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Park on the Highway: Building a Cap Park as a Solution to Decades of Devastation Caused by the Construction of the Cross-Bronx Expressway

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**PARK ON THE HIGHWAY: BUILDING A CAP
PARK AS A SOLUTION TO DECADES OF
DEVASTATION CAUSED BY THE
CONSTRUCTION OF THE
CROSS-BRONX EXPRESSWAY**

*Grace Brennan**

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INTRODUCTION

At the 1939 New York World’s Fair, the most popular display was the General Motor’s “Futurama” exhibit which sought to predict the way of the world for transportation in the next 20 years.¹ The exhibit presented 14 lane highways, 50,000 cars, 500,000 buildings, and 14,000 vehicles to symbolize the future of the free movement of people throughout the United States.² Seventeen years later, in 1956, Congress would take a step toward realizing General Motors’s vision with the Federal-Aid Highway Act (1956 Act), calling for 41,000 miles of highways, with 90% of the cost financed by the federal government.³ At the forefront of U.S. urban highway construction was one of New York City’s most infamous highways, funded by the 1956 Act, the Cross-Bronx Expressway.⁴ Rather than realize an image of technological ingenuity, the Cross-Bronx has come to represent the blatant disregard for the consequences of ramming multi-lane highways through urban neighborhoods.⁵ The six-mile, six-lane highway plowed through a dozen vibrant Bronx neighborhoods⁶ and is now surrounded by the poorest and most densely populated congressional district in the

1. See Benjamin Elisha Sawe, *Futurama — The Car City Envisioned by General Motors*, WORLDATLAS (Apr. 25, 2017), <https://www.worldatlas.com/articles/futurama-the-car-city-envisioned-by-general-motors.html> [<https://perma.cc/5ZW5-RPSZ>].

2. See *id.*

3. See *Congress Approves the Federal-Aid Highway Act*, U.S. SENATE (June 26, 1956), https://www.senate.gov/artandhistory/history/minute/Federal_Highway_Act.htm [<https://perma.cc/3VVC-MDLL>].

4. See Elisheva Blas, *The Dwight D. Eisenhower National System of Interstate and Defense Highways: The Road to Success?*, 44 HIST. TCHR. 127, 130 (2010); see also Michael Caratzas, *Past Meets Futurism Along the Cross-Bronx: Preserving a Significant Urban Expressway*, 1 FUTURE ANTERIOR 25, 25 (2004).

5. See Sam Dolnick, *On Bronx Stoops, a Highway’s Traffic Entertains*, N.Y. TIMES (Apr. 1, 2010), <https://www.nytimes.com/2010/04/02/nyregion/02bottleneck.html> [<https://perma.cc/4PAR-42LC>].

6. See Caratzas, *supra* note 4, at 25.

nation,⁷ with a high concentration of diesel truck traffic and disproportionately high asthma rates.⁸ Such construction of highways through urban centers was replicated across the United States, with the consequences of construction disproportionately falling on communities of color.⁹ Federal and state officials targeted marginalized communities to build massive highways under the pretext of “slum clearance” while in the process destroying homes, parks, churches, schools, and business districts.¹⁰

Policymakers today have once again placed highway infrastructure development at the forefront.¹¹ The landmark \$1.2 trillion Infrastructure Investment and Jobs Act (Infrastructure Act) that recently passed into law sets out to address both highways in disrepair, along with the aftermath of devastating highway construction under the 1956 Act on communities of color.¹² While reconstruction carries the risk that highway builders repeat mistakes of the past at the expense of marginalized communities, lawmakers, however, are presenting significant infrastructure projects as an opportunity to rectify some of the harm caused by the interstate highway

7. See *My Congressional District: 117th Congress*, U.S. CENSUS BUREAU, <https://www.census.gov/mycd/?st=36&cd=15> [<https://perma.cc/Q5UL-3GWA>] (last visited Mar. 7, 2022); see also Eugene Daniels, Krystal Campos & Michael Cadenhead, *Ritchie Torres Represents America’s Poorest Congressional District. He’s on a Mission to Save Public Housing*, POLITICO (Apr. 26, 2021, 4:32 AM), <https://www.politico.com/news/2021/04/26/ritchie-torres-new-117th-congress-freshman-members-diversity-2021-484443> [<https://perma.cc/Z9FA-ZZXU>]; *2016 Population Density by Congressional District*, ArcGIS (Nov. 2, 2021), <https://www.arcgis.com/apps/mapviewer/index.html?layers=ff48bbae433442a38f6c635b8c7baf72> [<https://perma.cc/T24H-MXPY>].

8. See Cecilia Butini, *Asthma in the South Bronx*, MEDIUM (Jan. 20, 2013), <https://medium.com/asthma-in-the-south-bronx/asthma-by-the-numbers-73553b2c9621> [<https://perma.cc/55RD-6UZR>].

9. See generally Omar Freilla, *Burying Robert Moses’s Legacy in New York City*, in HIGHWAY ROBBERY: TRANSPORTATION RACISM AND ROUTES TO EQUITY 75 (2004); Deborah N. Archer, “White Men’s Roads Through Black Men’s Homes”: *Advancing Racial Equity Through Highway Reconstruction*, 73 VAND. L. REV. 1259, 1263 (2020); Gary T. Schwartz, *Urban Freeways and the Interstate System*, 8 TRANSP. L.J. 167, 233 (1976); RAYMOND A. MOHL, POVERTY & RACE RSCH. ACTION COUNCIL, THE INTERSTATES AND THE CITIES: HIGHWAYS, HOUSING, AND THE FREEWAY REVOLT 1, 26 (2002).

10. See MOHL, *supra* note 9, at 20; see also 42 U.S.C. §§ 1441–1486 (most repealed or amended).

11. See, e.g., Jim Tankersley, *Biden Signs Infrastructure Bill, Promoting Benefits for Americans.*, N.Y. TIMES (Nov. 15, 2021), <https://www.nytimes.com/2021/11/15/us/politics/biden-signs-infrastructure-bill.html> [<https://perma.cc/TKZ7-Z75D>].

12. See Caroline Vakil, *Advocates See Pilot Program to Address Inequalities from Highways as Crucial First Step*, HILL (Nov. 26, 2021, 3:53 PM), <https://thehill.com/policy/transportation/583066-advocates-see-pilot-program-to-address-highway-inequalities-as-crucial> [<https://perma.cc/SQ2P-PQ69>].

system.¹³ Conversations around the legacy of land use and development have shifted discussions toward how developers can utilize new infrastructure projects as a solution to community inequities rooted in the impacts of decades-old highways.¹⁴ Among such infrastructure projects are highway cap parks — a land bridge built as a park over highways through urban centers.¹⁵ Research surrounding cap parks, both based on existing parks and future proposals, has provided data in connection with the positive environmental impacts of creating new acreage and green space,¹⁶ in addition to acting as a means to rectify the losses of neighborhoods that never recovered from their initial destruction.¹⁷ As a solution to the harms of the Cross-Bronx, this Note assesses the feasibility of a highway cap park over the Cross-Bronx. This Note argues that a cap park can serve as a feasible solution to rectify some of the harms caused by the continued challenges to communities living in the highway's path, provided that developers take on a series of measures, taking into account any disparate impacts on current residents, and ensuring that the character of the community is maintained.

Part I discusses a brief history of the 1956 Act, along with the construction of the Cross-Bronx, including the lasting harmful impacts on the community of the South Bronx. Part II addresses the legal response to slow the devastation of highway development, where battles in court based on racial discrimination or eminent domain fell short, and federal legislation focused on environmental protection and preserving historic sites rather than address the existing harms to communities. Part III explores the growing trend among urban planners to build cap parks over highways in U.S. cities and assesses the currently proposed highway cap park over the Cross-Bronx as a meaningful solution to rectify at least some of the harms caused by the initial highway construction. Part IV proposes

13. See Adina Solomon, *Three U.S. "Highway Cap" Projects Reckoning with Urban Inequity*, URB. LAND (Oct. 7, 2020), <https://urbanland.uli.org/industry-sectors/infrastructure-transit/three-u-s-highway-cap-projects-reckoning-with-urban-inequity/> [<https://perma.cc/3XDJ-PPCC>].

14. See *id.*

15. See *Freeway Cap Parks Encourage Stakeholder Coordination, Reconnect Communities, and Promote Healthy Ecosystems*, U.S. DEP'T TRANSP. (Mar. 2016) [hereinafter U.S. DEP'T OF TRANSP.], https://www.environment.fhwa.dot.gov/Pubs_resources_tools/publications/newsletters/mar16nl.pdf [<https://perma.cc/7MFB-UA94>].

16. See, e.g., CITY OF DALL. ET AL., USDOT LADDERS OF OPPORTUNITY EVERY PLACE COUNTS DESIGN CHALLENGE, CASE STUDY: KLYDE WARREN PARK, DALLAS, TX 2, <https://www.cnu.org/sites/default/files/Spokane%20Case%20Study%204%20-%20Dall as.pdf> [<https://perma.cc/8K6P-JJ45>] (last visited Mar. 6, 2022) (“90.9% of park users surveyed responded that their quality of life was significantly improved by the addition of the park.”).

17. See Solomon, *supra* note 13, at 5.

that a highway cap park may be feasible provided that developers take on a series of measures, including (1) the implementation of a robust racial equity impact assessment and (2) a participatory community budget with the goal of ensuring that past ignored issues associated with broad-scale projects are addressed head-on and that the community is a stakeholder in the success of the project. This Note will conclude that where courts and laws have fallen short, rebuilding with the right tools can offer a means to rectify.

I. GETTING TO “FUTURAMA”: THE NATIONAL INTERSTATE HIGHWAY SYSTEM

In 1956, President Eisenhower signed the Federal-Aid Highway Act of 1956.¹⁸ Professed as the “biggest peacetime construction project of any description ever undertaken by the United States or any other country,”¹⁹ the legislation called for 41,000 miles of highways with 90% of the cost financed by the federal government.²⁰ Prior to 1956, there were only 480 highway miles either completed or under construction in United States’s 25 largest cities, 290 of which were in New York, Los Angeles, and Chicago.²¹ The 1956 Act would thereafter account for 8,600 urban highway miles.²² This Part provides a brief history of the 1956 Act, focusing on Congress’s silence on the legislation’s potential social consequences, including community displacement while prioritizing the interests of private corporations. This Part further explains how the Cross-Bronx came to be built with lasting harmful impacts on the community of the South Bronx.

A. The 1956 Act

The practice of Congress authorizing federal “interstate” roadway programs dates back to 1921 following Henry Ford’s mass production of the Model T.²³ Accessibility to cars and a series of Congressional reports

18. See *The Interstate Highway System*, HIST. (June 7, 2019), <https://www.history.com/topics/us-states/interstate-highway-system> [<https://perma.cc/W9XP-SL7C>].

19. DWIGHT D. EISENHOWER, MANDATE FOR CHANGE 1953–1956: THE WHITE HOUSE YEARS 548 (1963).

20. See *Congress Approves the Federal-Aid Highway Act*, *supra* note 3.

21. See Schwartz, *supra* note 9, at 179.

22. See *id.*

23. See *id.* at 173. The idea of a highway system spanning throughout the United States dates back to a map drawn at the end of World War I by General Pershing and was intended to effectively transport military resources. See *id.* at 182.

and legislation calling upon states to designate a formal system of highways created the momentum that ultimately led to the 1956 Act.²⁴

The legislation sought to alleviate the problems of congestion and urban deterioration.²⁵ Interstate expressways moreover contributed to and embraced the suburban cultural boom, where highways and the proliferation of the automobile offered a link to the city and potential sites of suburban development.²⁶ By improving transportation, highways enabled suburbanites to easily access the city whereby impacting not only the population of cities but the overall structure to be amenable to the automobile.²⁷ Public officials generally supported urban highways because there was a belief that such highways, amid a broad, nationwide interconnected scheme, were essential to the success of the interstate system as a whole.²⁸ Moreover, public officials believed they were essential to improving urban transportation efficiency, thus strengthening urban economies.²⁹ Notably, President Eisenhower's 1956 State of the Union address called on Congress to address the growing problem of car accidents, when the numbers of cars, trucks, and buses had increased from 58 million to 61 million.³⁰

Funding of the 1956 Act was based upon the allocation of highway user taxes to pay the federal share and, in turn, allocating these funds to states for their highway projects.³¹ Highway user taxes, such as the gas and tire tax, would pay for the federal portion of costs, which would subsequently

24. *See id.* at 182–86.

25. *See The Interstate Highway System, supra* note 18.

26. *See Note, Locating the Suburb*, 117 HARV. L. REV. 2003, 2007 (2004) (citing PETER HALL, *CITIES OF TOMORROW* 291 (1988)) (explaining that while the drafters of the 1956 Act intended to bolster urban economies through allowing suburban residents to access the city, such suburban flight led to businesses and other commercial establishments leaving the city altogether).

27. *See* Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1203 (2017) (“Cities put shopping malls or festival marketplaces downtown, sought to make their streets amenable to automobiles, and then built highways to bring suburbanites to the city’s core.”).

28. *See* Schwartz, *supra* note 9, at 224 (“It would be unsatisfactory, the idea went, to connect Indianapolis and Cincinnati with Interstate 74, which can be driven in less than two hours if the motorist must pick up I-74 on the outskirts of Indianapolis and get off it on the outskirts of Cincinnati, thereby subjecting himself to an additional two hours of intrametropolitan driving on the congested streets of those two major cities.”).

29. *See* Schragger, *supra* note 27.

30. *See* Dwight D. Eisenhower, *Annual Message to the Congress on the State of the Union*, AM. PRESIDENCY PROJECT (Jan. 5, 1956), <https://www.presidency.ucsb.edu/documents/annual-message-the-congress-the-state-the-union-11> [<https://perma.cc/5MAQ-UHYR>].

31. *See* Schwartz, *supra* note 9, at 188.

be redirected into a Highway Trust Fund.³² This fund could only pay for interstate construction, ultimately creating a self-financing system.³³

While the bill set out to impact every U.S. resident equally, several features of the provisions to the highway bill stand out as contributing to disparate impacts on certain communities. First, the statute did not include any relocation assistance.³⁴ The bill initially considered by the House would have included family relocation expenses in highway construction costs with 90% of the federal share of payments made to persons requiring relocation.³⁵ When the bill reached the Senate, however, the provision was deleted by the Public Works Committee and the House acceded to this provision's removal.³⁶ The reasoning for the Senate's removing the provision has been described as Congressional "horse trading" of issues, while the congressional record indicates that the Senate opposed an amendment for housing relocation because committees had not adequately considered the issue.³⁷ One prominent factor, however, is the lack of a strong lobbying organization to represent displaced persons, unlike private entities.³⁸ This is particularly apparent given that where residents lacked relocation assistance, the Act provided an allowance of federal reimbursement for relocation payments to public utilities.³⁹

Community input, or a lack thereof, was another aspect that furthered a disproportionate impact on certain communities. Section 116(c) mandated that state highway officials comply with holding a public hearing regarding the "economic effects" of the interstate highway.⁴⁰ The public hearing processes, however, were often manipulated.⁴¹ Federal documents demonstrate that often hearings discouraged public participation and stated that the purpose of the hearing was merely to describe certain construction proposals.⁴²

32. See EISENHOWER, *supra* 19, at 548 n.1 ("The bill as enacted included a provision, which I approved, for financing the interstate system out of revenues from increased taxes, including taxes on gasoline, diesel oil, tires, trucks, buses and trailers.").

33. See Schwartz, *supra* note 9, at 188.

34. See *id.* at 237.

35. See *id.*

36. See *id.*

37. See *id.*

38. See *id.* at 237–38.

39. See *id.*

40. See *id.* at 235.

41. See Omari Scott Simmons, *Urban Removal: Reshaping Urban Landscapes Through a Responsive Communitarian Lens*, 29 CORNELL J.L. & PUB. POL'Y 885, 907 n.117 (2020) (citing Maria D. Hummer, *Retroactive Application of the Public Hearings Provision of the Amended Federal-Aid Highway Act*, 22 UCLA L. REV. 683, 696 n.60 (1975)).

42. See *id.*

The legislative history of the 1956 Act further indicates that the bill largely prioritized the oil and trucking industries over the social impacts on communities.⁴³ The first version of the bill failed to pass through Congress, largely due to the lobbying by the trucking and oil industries that demanded that road users' taxes be used only for the purposes of administering and building highways.⁴⁴ Giving into the oil and trucking businesses, the Ways & Means Committee ensured passage of the bill by creating a federal excise tax for the oil, gasoline, and automobile industries.⁴⁵ On the House floor, Representative Boggs of the Ways and Means Committee emphasized the desire for the taxes of corporations and organizations utilizing the highways to fund such roadways, believing that allocating the taxes of the "gasoline, diesel fuel, special motor fuel, lubricating oil, passenger automobiles, trucks, buses and trailers, automobile parts and accessories, and tires and tubes, for the purpose of constructing roads" is "only fair" for the purpose of financing the federal highway system.⁴⁶

Following the 1956 Act, the United States federal government reauthorized the bill several times, and by 1996, the federal share of interstate construction totaled \$119 billion.⁴⁷

B. Building the Cross-Bronx Expressway

While ultimately financed by the 1956 Act, the Cross-Bronx was unveiled to the public in 1945, over a decade before the Interstate Highway System came into effect.⁴⁸ New York's system of parkways predates the vast highway infrastructure in the rest of the country, such that by the end of World War II, New York was the only U.S. city with integrated, limited-access highways, including sections of the Major Deegan and the Brooklyn-Queens Expressways.⁴⁹ Today, the Cross-Bronx stands as one of the busiest roads in New York City and one of the four worst bottleneck roadways in the United States, carrying approximately 200,000 cars per

43. See Roel Hammerschlag, *Legislating the Highway Act of 1956: Lessons for Climate Change Regulation*, 31 ENVIRONS ENV'T L. & POL'Y J. 59, 80 (2007).

44. See *id.* at 85.

45. See *id.*

46. See Jeff Davis, *Federal Highway Policy Under President Eisenhower, 1955–1956*, ENO CTR. FOR TRANSP. (Sept. 9, 2020) (quoting Letter from George Humphrey to Harry Byrd (Mar. 23, 1956) (on file with the U.S. Department of Treasury)), <https://www.enotrans.org/article/federal-highway-policy-under-president-eisenhower-1955-1956> [<https://perma.cc/LDU2-U3XS>].

47. See *Interstate Frequently Asked Questions*, U.S. DEP'T TRANSP. (Apr. 27, 2021), <https://www.fhwa.dot.gov/interstate/faq.cfm> [<https://perma.cc/RK5D-425Q>].

48. See Caratzas, *supra* note 4, at 25.

49. See *id.* at 25 n.4.

day.⁵⁰ One would be hard-pressed to find a person who admires the Cross-Bronx⁵¹ — the poor lighting, lack of a shoulder lane, and concrete walls have been described as driving in a “coffin” along with traffic experts describing it as the worst roadway in the New York City area.⁵²

The Cross-Bronx was the brainchild of Robert Moses, one of the most powerful and influential urban planners who shaped much of how we look at highways in cities today.⁵³ As New York City’s “construction coordinator,” he oversaw all public works projects in the United States’s largest cities, including highways, bridges, tunnels, housing projects, and parks.⁵⁴ As chairman of the Slum Clearance Committee in New York City until 1960, Moses advocated that the best way to eradicate “slums” was to build highways through them.⁵⁵ In a 1959 speech, he argued, “[w]e can’t let minorities dictate that this century-old chore will be put off another generation or finally abandoned” and thus highway construction “must go right through cities and not around them.”⁵⁶ Moses’s influence extended well beyond New York City — his model of highways integrated into urban transportation was first realized in New York City but then replicated across the country and even internationally.⁵⁷ The Cross-Bronx is of great significance to both the local impacts of highway infrastructure as well as the national implications by standing as one of the country’s earliest planned expressways and one of the first expressway projects planned by Moses.⁵⁸

50. See Dolnick, *supra* note 5.

51. It has, however, been considered a great engineering achievement, as one New York documentary described it as “one of the most awesome public work projects in the city’s entire history.” Caratzas, *supra* note 4, at 25 (quoting a New York television documentary).

52. See Dolnick, *supra* note 5; see also *Cross Bronx Expressway Historical Overview*, NYCROADS, <http://www.nycroads.com/roads/cross-bronx/> [<https://perma.cc/D9XT-86RN>] (last visited Feb. 25, 2022) (“If you have ever wondered if you’re in Hell, then you are experiencing a rather normal spiritual quandary that you share with many. If, however, you know without the shadow of a doubt that you are in Hell, then you must be on the Cross Bronx Expressway!” (quoting Jeff Saltzman)).

53. See Farrell Evans, *How Interstate Highways Guttered Communities — and Reinforced Segregation*, HIST. (Oct. 20, 2021), <https://www.history.com/news/interstate-highway-system-infrastructure-construction-segregation> [<https://perma.cc/GA34-J34T>].

54. See *id.*

55. See *id.*

56. See *id.* (quoting Robert Moses in a 1959 speech).

57. See Caratzas, *supra* note 4, at 25; see also DAVID BRODSKY, L.A. FREEWAY: AN APPRECIATIVE ESSAY 101 (1981); TRIBOROUGH BRIDGE AUTH., VITAL GAPS IN NEW YORK METROPOLITAN ARTERIES (1940) (recounting Moses’s meeting with German highway engineers in 1940 to analyze the parkways in New York while studying their preliminary plans for their autobahn system).

58. See Caratzas, *supra* note 4, at 27.

Running 6.2 miles through what is known as the South Bronx,⁵⁹ the Cross-Bronx would come to be the most expensive road constructed in U.S. history at \$250 million.⁶⁰ While construction started in 1948 amid the growing conversations surrounding highway infrastructure projects, Moses quickly ran out of money after clearing a space for the highway. Shortly thereafter came the 1956 Act, which paved the way to fund 90% of the \$250 million cost.⁶¹ Moses famously could have avoided displacing citizens and building through Crotona Park, an important gathering place for the East Tremont community in the Bronx.⁶² Wielding his power, he superseded community objections and proceeded to remove a mile of residents for his preferred route.⁶³

Critics of historical accounts of Moses argue that he did not purposefully target communities of color when deciding where to bulldoze through neighborhoods to build highways — claiming that Moses targeted white neighborhoods and communities of color alike.⁶⁴ The history of the South Bronx leading up to the construction of the Cross-Bronx, however, demonstrates public officials' continued apathy for the area, of which the negative impacts disproportionately fell on Black and Brown residents.⁶⁵ Dating back to the Great Depression in the 1930s, federally-sponsored public works projects available to the Bronx largely exempted the South Bronx from attempts to improve the area.⁶⁶ During the 1940s, the South Bronx had been redlined by the Federal Housing Agency and private lending institutions because it was considered too diverse and thus dangerous for private loans.⁶⁷ That a neighborhood was already federally sanctioned as undesirable and too diverse enabled Moses to target what he described as a neighborhood with “tenements” or “walk-ups,” and, if he was speaking with a certain listener, “slums.”⁶⁸

59. See Sooyoung Kim et al., *Cost-Effectiveness of Capping Freeways for Use as Parks: The New York Cross-Bronx Expressway Case Study*, 108 *AJPH* 379 (2018).

60. See ROBERT A. CARO, *THE POWER BROKER: ROBERT MOSES AND THE RISE AND FALL OF NEW YORK* 886 (1974).

61. *See id.*

62. *See id.* at 850–84.

63. *See id.*

64. See Vincent J. Cannato, *Buttigieg's 'Systemic Racism' Claim Is the Leftist Myth About Robert Moses*, N.Y. POST (Nov. 14, 2021, 10:34 PM), https://nypost.com/2021/11/14/buttigieg-systemic-racism-claim-is-the-leftist-myth-about-robert-moses/?utm_campaign=iphone_nyp&utm_source=message_app [<https://perma.cc/X7GM-Y4TY>].

65. See EVELYN DIAZ GONZALEZ, *THE BRONX* 101–02 (2004).

66. *See id.* at 102.

67. *See id.* at 111.

68. *See* CARO, *supra* note 60, at 854.

The neighborhood targeted for construction and displacement, known as “East Tremont,” was a largely middle-class, Jewish neighborhood.⁶⁹ While predominantly Jewish prior to the Cross-Bronx, there were increased numbers of middle-class Black and Puerto Rican families living in the area.⁷⁰ Historians partially attribute the influx of Black and Puerto Rican residents into the neighborhood to Moses’s policies of slum clearance in Harlem, thereby displacing tenants to the Bronx.⁷¹ By 1952, when the non-white population of East Tremont was fairly substantial, Jewish families largely remained and they — “liberals, utopianists, socialists, radical labor unionists . . . the children of those men and women — said they believed in the equality of men No one felt the need to move out [of East Tremont] just because a few more [people of color] were moving in.”⁷²

Following the demolition of homes, parks, and small businesses in the area to make way for the highway, 5,500 tenants were removed from homes and 55,000 remained.⁷³ Large piles of rubble and rotting garbage in the surrounding area caused increased air pollution.⁷⁴ To residents, East Tremont felt nearly unrecognizable.⁷⁵ Moreover, the city was wholly lacking in relocation services for residents near construction, most unaware they might even be eligible for assistance.⁷⁶ Following the Cross-Bronx’s completion, a wave of noise pollution, sound pollution, and crime ensued.⁷⁷ The combination of increasing vacancy rates between businesses and residences and the decreased property values rendered neighborhoods surrounding the Cross-Bronx undesirable to homeowners.⁷⁸ And while voter registration in 1960 increased in the rest of the city, in the South Bronx, it dropped drastically.⁷⁹

The racial demographics of the area also changed considerably. White Jewish families fled to parts of Long Island and the North Bronx due in part to stabilized rent programs and Jewish families’ ability to get home loans under the Federal Housing Act, unavailable to Black and Hispanic

69. *See id.* at 851.

70. *See id.* at 857–58.

71. *See* GONZALEZ, *supra* note 65, at 111.

72. *See* CARO, *supra* note 60, at 858.

73. *See id.* at 886.

74. *See* Patrick A. Burns, *Chimney in Bronx Eased to Fall by Burning Out Its Foundation*, N.Y. TIMES, Oct. 19, 1956, at 29 (“When it hit the ground a moment later it became a jumble of tan-colored bricks.”); *see also* CARO, *supra* note 60, at 860 (“A thick layer of gritty soot made the very air feel dirty.”).

75. *See* CARO, *supra* note 60, at 893–94.

76. *See id.* at 861–63.

77. *See id.* at 888–89.

78. *See id.* at 890.

79. *See* Leo Egan, *Record Vote Due in State on Nov. 8*, N.Y. TIMES, Oct. 17, 1960, at 1.

residents.⁸⁰ In 1950, the Bronx was two-thirds white and, by 1960, two-thirds Black and Hispanic.⁸¹ Prior to the Cross-Bronx's construction, the Bronx was divided, in colloquial terms, into East and West Bronx.⁸² The highway created what Jane Jacobs coined a racial "border vacuum"⁸³ and thus, the North and South Bronx distinction was born.⁸⁴

Today, the South Bronx is categorized as the poorest and most densely populated congressional district in the country.⁸⁵ Moreover, with the highest concentration of diesel truck traffic, the Bronx has disproportionately high asthma rates.⁸⁶ In other parts of New York City, around 10% of the population has asthma, while asthma rates in corners of the South Bronx reach up to as high as 17%, which health experts attribute to the Cross-Bronx, along with the Major Deegan Expressway and Bruckner Expressway.⁸⁷ Presently, East Tremont, the neighborhood affixing the Cross-Bronx, is 36.1% Black and 58.9% Hispanic.⁸⁸

Nationally, following the implementation of the 1956 Act, the devastation in the South Bronx would be replicated in other U.S. cities to construct highways. Highway engineers followed Moses's blueprint by building highways through urban centers and removing undesirable populations.⁸⁹ The Rondo neighborhood in St. Paul, Minnesota, home to mostly Black residents, was uprooted and replaced by I-94; Riverfront Parkway and US-27 cut off and destroyed Black businesses in Chattanooga, Tennessee;⁹⁰ I-10 displaced hundreds of Black residents and

80. See GONZALEZ, *supra* note 65, at 110–11.

81. See *id.* at 1.

82. See Norimitsu Onishi, *NEIGHBORHOOD REPORT: SOUTH BRONX; Mapping the Lower Bronx: It's South, but South of What?*, N.Y. TIMES (Feb. 19, 1995), <http://www.nytimes.com/1995/02/19/nyregion/neighborhood-report-south-bronx-mapping-lower-bronx-it-s-south-but-south-what.html> [<https://perma.cc/8344-ZJ2P>] ("The term 'the South Bronx' did not exist before the 60's It was mostly an invention, a shorthand way to describe physically decaying neighborhoods, rising crime and rising poverty." (quoting then-Borough President Fernando Ferrer)).

83. Andrew Small, *The Complete Guide to 'Border Vacuums,'* BLOOMBERG CITYLAB (Jan. 9, 2017, 11:03 AM), <https://www.bloomberg.com/news/articles/2017-01-09/undersanding-border-vacuums> [<https://perma.cc/K4TW-TBXB>].

84. See Onishi, *supra* note 82.

85. See Daniels et al., *supra* note 7; see also *My Congressional District: 117th Congress, supra* note 7; *2016 Population Density by Congressional District, supra* note 7.

86. See Butini, *supra* note 8.

87. See *id.*

88. See *Belmont/East Tremont BX06, Neighborhood Indicators*, N.Y.U. FURMAN CTR., <https://furmancenter.org/neighborhoods/view/belmont-east-tremont> [<https://perma.cc/8BNN-JS7V>] (last visited Dec. 1, 2021).

89. See Archer, *supra* note 9, at 1277.

90. See Rachael Dottle, Laura Bliss & Pablo Robles, *What It Looks Like to Reconnect Black Communities Torn Apart by Highways*, BLOOMBERG CITYLAB (July 28, 2021),

businesses in the Tremé neighborhood in New Orleans;⁹¹ I-395 and Dolphin Expressway turned Miami's traditionally Black community of Overtown into mostly stretches of highway lanes;⁹² Chicago's Dan Ryan Expressway divided a large Black public housing project from "white ethnic neighborhoods" on the West;⁹³ in Cleveland, Ohio several expressways displaced approximately 19,000 people by the 1970s,⁹⁴ not to mention Black communities torn apart in Detroit, Cincinnati, Houston, Atlanta, and Pittsburgh by highway construction.⁹⁵ Put by one researcher, "[a]lmost every major U.S. city bears the scars of communities split apart by the nearly impenetrable barrier of concrete."⁹⁶ In the decades following, impacted communities pursued new battles in courts with policymakers in attempts to redress at least some of the detrimental costs of this new vision of cities.

II. THE AFTERMATH — A LACK OF VIABLE LEGAL SOLUTIONS TO THE HARMS CAUSED BY THE INTERSTATE HIGHWAY SYSTEM

By the 1960s, many U.S. residents began to respond to the harmful impacts of highway development, where the supposed promises of lawmakers for freedom of mobility came at the unjustifiable cost of damages to the environment, parks, historic neighborhoods, and communities.⁹⁷ This Part presents two forms of legal responses to increased highway infrastructure. The first is "freeway revolts" — powerful movements in communities fighting highway development projects where organizers used legal and political tools to block highway development.⁹⁸ The second is legislation that placed limitations on highway construction and development. Both methods failed to adequately mitigate the harms caused by existing highways that were already built through urban centers.

<https://www.bloomberg.com/graphics/2021-urban-highways-infrastructure-racism/>
[<https://perma.cc/3YMX-R2R4>].

91. *See id.*

92. *See id.*

93. MOHL, *supra* note 9, at 25.

94. *See id.*

95. *See id.*; *see also* Dottle et al., *supra* note 90.

96. MOHL, *supra* note 9, at 26.

97. *See* Archer, *supra* note 9, at 1310.

98. *See* MOHL, *supra* note 9, at 37.

A. Freeway Revolts

The harmful consequences of highways through cities created large opposition and community activism across the country.⁹⁹ Parties brought legal battles to court to try and block the construction of highways under several legal theories, including racial discrimination, eminent domain, and environmental protection.

i. Freeway Revolts on the Basis of Racial Discrimination

Given that highway development projects sprouting from the 1956 Act through urban centers disproportionately fell on Black and lower-income communities, several leaders sought to fight such projects through challenges on the basis of intentional racial discrimination. Such challenges, however, were largely unsuccessful.

For example, in Columbia, South Carolina, the National Association for the Advancement of Colored People (NAACP) took action in opposition to the construction of the Bull Street Expressway, a part of I-20, which was threatening to rip through the city's center.¹⁰⁰ Black community leader Franchot Brown argued that the South Carolina Highway Development acted with "a general pattern of racial discrimination" by using the highway to "restrict Negroes to the ghettos."¹⁰¹ He further argued that the plans failed to look to an alternative, unoccupied location, nor was there a proper public hearing.¹⁰² Despite opposition and an appeal to federal highway officials, the construction of the highway proceeded as planned through the city center.¹⁰³

In Nashville, Tennessee, community members backed by the NAACP Legal Defense Fund unsuccessfully argued that the construction of I-40 intentionally targeted and disproportionately impacted Black communities.¹⁰⁴ A federal court rejected such evidence and found that any adverse impacts on community members were beyond the concern of the courts and an issue for the legislature.¹⁰⁵

In Camden, New Jersey, where construction of I-95 broke up several neighborhoods, the Civil Rights Division of the New Jersey State Attorney

99. *See id.* at 26.

100. *See id.* at 24.

101. *See id.* (quoting Brown: "Your swift action may save our neighborhood and stop the age old practice of sparing a few white occupied homes at the expense of hundreds of Negro families and affecting thousands of Negro citizens").

102. *See id.*

103. *See id.*

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

105. *See id.*

General's Office put together a report based on the impact of the highway on the displaced communities, finding that 85% of the families displaced were minorities and, from 1963 to 1967, 3,000 low-income housing units were destroyed, while only 100 new units were built.¹⁰⁶ The report, titled "Camden, New Jersey: A City in Crisis," stated, "[i]t is obvious from a glance at the renewal and transit plans that an attempt is being made to eliminate the Negro and Puerto Rican ghetto areas by two different methods. The first is building highways that benefit white suburbanites."¹⁰⁷ While the report provided recognition of the adverse racial impacts of the construction of I-95, the study was done too late for any remedial efforts to mend existing harms.

One legal scholar argues that civil rights laws could potentially challenge highway construction decisions that resulted in significant racial disparities or were motivated by racial bias.¹⁰⁸ However, most traditional civil rights laws place the burden of proof on the impacted community, focusing on "intent" rather than structural racism.¹⁰⁹ For example, Title VI of the Civil Rights Act of 1964 prohibits discrimination in federal programs or activities receiving federal financial assistance "on the ground of race, color, or national origin."¹¹⁰ Courts, however, have accepted "modern racial inequality as a neutral baseline," meaning that it is "limited in its ability to redress the decades of accumulated structural racism that shaped the interstate highway system."¹¹¹ This interpretation of Title VII enables government officials to continue to threaten marginalized communities as highways are rebuilt and fails as a method to rectify any of the harms caused by decades of existing highways.

ii. Eminent Domain Challenge to the Cross-Bronx

In the context of the Cross-Bronx, an initial eminent domain challenge brought by the Borough of the Bronx in the N.Y. Supreme Court failed, where a culture supporting highway expansion in New York City stacked the odds against challengers.¹¹² Local politicians and private developers undergoing urban renewal projects, in New York and elsewhere, believed that displacing lower-income residents through eminent domain was a mere

106. See MOHL, *supra* note 9, at 24.

107. *Id.*

108. See Archer, *supra* note 9, at 1305.

109. See *id.*

110. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.

111. Archer, *supra* note 9, at 1305.

112. See *In re Cross-Bronx Expressway*, 82 N.Y.S.2d 55, 61 (Sup. Ct. 1948).

baseline for any adequate urban development.¹¹³ Countering the Borough's challenge, the court's opinion focused on highways representing the future of cities, noting that highway development is a matter of human progress premised on the development of the automobile.¹¹⁴ The court noted that highways in New York City would hold a greater purpose, to connect the city to the rest of the world, describing future highways as "magnificent systems of state, national and international highways" that are meant to connect all of North America.¹¹⁵ The court justified any displacement from highways as a cost for the "[w]isdom, vision and courage of the highest order in road planning and building, as well as in civic enterprise . . . required to meet the challenge of this city's future greatness."¹¹⁶ The court's language serves as an example of how a culture of urban renewal and highway development, coupled with Moses's power, infiltrated New York's courts as a basis for justifying eminent domain challenges.

B. Environmental Protection and Historical Preservation Legislation to Combat Highway Infrastructure

While communities were largely unsuccessful in bringing their anti-highway battles relating to racial inequity, or eminent domain, communities were often more successful if they linked their challenge to environmental protection or historical preservation. Political pressures from mounting citizen opposition to urban highways gave way to several pieces of legislation from Congress in the 1960s.¹¹⁷ However, such legislation was largely too late — the construction for most highways had already been laid down, and any preventative legislation failed to address the vulnerable neighborhoods that had already been impacted by highways sweeping through.¹¹⁸

i. Environmental Protection Legislation

One of the most effective pieces of environmental legislation in connection with highway construction was the National Environmental

113. See Sam Fulwood III, *When Home Disappears*, CTR. FOR AM. PROGRESS (Apr. 7, 2016), <https://www.americanprogress.org/issues/race/news/2016/04/07/134933/when-home-disappears/> [<https://perma.cc/LZ3H-CH47>] (quoting Robert Moses: "I raise my stein to the builder who can remove ghettos without removing people as I hail the chef who can make omelets without breaking eggs").

114. See *In re Cross-Bronx Expressway*, 82 N.Y.S.2d at 66.

115. *Id.* at 61.

116. *Id.*

117. See MOHL, *supra* note 9, at 26–27.

118. See *id.* at 27.

Policy Act (NEPA).¹¹⁹ NEPA requires cumbersome study periods regarding the impact a given new highway construction project will have on the natural environment.¹²⁰ By focusing explicitly on the natural environment rather than the social and economic environment, parties have even defeated highway projects in courts that had tremendous political and financial backing.¹²¹

Moreover, section 4(f) of the Transportation Act prohibited highway construction through public parks and through historic sites.¹²² A tight reading of the legislation famously prevented a highway's pathway through a park in the landmark decision of *Citizens to Preserve Overton Park, Inc. v. Volpe*.¹²³ Here, a Memphis neighborhood revolted against the construction of a highway through a park.¹²⁴ Under section 4(f), the Supreme Court held that the Secretary of Transportation's action was arbitrary and capricious and violated the Federal Aid Highway Act by not looking for an alternate route to construct the highway.¹²⁵ The Yarborough Amendment to the Federal Highway Aid Act of 1966 also prioritized environmental protection, requiring that maximum efforts are taken to preserve government parklands at the federal, state, and local levels to preserve "the beauty and historic value of such lands and sites."¹²⁶

On the state level, New York's State Environmental Quality Review Act (SEQRA) is the State's version of NEPA. On top of NEPA's protections, it is inclusive of both physical environmental impact, along with community and neighborhood context, which can be used as a tool to combat displacement and gentrification.¹²⁷ In *Chinese Staff & Workers Ass'n v. City of New York*, a worker's rights group brought a lawsuit under SEQRA challenging a developer's construction of seven luxury apartment buildings in the City's Plan through Manhattan's historic Chinatown district.¹²⁸ Under a SEQRA theory, the New York Court of Appeals held that the City

119. See 42 U.S.C. § 4332(2)(C); see also J. Peter Byrne, *The Rebirth of the Neighborhood*, 40 *FORDHAM URB. L.J.* 1595, 1607 (2013).

120. See Byrne, *supra* note 119, at 1607.

121. See *id.* at 1607–08 (explaining legal battles that stopped popular highway projects including the Westway Highway, Three Sisters Bridge, and Center Leg Freeway in Washington D.C.).

122. See *id.* at 1607.

123. See *id.* at 1607 n.58.

124. See *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 407–09 (1971).

125. See *id.* at 404–06.

126. See Archer, *supra* note 9, at 1312, 1312 n.317 (quoting the Federal-Aid Highway Act of 1966, Pub. L. No. 89-574, § 15, 72 Stat. 891).

127. See *Introduction to SEQR*, N.Y. ST. DEP'T ENV'T CONSERV., <https://www.dec.ny.gov/permits/6208.html> [<https://perma.cc/BWH5-AWJA>] (last visited Mar. 2, 2022).

128. 68 N.Y.2d 359, 362 (1986).

failed to fulfill the SEQRA review by neglecting to examine the cumulative impact of the apartment buildings on potential displacement and gentrification.¹²⁹ New York's highest court clarified that SEQRA's plain language requiring that a lead agency consider "community or neighborhood character" and not just the "natural" environment indicated that environmental review can encompass displacement of communities.¹³⁰

ii. Historical Preservation Legislation

The community's concern over preserving historic neighborhoods and buildings sparked additional legislation.¹³¹ Congress passed the National Historical Preservation Act in 1966, which created hurdles for building highways through old neighborhoods, based on adverse impacts on properties that are either designated or eligible for the National Register.¹³² Section 106 of the Act requires that federal agencies provide the impacts of their projects on buildings or structures in place that are eligible to be listed in the National Register of Historic Places.¹³³

In New York, city dwellers had grown weary of developers wrecking historic properties after having just witnessed the destruction of the famous Penn Station in 1963, in addition to wrecking balls to the Lenox Library and the old Waldorf-Astoria.¹³⁴ Historical preservation would unite a counter group of New York City residents against the efforts of developers like Moses to modernize the City's buildings and roadways. In 1968, community activist Jane Jacobs famously battled with Moses over the construction of a highway that was to be built directly through lower Manhattan to connect New Jersey and Brooklyn, known as the Lower

129. *See id.* at 368.

130. *Id.* at 356–66.

131. *See Archer, supra* note 9, at 1312 (quoting Senate speech by Senator Joseph S. Clark regarding historic preservation: "Congress [should] look at the highway program, because it is presently being operated by barbarians, and we ought to have some civilized understanding of just what we do to spots of historic interest and great beauty by the building of eight-lane highways through . . . our cities"); *see also* Eric Carlson, *How New York City's SOHO District Was Nearly Destroyed*, URBANIST (May 11, 2022), <https://medium.com/modern-city/how-new-york-citys-soho-district-was-nearly-destroyed-4358e5746013> [<https://perma.cc/8HFB-T248>].

132. *See An Introduction to Section 106*, ADVISORY COUNCIL ON HIST. PRES., <https://www.achp.gov/protecting-historic-properties/section-106-process/introduction-section-106> [<https://perma.cc/TN9E-U9BF>] (last visited Feb. 15, 2022); *see also* Byrne, *supra* note 119, at 1607.

133. *See* Byrne, *supra* note 119, at 1607 n.59.

134. *See* Michael Kimmelman, *When the Old Penn Station Was Demolished, New York Lost Its Faith*, N.Y. TIMES (Apr. 24, 2019), <https://www.nytimes.com/2019/04/24/nyregion/old-penn-station-pictures-new-york.html> [<https://perma.cc/63EQ-TQD6>] ("The historic preservation movement, which rose from the vandalized station's ashes, was born of a new pessimism.").

Manhattan Expressway, or “Lomex.”¹³⁵ Staging a protest in front of the New York State Department of Transportation at an event to collect community input, Jacobs would be arrested and, amid the spectacle, would turn the tide of public opinion toward squashing the Lomex project.¹³⁶ Garnering the support of local representatives and organizations amidst the historic preservation movement, Jacobs was able to stop the highway development that would destroy the neighborhood now known as Soho.¹³⁷

While environmental and historical preservation legislation has proven to be impactful in combatting future highway construction projects through urban centers, it came too late to protect the neighborhoods that had already been destroyed in the pathways of highways. Moreover, such legislation failed to prioritize the vulnerable communities that continue to bear the costs of the 1956 Act, nor took action to alleviate the harms already caused as neighborhoods continued to deteriorate.

III. PARK ON THE HIGHWAY — INFRASTRUCTURE PROJECT AS A VIABLE SOLUTION TO THE CROSS-BRONX’S HARMS

Over the highly dense, multi-lane, loud highways that rip through urban centers across the nation, a new idea for a feasible solution has infiltrated meeting rooms of urban planners and community organizers alike — the creation of highway cap parks.¹³⁸ A highway cap park is a greenspace in the form of a park built over high-dense roadways.¹³⁹ Cap parks provide a new way of reimagining urban spaces; by shifting the focus from designing a city around cars to designing around people, cap parks are a way to create acreage and green space.¹⁴⁰ In addition to the intuitively pleasant aesthetics of green space in cities, locally-driven projects are looking to cap parks as a means to reconnect communities that were displaced and have subsequently suffered as a result of highway infrastructure.¹⁴¹ In the context of the South Bronx, lawmakers and community organizers have proposed that federal funds be used to build a cap park over 2.3 miles of

135. See Carlson, *supra* note 131.

136. See *id.*

137. See *id.*

138. See U.S. DEP’T OF TRANSP., *supra* note 15.

139. Highway cap parks are also known as “Freeway cap parks” or “highway deck parks.” Freeway is defined as a “highway without toll fees,” or “an expressway without fully controlled access.” *Freeway*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/freeway> [<https://perma.cc/BZ7H-UJ2W>] (last visited Feb. 15, 2022).

140. See Martha T. Moore, *More Cities Are Banishing Highways Underground — And Building Parks on Top*, PEW (Apr. 2, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/04/more-cities-are-banishing-highways-underground-and-building-parks-on-top> [<https://perma.cc/FZB9-VU5W>].

141. See U.S. DEP’T OF TRANSP., *supra* note 15.

the Cross-Bronx as a means to reconnect the community torn apart by its construction and repair some of the harms that have been perpetuated against the South Bronx.¹⁴²

A. Highway Cap Parks

While recently re-envisioned, highway cap parks are not a new concept. The first park built over a highway was in Seattle, Washington in 1976, known as Freeway Park.¹⁴³ The landscape architects pictured a park that would restore access for pedestrians connecting Seattle's downtown and Seattle neighborhoods following the development of Interstate 5.¹⁴⁴ Decades later, in 1991, a complex project in Boston, Massachusetts commenced to remove elevated highway and create a tunnel system below, known as the "Big Dig."¹⁴⁵ Fully completed in 2008, a green space, now known as the Rose Kennedy Greenway, replaced the highway and now features five parks that connect Boston's North End and Fort Point Channel neighborhoods with the rest of the city.¹⁴⁶ In Phoenix, Arizona, local voters in 1990 voted on a deck park as the means to complete I-10, the long highway that connects Florida to California.¹⁴⁷ Completion of the highway only came about after local voters approved the underground freeway, with a park over the top, known today as Deck Park Tunnel.¹⁴⁸

Conversations around the legacy of land use and development have shifted discussions towards how infrastructure can be a solution for community inequities and the potential for open airspace to achieve such a feat.¹⁴⁹ In Dallas, Texas, the successes of Klyde Warren Park,¹⁵⁰ a deck

142. See Stephen Nessen, *Capping the Cross-Bronx: Infrastructure Bill to Be Used to Undo Robert Moses-Era Environmental Racism*, GOTHAMIST (Nov. 10, 2021), <https://gothamist.com/news/capping-cross-bronx-infrastructure-bill-be-used-undo-robert-moses-era-environmental-racism> [<https://perma.cc/E58R-CNND>].

143. See *Freeway Park*, SEATTLE PARKS & RECREATION, <https://www.seattle.gov/parks/find/parks/freeway-park> [<https://perma.cc/5GJQ-XGLT>] (last visited Feb. 15, 2022).

144. See *About the Park*, FREEWAY PARK ASS'N, <https://www.freewayparkassociation.org/about-park/> [<https://perma.cc/B3T4-8KLA>] (last visited Feb. 15, 2022).

145. See *History*, GREENWAY, <https://www.rosekennedygreenway.org/history/> [<https://perma.cc/U6ZV-WPM9>] (last visited Mar. 7, 2022).

146. *Id.*

147. See Mark Nothaft, *Why Does Downtown Phoenix Have a 'Tunnel?'*, AZCENTRAL (Nov. 1, 2016, 5:00 AM), <https://www.azcentral.com/story/news/local/phoenix-contributor/2016/11/01/why-does-downtown-phoenix-have-tunnel/92709238/> [<https://perma.cc/Y34Z-9YKN>].

148. *See id.*

149. See, e.g., Adina Solomon, *Three U.S. "Highway Cap" Projects Reckoning with Urban Inequity*, URB. LAND (Oct. 7, 2020), <https://urbanland.uli.org/industry-sectors/infrastructure-transit/three-u-s-highway-cap-projects-reckoning-with-urban-inequity/> [<https://perma.cc/CE4Y-WFLA>] ("[T]here's a lot of discussion about infrastructure and how

park built in 2012 that connects the Uptown neighborhood and Arts District,¹⁵¹ planted the seeds for a community to launch a movement for a deck park to connect with the Oak Cliff neighborhood in Dallas, a historic Black community that was torn apart for construction of I-35E.¹⁵² Other projects across the nation that are using cap parks as a means to reckon with urban inequity include, among others, Reconnect Rondo in St. Paul, Minnesota,¹⁵³ Central Atlanta Progress (CAP) in Atlanta, Georgia,¹⁵⁴ Downtown Austin Alliance in Austin, Texas,¹⁵⁵ and the I-579 Cap Park in Pittsburgh, Pennsylvania.¹⁵⁶

that might be a solution to the kind of economic malaise that is impacting the nation.” (quoting Michael Banner, President and Chief Executive Officer of the Los Angeles LDC)).

150. See CITY OF DALL. ET AL., *supra* note 16 (“90.9% of park users surveyed responded that their quality of life was significantly improved by the addition of the park.”).

151. See *Our Story*, KLYDE WARREN PARK, <https://www.klydewarrenpark.org/about-the-park/our-story.html> [<https://perma.cc/PGG4-22WB>] (last visited Feb. 16, 2022).

152. See Miguel Perez, *New Deck Park Seeks to Bring Oak Cliff Together Again*, ART & SEEK (July 20, 2021, 3:11 PM), <https://artandseek.org/2021/07/20/new-deck-park-seeks-to-bring-oak-cliff-together-again/> [<https://perma.cc/JCT8-DMVM>]; see also Moore, *supra* note 140 (“Why should North Dallas and Klyde Warren get all the nice things?” (quoting Bobby Abtahi, President of the Dallas Park and Recreation Board)).

153. Reconnect Rondo strives to build a land bridge in the Rondo neighborhood of Minnesota, where 80% of the city’s Black population lived in the 1950s and 1960s before construction of I-94 ripped through the community. See *History*, RECONNECT RONDO, <https://reconnectrondo.com/vision/history/> [<https://perma.cc/AP8J-JB83>] (last visited Feb. 16, 2022).

154. Central Atlanta Progress is working to create “the Stitch,” a public park space above I-75/85, where construction cut up and eliminated mostly Black neighborhoods, along with what was once the largest Jewish community in Atlanta. See *The Stitch*, ATLANTA DOWNTOWN, <https://www.atlantadowntown.com/initiatives/the-stitch> [<https://perma.cc/S6EU-GDDX>] (last visited Mar. 7, 2022); see also Solomon, *supra* note 13 (explaining there was a Jewish community in Atlanta); Ernie Suggs & Tia Mitchell, *Highways Divided Black Communities; Infrastructure Money Could Bridge Gaps*, ATLANTA J.-CONST. (Jan. 7, 2022), <https://www.ajc.com/news/highways-divided-black-communities-infrastructure-money-could-bridge-gaps/4WE4HEEYMZB4DNECJXWWZKSFU4/> [<https://perma.cc/2ZY7-QTTQ>].

155. Downtown Austin Alliance is seeking to develop highway caps along I-35, which was built in the 1950s and in displacing communities, augmented subsequent segregationist policies. See *I-35 Cap and Stitch*, DOWNTOWN AUSTIN ALL., <https://downtownaustin.com/what-we-do/current-projects/i35/> [<https://perma.cc/RN2J-B6JG>] (last visited Feb. 16, 2022).

156. The I-579 Cap Park is attempting to reconnect the Hill District to downtown Pittsburgh, which was cut-off by construction of I-579 in the 1950s. See *Frankie Pace Park (I-579 CAP Urban Connector Project)*, SPORTS & EXHIBITION AUTH., <http://www.pgh-sea.com/index.php?path=i5-ucp> [<https://perma.cc/KR82-GSYF>] (last visited Feb. 16, 2022); see also Ollie Gratzinger, *What to Expect When You Visit Pittsburgh’s New Cap Park*, PITTSBURGH (Nov. 24, 2021), <https://www.pittsburghmagazine.com/what-to-expect-when-you-visit-pittsburghs-new-cap-park/> [<https://perma.cc/8MWM-EMT3>].

The Infrastructure Act, the landmark \$1.2 trillion bipartisan infrastructure bill that recently passed into law,¹⁵⁷ sets out to address not only highways in disrepair but also address the aftermath of devastating highway construction under the 1956 Act on communities of color.¹⁵⁸ The provision in the bill called the “Reconnecting Communities Pilot Program” provides for a planning grant to create connectivity to barriers caused by highways or other transportation to areas such as mobility, access, or economic development, specifically to economically disadvantaged communities such as small businesses, individuals, and residences.¹⁵⁹ Ideas of how to “reconnect” include digging highways below the ground to be replaced with affordable housing above ground or elevating highways to utilize the space below for the public. The provision represents a shift in the way the federal government addresses infrastructure policy.

B. Capping the Cross-Bronx

Amid the growing trend of urban planners looking to cap parks as a solution to highway construction that occurred 50 years ago, there has been recent dialogue regarding a cap park over the Cross-Bronx amongst community leaders, politicians, and citizens alike. Thanks to the passage of the Infrastructure Act, there is at the very least federal funding to develop a plan.¹⁶⁰

In 2018, Dr. Peter Muennig of the Mailman School of Public Health at Columbia University conducted a study on the cost-effectiveness of capping highways for the use of parks and based his case study on the Cross-Bronx.¹⁶¹ Using a simulation to evaluate the cost-effectiveness and the public health benefits, the study shows that because the Cross-Bronx is below-grade (meaning below ground level), it would be relatively inexpensive to cap.¹⁶² Moreover, the study found that the long-term health and economic benefits, including improved cardiovascular health due to a reduction in noise pollution, and increased levels of physical activity due to

157. See Vakil, *supra* note 12.

158. While there is a pilot program in place, it only provides \$1 billion in funding. *See id.*

159. H.R. 3684, 117th Cong. § 11509 (2021).

160. See Aliya Uteuova, *The Plan to Transform One of New York City's Dirtiest Freeways into Green Space*, GUARDIAN (Nov. 30, 2021, 6:00 AM), <https://www.theguardian.com/us-news/2021/nov/30/plan-transform-cross-bronx-expressway-green-space> [<https://perma.cc/4PSE-PJEE>].

161. *See generally* Kim et al., *supra* note 59.

162. *See id.* at 380.

proximity to a park, would far exceed the \$750 million cost to build the park.¹⁶³

Since the 2018 study, community leaders and lawmakers have been making the case for the cap park over the Cross-Bronx. Leading up to the passage of the Infrastructure Act, Congressman Ritchie Torres, who represents the South Bronx in District NY-15, sent a letter to Transportation Secretary Pete Buttigieg to push for the inclusion of the Cross-Bronx within the Infrastructure Bill:

The Cross Bronx left in its wake decades of displacement, disinvestment and environmental degradation whose effects remain deeply felt . . . Children who live near the Cross Bronx or who attend school nearby are — through no fault of their own — breathing in pollutants that cause the Bronx to have among the highest rates of childhood asthma in the nation. The diesel trucks that often congest the Cross Bronx have been a death sentence for the people of the South Bronx, shorting their life spans with chronic diseases that have grown lethal in the age of COVID. The Cross Bronx Expressway is, both literally and figuratively, a structure of environmental racism whose dismantling is long overdue.¹⁶⁴

Outside of local lawmakers and community organizers, leaders of the U.S. Department of Transportation have formally recognized that the roots of highway infrastructure disproportionately impact marginalized communities.¹⁶⁵ In 2017, a report prepared by the former Secretary of Transportation, Anthony Foxx, estimated that more than a million people were displaced due to federal highway infrastructure.¹⁶⁶ And most recently, the current Secretary of Transportation, Pete Buttigieg, has

163. See *Plan to Transform the Cross Bronx Expressway Gains Momentum*, COLUM. MAILMAN SCH. PUB. HEALTH (Apr. 27, 2021), <https://www.publichealth.columbia.edu/public-health-now/news/plan-transform-cross-bronx-expressway-gains-momentum> [<https://perma.cc/RQS3-5SP3>].

164. Jason Cohen, *Torres and Environmental Groups Push Biden Admin to Invest in Capping the Cross BX*, BRONX TIMES (Apr. 26, 2021), <https://www.bxtimes.com/torres-and-environmental-groups-push-biden-admin-to-invest-in-capping-the-cross-bx/> [<https://perma.cc/4P7D-QHB3>] (quoting Congressman Torres's letter); see also Press Release, Ritchie Torres, Rep., House of Reps., Rep. Torres & Bronx Environmental Groups Push Biden Administration to Invest in Fixing Cross Bronx Expressway Through the American Jobs Plan (Apr. 23, 2021), https://torres.nyc/press_releases/2 [<https://perma.cc/E4JB-SFHA>].

165. See Alana Semuels, *A Departure from Decades of Highway Policy*, ATLANTIC (Mar. 29, 2021), <https://www.theatlantic.com/business/archive/2016/03/the-transportation-secretary-speaks-out-against-highways/475749/> [<https://perma.cc/2TPA-G723>]; see also Alexandra Kelley, *Transportation Secretary Pete Buttigieg Says 'There Is Racism Physically Built' into America's Infrastructure*, HILL (Apr. 7, 2021), <https://thehill.com/changing-america/respect/accessibility/546946-transportation-secretary-pete-buttigieg-says-there-is> [<https://perma.cc/96C4-4HKW>].

166. See U.S. DEP'T OF TRANSP., *BEYOND TRAFFIC 2045 95* (2017), https://www.transportation.gov/sites/dot.gov/files/docs/BeyondTraffic_tagged_508_final.pdf [<https://perma.cc/483H-5UYC>].

spoken out about reckoning with the United States's racist history in highway infrastructure in order to create an equitable solution.¹⁶⁷

This raises the question of how the federal government can mitigate the harms caused by a past wrong, when a social group has an account of an injury that has not been properly redressed through traditional legal remedies. Conversations for solutions to such particular types of injuries include reparations, where a clearly defined social group can bring an account of an injury and how a present remedy, such as monetary compensation, relates to that injury.¹⁶⁸ Inevitable political and economic pitfalls aside, conceptualizing a traditional monetary or land distribution form of reparations in the context of citizens aggrieved by highway infrastructure fails to address the underlying cause of such grievances — the highway itself.

Outside the realm of government-sanctioned racial inequities, there is precedence for government-funded infrastructure as a solution to mend a harm, specifically to mitigate environmental damages. “Green infrastructure,” for example, as defined by the Environmental Protection Agency, is the use of plant or soil systems (rather than traditional gutters, pipes, and tunnels) to prevent stormwater runoff from causing water pollution in urban areas.¹⁶⁹ Building a cap park would mean coupling environmental infrastructure mitigation efforts together with the desire to create equitable solutions to rectify the harms of past highway infrastructure.

IV. FRAMEWORK TO CAP THE CROSS-BRONX

While highway cap parks have been scientifically proven to have positive environmental impacts¹⁷⁰ and are a visual, physical representation of stitching land back together that was once broken apart, such a physical connection is not immune to the existing risks that come with urban

167. See Pete Buttigieg (@SecretaryPete), TWITTER (Apr. 12, 2021, 2:22 PM), <https://twitter.com/SecretaryPete/status/1381674012670066688?s=20> [<https://perma.cc/7QGW-U7JA>] (“Let me be clear: American highways were too often built through Black neighborhoods on purpose — dividing communities, adding pollution, and making pedestrians less safe . . . It’s a troubled history, but if we’re going to create an equitable infrastructure for the future, we cannot look away from the past.”).

168. See, e.g., Rhoda E. Howard-Hassmann, *Getting to Reparations: Japanese Americans and African Americans*, 83 SOC. FORCES 823, 824–25 (2004).

169. See *What Is Green Infrastructure?*, EPA, <https://www.epa.gov/green-infrastructure/what-green-infrastructure> [<https://perma.cc/MHW9-LKJR>] (last visited Mar. 8, 2022); see also Winne Hu & James Thomas, *Why New York Is Unearthing a Brook It Buried a Century Ago*, N.Y. TIMES (Dec. 6, 2021), <https://www.nytimes.com/2021/12/06/nyregion/tibbets-brook-bronx-daylighting.html> [<https://perma.cc/Y7FT-9Y6W>] (describing a \$130 million project in the Bronx to unearth a brook to improve flooding issues).

170. See, e.g., CITY OF DALL. ET AL., *supra* note 16.

development. This Part addresses two primary issues with infrastructure development through a cap park. First, large-scale infrastructure projects, such as a cap park, are not immune to the effects of gentrification, where actions from government policies and private entities result in the displacement of communities surrounding such infrastructure.¹⁷¹ Second, given large-scale infrastructure projects require the coordination of several public and private entities, building a piece of infrastructure over a highway runs the risk of losing the actual desires of the community members impacted by the project, or worse, it becomes an excuse to further expand highway development.¹⁷² This Part assesses the best means to address each of these potential issues.

This Note recommends two actions be taken to ensure the goals of capping the Cross-Bronx are met. Amid the emergence of legal literature studying the present-day implications of the discriminatory history of the interstate highway system, this Part recommends the codification of racial equity impact assessments and a community-based approach to both the planning and implementation of urban infrastructure projects through a community discretionary budget. This Note does not seek to argue that building a cap park is the best solution, nor the only solution for filling the void of legal remedies on highway development and infrastructure projects. However, with the proper measures, this Part concludes that a cap park over the Cross-Bronx is a viable solution to rectify at least some of the harms caused decades ago.

A. Agency Coordinated Racial Equity Impact Assessments

The Cross-Bronx's construction disproportionately impacted Black and Brown communities for decades to follow. Thus, in order to assess the feasibility of a cap park over the Cross-Bronx, an analysis of how this park will impact those very communities surrounding the Cross-Bronx must be done. This analysis will allow policymakers to foresee unintended consequences on communities of color surrounding the area that would counter the park's goals of mitigating existing harms such as pollution, noise, and a general disconnect in communities. To prevent such potential

171. See Simmons, *supra* note 41, at 934–35 (explaining the modern phenomena of gentrification since the year 2000).

172. For example, in Denver, Colorado, a group of community organizers and nonprofits sued the Colorado Department of Transportation (CDOT) over a highway expansion project for I-70, where plaintiffs argued over the concern for pollution after years of reconstruction. The parties reached a settlement agreement where CDOT agreed to, among other things, funding for an independent health study of the impact of the highway and construction of a four-acre park over the completed Interstate. See *Settlement Reached on Central 70 Project*, EARTHJUSTICE (Dec. 20, 2018), <https://earthjustice.org/news/press/2018/settlement-reached-on-central-70-project> [<https://perma.cc/K9QR-UCDB>].

underpinnings of the Cross-Bronx, this Note first recommends a required racial equity impact assessment.

i. Racial Equity Impact Assessments in Urban Policy.

Generally, policymakers pursuing highway infrastructure projects should be required to engage in comprehensive reviews of all racial and ethnic groups impacted by a given project, also known as racial equity impact assessments. Racial equity impact assessments analyze how a racial or ethnic group would be impacted by a proposed action or policy.¹⁷³ They are intended to assist legislators in detecting unforeseen policy consequences and can adjust legislation that has the potential to worsen racial disparities.¹⁷⁴ Racial equity impact assessments are now commonly seen in the context of criminal justice policies, including sentencing commissions, budget and fiscal agencies, and corrections departments.¹⁷⁵ Scholars argue that such studies “uncover the specific structural mechanisms that create cumulative racial disadvantage across domains, time and generations” through a lens into the complex dimensions of race in the United States.¹⁷⁶

A recent piece of legal scholarship in addressing inequities in highway infrastructure recommends racial equity impact assessments for highway redevelopment projects to advance the goal of rebuilding crumbling infrastructure while working to mitigate the negative consequences of the interstate highway system.¹⁷⁷ The proposal suggests an analysis of data regarding highway projects’ effect on racial and ethnic groups and communities. This notion is grounded in the principles of the transportation justice movement,¹⁷⁸ and the plan encourages a community-based process.¹⁷⁹

173. See Nicole D. Porter, *Racial Impact Statements*, SENT’G PROJECT (June 16, 2021), <https://www.sentencingproject.org/publications/racial-impact-statements/> [<https://perma.cc/EFW9-VT5U>].

174. See *id.*

175. See *id.*; see also Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 18 (1998).

176. R.A. Lenhardt, *Race Audits*, 62 HASTINGS L.J. 1527, 1527 (2011).

177. See Archer, *supra* note 9, at 1326.

178. Defined as a framework that addresses the “disparate outcomes in planning, operation and maintenance, and infrastructure development’ and redress inequalities in the distribution of the benefits and costs of the nation’s transportation systems.” *Id.* at 1328 (quoting Robert D. Bullard, *The Anatomy of Transportation Racism*, in HIGHWAY ROBBERY: TRANSPORTATION RACISM AND NEW ROUTES TO EQUITY 26 (Robert D. Bullard, Glenn S. Johnson & Angel O. Torres eds., South End Press 2004)).

179. See *id.*

Government requirements to address possible injustices from a given project are not a new concept. President Clinton's 1994 Executive Order (EO) 12,898 was designed to confront environmental discrimination head on.¹⁸⁰ The Order required that agencies conduct their activities in a way that made environmental justice a part of its mission. The Executive Order states that "each Federal agency 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."¹⁸¹ The EO included a memorandum that set forth a robust environmental justice analysis — highlighting key actions that federal agencies must perform to fulfill the Order's goals, including ensuring that all programs receiving Federal assistance that affect human health or the environment do not use discriminatory methods or practices, federal agencies analyze the environmental effects (including economic and social) on minority and low-income communities and providing opportunities for community input, including access to information related to planning.¹⁸²

In drafting the order, the theory was to first "identify the characteristics of the communities to be protected," second, "account for cumulative impacts and cross-media environment burdens," and "[t]hird, change the decisionmaking [sic] apparatus and integrate serious consideration of how agency choices will affect all communities, but especially identified [environmental justice] communities."¹⁸³ The EO, however, lacked teeth. While the EO was aimed at the administrative agencies, it did not have any force of legislation for compliance and was premised on a hope that absent any substantive law, environmental justice decision-making would improve.¹⁸⁴ Over 20 years following, the EO has proven that "hope is not enough" for results.¹⁸⁵

Currently, President Biden's EO 13,985 "On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government," the first EO of his administration, sets forth a framework to achieve racial equity across government agencies.¹⁸⁶ The White House

180. Exec. Order No. 12,898, 59 Fed. Reg. 32 (Feb. 16, 1994).

181. *See id.*

182. *See id.* ("Mitigation measures outlined or analyzed in an environmental assessment, environmental impact statement, or record of decision, whenever feasible, should address significant and adverse environmental effects of proposed Federal actions on minority communities and low-income communities.").

183. Gerald Torres, *Hope Is Not Enough. Here Are Four Steps*, 37 ENV. F. 56, 56 (2020).

184. *See id.*

185. *See id.*

186. *See* Exec. Order No. 13,985, 86 Fed. Reg. 7,009 (Jan. 20, 2021).

Domestic Policy Council is tasked with coordinating the inter-agency process.¹⁸⁷ While the effectiveness of the latest EO is lacking in research, the EO, as in the Clinton Administration, lacks the force of legislation for agency compliance. However, where EO 12,898 was lacking in compliance, EO 13,985's addition of an office to coordinate interagency action has the potential to facilitate greater agency cooperation.

ii. Applying Racial Equity Impact Assessments to Highway Infrastructure.

In assessing the feasibility of a cap park, given that the entire goal of the project is to mitigate the conditions that have plagued communities of color, to not run a full environmental justice and equity impact study surrounding the park's construction would run counter to the purpose of the project's goals. While New York State requires a SEQRA analysis within its environmental impact statement, which takes into account the overall impact on the community, including community displacement and character,¹⁸⁸ this Note recommends to go one step further, where agencies not only identify potential racial disparities but also "unearth structural conditions that perpetuate racial inequality and understand how highway construction will impact transportation equity, racial segregation and concentrated poverty, economic opportunity and investment, access to quality education and affordable housing, and health outcomes."¹⁸⁹

To be the most effective, while states would determine specific factors to be included within their assessment, agencies across the board would have a consistent definition of racial equity,¹⁹⁰ which would be informed by a review of past decisions and the subsequent impacts. Such a study would force agencies to look to possible remediation efforts in every action conducted. For example, if the Bruckner Expressway in the Bronx were to need new ramps, the Federal Highway Administration would be required to look to the underlying harms caused by the existing structures surrounding the ramps and look for the best possible infrastructure that would remedy existing racial inequities surrounding the expressway.

Applying this framework to capping the Cross-Bronx, a uniform agency definition for racial equity is crucial, given the number of state and federal agencies that would have to coordinate for such a complex operation, including, among others, the Federal Highway Administration, the N.Y.

187. *See id.*

188. *See supra* Section II.B.i; *see also Introduction to SEQRA*, DEP'T ENV'T CONSERVATION, <https://www.dec.ny.gov/permits/6208.html> [<https://perma.cc/6VB7-Y3AJ>] (last visited Feb. 14, 2022).

189. Archer, *supra* note 9, at 1327.

190. *See Torres, supra* note 183 (noting how a consistent definition of racial equity requires establishing a consensus of environmental justice community).

State Department of Transportation, the Department of the Interior, and the Department of Environmental Conservation.¹⁹¹ A racial equity impact assessment on a consistent framework across agencies may unearth disparate treatment on the basis of unconscious racism or class bias.¹⁹²

While criticized for adding cumbersome and expensive processes to already intensive environmental impact reviews, critics may be able to reconcile any perception of government “red tape” with the tremendous economic incentives. Scholars have found that implementing such racial equity impact reviews, thereby reducing the incidence of racial disadvantage, would in turn reduce the costs of expensive government programs in place to assist the disadvantaged.¹⁹³ Moreover, research suggests that the costs associated with expenditures on such impact studies curtail that of actual pervasive racial inequality.¹⁹⁴ In the context of the Cross-Bronx, the Columbia University study has already indicated that the large price tag is misleading as compared to the cost savings associated with the long-term health and economic benefits.¹⁹⁵

Where existing required environmental impact studies have lacked in accountability and enforcement through inter-agency EOs, a required equity impact study across agencies takes the appropriate steps to ensure that such a major project does not stray from the goals that the cap park would set out to achieve.

B. Community-Based Infrastructure — Community Stakeholders Through a Discretionary Budget

The processes associated with undergoing a large federally funded project through the different stakeholders involved along with the agencies at work can often lead the project in a direction outside of its initial goals. Here, undergoing a federally funded cap park project runs the risk of losing the core goals of the South Bronx community that the park sets out to accomplish.

191. See, for example, the agencies required for a similar highway cap park project in Buffalo, NY. See N.Y. DEP’T OF TRANSP. & U.S. DEP’T TRANSP., PROJECT SCOPING REPORT: NYS ROUTE 5 (BUFFALO SKYWAY) PROJECT 17 (2020).

192. See Davis, *supra* note 175, at 19.

193. See ROBERT WEISSBOURD, LIVING CITIES, STRENGTHENING COMMUNITIES FOR REGIONAL PROSPERITY 4–5 (2007), http://rw-ventures.com/wp-content/uploads/2017/01/Strenghening_Communities.pdf [<https://perma.cc/G25D-N6NC>] (“[A]nti-poverty strategies are not simply concerned with redistribution. Targeting poverty can have benefits for the regional economy as a whole.”).

194. See *id.* at 5.

195. See *supra* Section III.B; see also Kim et al., *supra* note 59, at 379–84.

The South Bronx community has historically been excluded from certain planning decisions that impact residents. Recent efforts to improve quality of life for residents surrounding the Sheridan Expressway in the South Bronx offer lessons regarding community input for infrastructure projects.¹⁹⁶ The Sheridan Expressway, also designed by Robert Moses and built in 1963, cut through four diverse districts, resulting in a massive decrease in population, cut off the Bronx River from residents, and increased pollution along the river.¹⁹⁷ A coalition of community groups known as the South Bronx Watershed Alliance has been rallying for removal of the Sheridan since the 1990s, and with such efforts have come constant disconnect between community members and builders.¹⁹⁸

For example, in a project known as the 2013 Sheridan-Hunts Point Land Use and Transportation Study (SEHP), New York City received a \$1.5 million federal planning grant to study the South Bronx's transportation infrastructure to measure how feasible changes could improve living conditions.¹⁹⁹ By 2017, the New York State budget allocated \$700 million to this initiative, which included converting the Sheridan Expressway into a pedestrian-friendly boulevard.²⁰⁰ In 2018, however, the Project Scoping Report provided that the New York State Department of Transportation decided to move forward with another planning project that will divert truck traffic next to community parks and facilities typically used by children with little reason at all.²⁰¹

196. See David Westenhaver, 'Missed Opportunity': Sheridan Offer Lessons as Congress Considers Sprawling Infrastructure Bill, HUNTS POINT EXPRESS (Oct. 24, 2021), <https://huntpointexpress.com/2021/10/24/missed-opportunity-sheridan-offers-lessons-as-congress-considers-sprawling-infrastructure-bill/> [<https://perma.cc/RX3S-6VFA>].

197. See Danielle Muoio, *A Hated, Mile-Long Highway Shows an Overlooked Problem with America's Infrastructure — But It Could Soon Come Crumbling Down*, BUS. INSIDER (July 9, 2017, 10:04 PM), <https://www.businessinsider.com.au/cities-removing-highways-cut-off-neighborhoods-2017-7> [<https://perma.cc/VBS6-A336>].

198. See *id.*

199. See Ed García Conde, *Ignoring Community Wishes & Planning, NYS to Proceed with Dangerous Redesign of Sheridan Expressway*, WELCOME2THEBRONX (Mar. 26, 2018), <https://welcome2thebronx.com/2018/03/26/ignoring-community-wishes-planning-nys-proceed-dangerous-redesign-sheridan-expressway> [<https://perma.cc/625L-27ME>].

200. See *id.*

201. See *id.* ("South Bronx neighborhoods have historically been excluded from planning decisions that have been catastrophic for our health and the local environment. We have some of the highest asthma rates in the country due to the highways that divide our neighborhoods. We lack open, green spaces and suffer from dangerous pedestrian conditions due to decades of funding neglect for infrastructure improvements. We deserve and demand to be part of the decision-making process. We demand Oak Point and Leggett ramps to be put back on the table." (quoting Adam Green, Executive Director of Rocking the Boat, a youth development program in the South Bronx)).

After persistence from community members, in 2019, the Sheridan Expressway's removal project was completed, converting the Expressway into a ground-level Boulevard with two cross-walks.²⁰² While the project has been praised by the Congress for New Urbanism, community members argue that the project ignored the demands of impacted residents and nonprofits, particularly given the boulevard lacks bus lanes, the bike lanes are typically blocked by cars, and the boulevard still allows thousands of trucks to stream through every month, augmenting existing air pollution issues.²⁰³

To prevent stripping the community from the initiative that has grossly impacted the Bronx for decades, this Note next recommends that in order to preserve the spirit of the Cross-Bronx cap park proposal, the community should have a discretionary budget within the project.

i. Community-Based Initiatives for Policy Decisions

While courts and laws are by nature reactive, an emphasis on courts and laws ignores “factors that marginalize . . . communities — customs, discriminatory practices, social attitudes, physical violence and its threat.”²⁰⁴ There must be a robust process for citizen participation “to render any decision the equivalent of informed consent.”²⁰⁵ Legal scholars in connection with highway infrastructure have argued that requiring a collaborative, community-based initiative would ensure that policymakers are forced to evaluate the full impact of a project and may adjust plans in response to community concerns.²⁰⁶ Scholars have further argued that in order to properly redress past governmental actions requires not only that community organizers express their views on a given issue but rather have a stake in the substantive decisions that will shape the project.²⁰⁷

202. See Westenhaver, *supra* note 196.

203. See *id.* The second phase of the Improvement Project began in March 2021, setting out to provide direct access to the Hunts Point Market from the newly completed Sheridan Boulevard and Bruckner Expressway. See Victor Victorio, *Second Phase of Hunts Point Access Improvement Project Set to Begin*, HUNTS POINT EXPRESS (Mar. 26, 2021), <https://huntspointexpress.com/2021/03/26/second-phase-of-the-transformative-hunts-point-access-improvement-project-set-to-begin/> [<https://perma.cc/H85R-73TR>].

204. Simmons, *supra* note 41, at 929.

205. Torres, *supra* note 183, at 56.

206. See Archer, *supra* note 9, at 1329 n.394 (“[C]ommunity input into agency decisionmaking ‘can counteract influential interests, provide overlooked data, and open the process to scrutiny of all affected individuals.’” (quoting Peter L. Reich, *Greening the Ghetto: A Theory of Environmental Race Discrimination*, 41 U. KAN. L. REV. 271, 288–89 (1992))).

207. See *id.* at 1329 (“[M]embers of the impacted community must not only be heard, but have a seat at the table and be involved in the substantive conversations and decisions that will shape the direction of the project after initial information and feedback have been

Allowing community members to be stakeholders in large-scale projects is no easy feat. The recent trend of Community Benefit Agreements (CBAs) in developer projects has delineated the potential issues that come about when developers work with communities to complete a certain project.²⁰⁸ A CBA is a legally binding agreement between developers and community members, where a coalition of community members agree to not oppose a project in exchange for certain assurances from developers such as jobs, housing, or other environmental improvements.²⁰⁹ An example of a successful CBA is in Pittsburgh, Pennsylvania, where the Pittsburgh Penguins demanded \$750 million in public funds for a new stadium, all while the Hill District, a Black community that continued to suffer the consequences of urban renewal in the 1950s, struggled due to a lack of public investment.²¹⁰ However, the city's first CBA in 2008 provided \$8.3 million in improvements to the neighborhood, along with jobs, a new grocery store, and an overall improvement in community health from a new YMCA recreation center.²¹¹ Weaker CBAs can result in a developer co-opting power to its own benefit, lead to weak enforcements with benefits that never materialize, or do not adequately address the needs of the impacted community.²¹² Such issues come as a result of communities that are not adequately represented (from a wide-scale coalition), or the CBA does not adequately hold the developer accountable.²¹³

ii. Community Discretionary Budget for the Highway Cap Park

Given the difficulties to ensure that communities are truly at the table in decision-making among the several agencies, developers, and politicians, to ensure adequate community participation, this Note proposes that an

gathered.”); *see also* Simmons, *supra* note 41, at 897–88 (“The overall practice of planning ‘for’ and not ‘with’ minority groups in the development of an *urban* renewal program for the entire community has a tendency to relegate the affected minorities into positions of having others plan for their housing needs, irrespective of their rights guaranteed as citizens of the state and nation.”).

208. *See* Vicki Been, *Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?* (Furman Ctr. for Real Est. & Urb. Pol’y, Working Paper, 2010), https://furmancenter.org/files/publications/Community_Benefits_Agreements_Working_Paper.pdf [<https://perma.cc/2UCJ-GW8S>].

209. *See id.*

210. *See* P’SHP FOR WORKING FAMS. & CMTY. BENEFITS L. CTR., COMMON CHALLENGES IN NEGOTIATING COMMUNITY BENEFIT AGREEMENTS — AND — HOW TO AVOID THEM 2 (2016), <https://www.forworkingfamilies.org/sites/default/files/publications/Effective%20CBAs.pdf> [<https://perma.cc/74QN-PAS7>].

211. *See id.* at 9.

212. *See id.*

213. *See id.*

effective model to ensure community participation is in the form of a discretionary grant to community organizers within the budget to allocate towards the project in any way they see fit.

There have been several successful federal funding programs for cities that provide discretionary spending to distressed communities. The Model Cities Program, for example, under the Johnson Administration (terminated by the Ford Administration), created the Community Development Block Grant Program (CDBG), which allocated funds to states and municipalities through the Department of Housing and Urban Development where, thereafter, local governments had the discretion to allocate funds to local needs.²¹⁴ The Carter Administration continued federal funding for discretionary spending with the Urban Development Action Grants Program.²¹⁵

Discretionary spending on local municipalities and community groups has been successful presently under the Department of Transportation (DOT). Under the Rebuilding American Infrastructure with Sustainability and Equity, or RAISE Discretionary Grant program (born out of the TIGER Program),²¹⁶ the DOT receives hundreds of applications from states, municipalities, counties, tribal governments, or other public entities for transportation infrastructure projects and invests in road, rail, and transit projects at the local level.²¹⁷

Moreover, discretionary funds to community groups have taken off on a global scale in the form of “participatory budgeting” (PB).²¹⁸ What started in Porto Alegre, Brazil, in 1989, PB is the process where community members are able to decide how to spend parts of the public budget.²¹⁹ Presently, PB is used in over 3,000 municipalities around the globe (including New York City). Studies show that PB has led to a greater focus on public investment in more disadvantaged districts and has contributed to an improvement in public services and infrastructure.²²⁰

214. See Scott L. Cummings, *Community Economic Development as Progressive Politics: Toward a Grassroots Movement for Economic Justice*, 54 STAN. L. REV. 399, 416–17 (2001).

215. See *id.*

216. See *TIGER Discretionary Grant Program*, U.S. DEP’T TRANSP. (Mar. 13, 2012), https://www.transportation.gov/sites/dot.gov/files/docs/TIGER_DISCRETIONARY_GRANT_PROGRAM.pdf [<https://perma.cc/5EWW-M5Z7>].

217. See *About RAISE Grants*, U.S. DEP’T TRANSP. (Nov. 19, 2021), <https://www.transportation.gov/RAISEgrants/about> [<https://perma.cc/9N82-73NF>].

218. See YVES SINTOMER ET AL., *DIALOG GLOB., PARTICIPATORY BUDGETING WORLDWIDE — UPDATED VERSION 26* (2013), <https://estudogeral.uc.pt/bitstream/10316/42267/1/Participatory%20Budgeting%20Worldwide.pdf> [<https://perma.cc/RP8Y-UMUC>].

219. See *Participatory Budget*, N.Y.C. COUNCIL, <https://council.nyc.gov/pb/> [<https://perma.cc/Y6LW-DFZQ>] (last visited Mar. 8, 2022).

220. See SINTOMER ET AL., *supra* note 218, at 26.

In New York City, since 2011, PB has played an important role in the ability of community members to impact the budgeting process and decision-making in community projects.²²¹ In 2019, Council Members allocated \$35 million in capital funding based on projects voted on by community members.²²² Reports demonstrate that PB has led to the involvement of long-term residents in lower income communities, including the South Bronx, who had not previously been active.²²³ Recent successful PB initiatives in the South Bronx include technology upgrades in schools, the development of gyms for students with disabilities, basketball court renovations, and water fountain upgrades.²²⁴

Creating a discretionary budget for community groups within an infrastructure project to cap the Cross-Bronx would guarantee not only that community members are at the table in discussions for the piece of infrastructure but moreover are a part of the implementation. Such a budget would alleviate the concern that developers and agencies co-opt power to bring such a project in their preferred direction, given the community impacted is guaranteed to receive a portion of the budget. Guaranteeing community members are adequately involved in the planning and implementation to cap the Cross-Bronx would contribute to achieving the overall goals of the park.

CONCLUSION

After decades of communities living with the consequences of governments building cities to benefit only some, with a lack of remedies available in courts and through legislation, the United States's current renewed focus on infrastructure is a unique opportunity to reshape the way we look at cities and who cities are built for. The Infrastructure Act's passage, including a provision to reconnect communities impacted by harmful highways, coupled with a movement of urban planners to build parks over environmentally and socially harmful highways, presents a unique opportunity to reconnect the South Bronx, which has been bearing the consequences of the Cross-Bronx Expressway and the harmful laws and policy decisions associated with it for generations. However, a project to build a park over the Cross-Bronx cannot ignore the consequences that

221. See *Participatory Budget*, *supra* note 219.

222. See *id.*

223. See ALEXA KASDAN & LINDSAY CATTEL, URB. JUST. CTR., A PEOPLE'S BUDGET 2, 23 (2012), <https://nyf.issuelab.org/resource/a-people-s-budget-a-research-and-evaluation-report-on-the-pilot-year-of-participatory-budgeting-in-new-york-city.html> [<https://perma.cc/HYY9-2DA3>].

224. See *Participatory Budget Winning Projects*, N.Y.C. COUNCIL, <https://council.nyc.gov/pb/results/cycle-8-results/> [<https://perma.cc/98PD-ZWHX>] (last visited Mar. 8, 2022).

come with urban development, including further community displacement and a lack of community input in decision-making. Thus, to be an adequate solution to repair at least some of the harms caused, the project must look to maintain the community's character and prevent any additional harm to the very communities suffering the consequences through adequate racial equity impact assessments and discretionary budgeting for community members.

Moses famously ordered engineers to build the Southern State Parkway's bridges extra low to prevent poor people in buses from using the highway.²²⁵ "Legislation can always be changed[.]' . . . 'It's very hard to tear down a bridge once it's up.'"²²⁶ While placing green on top of diesel trucks and noise may not reverse the embedded systemic racism in the roads, rebuilding through a sphere that unearths the past head on and engages the community to redevelop, stands as a feasible solution, and a path forward to a reconnected South Bronx.

225. See Thomas J. Campanella, *Robert Moses and His Racist Parkway, Explained*, BLOOMBERG CITYLAB (July 9, 2017, 12:03 PM), <https://www.bloomberg.com/news/articles/2017-07-09/robert-moses-and-his-racist-parkway-explained> [<https://perma.cc/CFS7-MHQR>].

226. See *id.* (quoting Sidney M. Shapiro, a close associate of Robert Moses and former Chief Engineer and General Manager of the Long Island State Park Commission).