals, and therefore perhaps harder to correct. Finally, while the Court in *Tennessee v. Lane* found an enforceable right of access (in that case, access to the courthouse) accorded to a protected class (people with disabilities) under the ADA,<sup>476</sup> architectural decisions often exclude poor people, who are not a protected class.<sup>477</sup>

Despite these differences, adopting a similar remedial approach could be useful. The ADA requires both retrospective and prospective solutions to exclusionary environments.<sup>478</sup> Generally, the ADA places the greatest burden on those building new construction, followed by those who are making alterations to existing structures.<sup>479</sup> Existing structures that are not undergoing alterations are not completely grandfathered under the ADA; although a building owner or tenant is not required to bring a building up to ADA standards simply because she owns or occupies the building, she must remove accessibility barriers where doing so is "readily achievable."<sup>480</sup> A similar approach could be used in the context of architectural exclusion. However, it is important to note that there is widespread non-compliance with the retrofitting provisions of the ADA.<sup>481</sup> As a result, the ultimate success of an architectural exclusion statute with regard to legacy issues, as opposed to just new developments, is unclear.

## **CONCLUSION**

Viewing the built environment through a regulatory lens, one may begin to see the world differently. A bridge does not exist merely to transport pedestri-

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<sup>476</sup>. 541 U.S. 509 (2004).

<sup>477</sup>. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17-18 (1973).

<sup>478</sup>. "Recognizing that failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion, Congress required the States to take reasonable measures to remove architectural and other barriers to accessibility." 541 U.S. at 531.

<sup>479</sup>. "In the case of facilities built or altered after 1992, the regulations require compliance with specific architectural accessibility standards. But in the case of older facilities, for which structural change is likely to be more difficult, a public entity may comply with Title II by . . . relocating services to alternative, accessible sites and assigning aides to assist persons with disabilities in accessing services." *Id.* at 532 (internal citation omitted).

<sup>480</sup>. See Civil Div., *Reaching Out to Customers With Disabilities, Lesson Four*, U.S. DEP'T JUST., <http://www.ada.gov/reachingout/lesson41.htm> [<http://perma.cc/U4JC-YQP4>] ("Barrier removal is considered 'readily achievable' when it can be easily accomplished, without much difficulty or expense.").

<sup>481</sup>. See Robert G. Schwemm, *Barriers to Accessible Housing: Enforcement Issues in "Design and Construction" Cases Under the Fair Housing Act*, 40 U. RICH. L. REV 753, 754 (2006).

ans or motorists across a body of water or over a road, but also to deposit those pedestrians and motorists into certain areas and not others. If a law were to require certain individuals to take one exit but not another, we might question its intent or its legality, but if a decision-maker creates an architectural feature that has the same effect, it is often viewed as innocuous. This Article seeks to raise awareness and foster discussion about the regulatory nature of architecture and its role in dividing (or, more positively, bringing together) people within and across communities. Just as educational campaigns have been used to shift norms,<sup>482</sup> this Article aims to expand the way that citizens, courts, legislators, administrators, and legal scholars consider regulation through architecture. Once the issue of architectural exclusion is brought to a person's attention, she will see it in her own community<sup>483</sup> and can begin taking action to fight against its effects in the future. Zoning ordinances that explicitly divided cities along racial lines were struck down many years ago, but walls and roads continue to divide cities along racial lines. Are these any less pernicious?

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482. See, e.g., Jane Aiken & Katherine Goldwasser, *The Perils of Empowerment*, 20 CORNELL J.L. & PUB. POL'Y 139, 173 (2010) ("[T]he anti-smoking campaign provides a powerful example of how such a campaign can change perceptions of harm and, in so doing, shift the social norms about getting involved."); Eric Biber, *Climate Change and Backlash*, 17 N.Y.U. ENVTL. L.J. 1295, 1339 (2009) ("Norm-shifting could be accomplished through educational efforts using schools, public service announcements, etc. Current examples of fairly successful environmental norm-shifting efforts in the United States include the Smokey Bear campaign by the U.S. Forest Service to encourage the safe use of fire in natural areas, and anti-littering campaigns.").

483. Every time the author presented this Article, numerous commenters provided her with examples of architectural exclusion in their own towns.