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

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

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

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INTRODUCTION

Robert Moses was known as the "Master Builder" of New York.[1] During the time that he was appointed to a number of important state and local offices,[2] he shaped much of New York's infrastructure, including a number of "low-hanging overpasses" on the Long Island parkways that led to Jones Beach.[3] According to his biographer, Moses

directed that these overpasses be built intentionally low so that buses could not pass under them.[4] This design decision meant that many people of color and poor people, who most often relied on public transportation, lacked access to the lauded public park at Jones Beach.[5]

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Although the Atlanta, Georgia, metropolitan area is known for its car-centric, sprawling development patterns, it has a subway system: the Metropolitan Atlanta Regional Transit Authority (MARTA).[6] Wealthy, mostly white residents of the northern Atlanta suburbs have vocally opposed efforts to expand MARTA into their neighborhoods for the reason that doing so would give people of color easy access to suburban communities.[7] The lack of public-transit connections to areas north of the city makes it difficult for those who rely on transit—primarily the poor and people of color—to access job opportunities located in those suburbs.[8]

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At the request of white residents, in 1974 the city of Memphis closed off a street that connected an all-white neighborhood to a primarily black one.[9] Supporters of this measure argued that it would ostensibly reduce traffic and noise, in addition to promoting safety.[10] The U.S. Supreme Court dismissed a challenge to this action, stating that the road closure was just a "routine burden of citizenship" and a "slight inconvenience."[11] Justice Marshall dissented, acknowledging that this inconvenience carried a "powerful symbolic message."[12] He wrote, "The picture that emerges from a more careful review of the record is one of a white community, disgruntled over sharing its street with Negroes, taking legal measures to keep out the 'undesirable traffic,' and of a city, heedless of the harm to its Negro citizens, acquiescing in the plan."[13] He believed that through this action, the city was sending a clear message to its black residents,[14] and he could not understand why the Court could not see that message.

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Why have the Court, judges, and lawmakers—the entities usually tasked with crafting and enforcing antidiscrimination law—failed to find fault with these sorts of physical acts of exclusion? The most straightforward reason is that it is difficult to show the necessary intent to discriminate, especially in situations involving land use and the

built environment.[15] This Article, however, suggests an additional reason—specifically, that those entities often fail to recognize urban design as a form of regulation at all. Scholarship on urban planning, which describes the history of city-building, is rife with tales of physical exclusion.[16] And although the law has addressed the exclusionary impacts of zoning ordinances and restrictive covenants, courts, legislatures, and most legal scholars have paid little attention to the use of less obvious exclusionary urban design tactics. Street grid design, one-way streets, the absence of sidewalks and crosswalks, the location of highways and transit stops, and even residential parking permit requirements can shape the demographics of a city and isolate a neighborhood from those surrounding it, often intentionally. Decisions about infrastructure shape more than just the physical city; those decisions also influence the way that residents and visitors experience the city.[17]

This Article examines the sometimes subtle ways that the built environment has been used to keep certain segments of the population—typically poor people and people of color—separate from others. Further, it considers the ways in which the law views and treats the exclusionary effects of these seemingly innocuous features of the built environment—which the Article terms "architectural exclusion"—as compared to more traditional and more obvious exclusionary practices. Although exclusion is perhaps the most important stick in the bundle of property rights, and although certain forms of exclusion can have beneficial results,[18] this Article focuses on forms of exclusion that result in discriminatory treatment of those who are excluded. This Article builds on Lawrence Lessig's regulatory theory, which asserts that behavior may be regulated or constrained, in part, by "architecture."[19] Lessig broadly defined architecture as "the physical world as we find it, even if 'as we find it' is simply how it has already been made."[20] The Article also employs the term "architecture" quite broadly to encompass civil engineering, city planning, urban design, and transit routing. The decisions of those who work in these varied fields result in infrastructure that shapes the built environment. The resulting infrastructure is included in this broad definition of architecture and functions as a form of regulation through architecture.[21]

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II. ARCHITECTURAL EXCLUSION: PRACTICE

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

A. Physical Barriers to Access

A number of localities have used physical barriers to exclude. A paradigmatic example of architectural exclusion through physical barriers is Robert Moses's Long Island bridges that were mentioned in the Introduction to this Article.[80] Moses set forth specifications for bridge overpasses on Long Island, which were designed to hang low so that the twelve-foot tall buses in use at the time could not fit under them.[81] "One consequence was to limit access of racial minorities and low-income groups"—who often used public transit—"to Jones Beach, Moses's widely acclaimed public park. Moses made doubly sure of this result by vetoing a proposed extension of the Long Island Railroad to Jones Beach."[82] Moses's biographer suggests that his decision to favor upper- and middle-class white people who owned cars at the expense of the poor and African-Americans was due to his "social-class bias and racial prejudice."[83] Instead of garnering support to pass a law banning poor people or people of color from the places in which he did not want them—which, if the intent were clear, would not be permissible today[84]—Moses used his power as an architect to make it physically difficult for certain individuals to reach the places from which he desired to exclude them. Although in this situation, there was at least anecdotal evidence of the architect's intent, that sort of evidence is often not available. Instead, our environment contains low bridges that might make travel difficult for some, but we tend to view such bridges as innocuous features rather than as exclusionary objects.

A municipality that lacks sufficient connections between different parts of the community is often exclusionary because residents are deterred from traveling. For

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

Similarly, the existence of divided highway-style median barriers on local arterials makes it difficult for pedestrians to cross streets or for cars to turn left.[88] In Palo Alto, traversing Highway 101 to reach affluent West Palo Alto from low-income East Palo Alto is dangerous and involves passing through numerous busy intersections; the area has one of the highest rates of car-pedestrian collisions.[89] The lack of secure pedestrian infrastructure makes areas more difficult to access in a safe and easy manner. Municipalities also often use the most straightforward physical structures to exclude—walls and barriers. Walled ghettos are a well-known example of physical segregation.[90]Jewish people in Europe were made to live in separate, walled areas, as were Arab and European traders in China.[91] This form of physical exclusion by walls and barriers is nothing new.[92] However, it is not only a remnant of the distant past, but also exists in more modern examples.

In Detroit in 1940, a private developer constructed a six-foot-high wall—known as Eight Mile Wall—to separate an existing black neighborhood from a new white one that was to be constructed.[93] Historically, the Federal Housing Administration (FHA) provided financing for a new development project only if the neighborhood was sufficiently residential and racially segregated.[94] In the case of the Eight Mile Wall, the FHA would not finance the new housing project unless the wall was constructed because the FHA believed that the proposed new development was too close to an existing black one.[95] The wall still exists today—a legacy of discriminatory government policy—and though Detroit has experienced declines in segregation in recent years, this city is still the most racially segregated metropolitan area in the United States.[96]

Another divider was an approximately ten-foot-high, 1,500-foot-long fence that separated the racially diverse (though predominantly white) suburb of Hamden, Connecticut, from the primarily black public housing projects in New Haven.[97] Although the fence was finally removed in May 2014, while it was in place, residents in the public housing were extremely isolated from the surrounding community.[98] In order "to buy groceries at a Hamden shopping center three miles away," the public housing residents would "have to travel into New Haven to get around the fence, a 7.7-mile trip that takes two buses and up to two hours to complete."[99] The fence was originally erected by the city of Hamden in the 1950s to keep crime in the New Haven projects out of Hamden.[100] As recently as 2012, calls to remove the fence were met with resistance from Hamden residents who "described the robberies and traffic overflow they said would result from opening the fence."[101] Hamden agreed to remove the fence only after the New Haven Housing Authority threatened to "sue Hamden on civil rights grounds."[102] A similar eight-foot-tall spiked fence was installed in 1998 around a public housing project in Hollander Ridge in Baltimore.[103] This fence, which was constructed by the local housing authority with funding from the Department of Housing and Urban Development (HUD), blocked access to and through Rosedale, a contiguous, mostly white neighborhood.[104] The Rosedale residents wanted the fence to keep out crime and keep their property values up, and "there was a not insubstantial vocal segment of the Rosedale whose racist views were made readily apparent."[105]

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

Local governments also take affirmative steps to install exclusionary architecture themselves. Often, cities use barriers and blockades to mold traffic patterns. For example, the concrete barriers and bollards that exist throughout the streets of Berkeley, California, were installed to calm traffic;[110] however, the barriers do this by preventing people from driving down the streets on which they are placed. In Shaker Heights, Ohio, the city installed a "traffic diverter," which was called "the Berlin Wall

for black people" by nearby neighbors in Cleveland.[111] In some communities, the purpose of rerouting traffic is to inhibit harmful behaviors tied to drugs and crime. Concrete barriers were put in place near the highways of Bridgeport, Connecticut, to block quick access into the city by those who wanted to buy drugs.[112] The strategy, according to police, was that "buyers would fear 'driving all over looped streets, stopping and turning around, trying to find drugs with the possibility of having their nice cars, their jewelry, their money ripped off as they look.'"[113] A similar technique was implemented in Los Angeles, which put traffic barriers in place on certain streets that allegedly provided quick escape routes for gang members who had committed crimes.[114]

In all these instances, the barriers and road closures were instituted, installed, and approved based on their purported relationship to public health and safety. While these barriers are often related to traffic, they have marked secondary effects: they often intentionally restrict access by a certain class of individuals (here, drug dealers and "johns"). They also make access more difficult for those unfamiliar with the area—not just those bad actors who the locality wants to keep out, but any outsider. It is quite possible that these architectural decisions contribute to racial or socioeconomic change in the neighborhoods.[115] Katyal notes that traffic measures implemented in North London resulted in a neighborhood transformed "from a noisy and hazardous 'red light' district into a relatively tranquil residential area."[116] The possibility of transformation as a result of architecture raises a related question: where did the people who were using these streets prior to the architectural intervention go? Presumably, they were pushed to a different—possibly less affluent—part of town.[117] This suggests that the area from which they were expunged may have had residents with sufficient political capital to organize and make this change happen.

B. Transit

Communities also engage in architectural exclusion in the way they design and place public transit and transportation infrastructure. The siting of bus stops and subway stations changes the built environment. These routing decisions and patterns have a dramatic impact on the mobility of individuals through, and the accessibility of, different areas of the community.[118] Further, transit siting and infrastructure decisions

are often implemented with the intention of making it more difficult for certain groups of people to access certain parts of the community.[119] This section will provide examples of these exclusionary transportation design decisions.

1. Placement of Transit Stops

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

Because there are a number of benefits to living near a transit stop,[122] the Homevoter Hypothesis suggests that homeowners will readily lobby for them.[123] However, many communities actively push their elected decision makers not to bring transit stops to their neighborhoods. Research shows that the opposition to transit is often motivated by the desire to block access by certain "undesirable" people who ride transit (for example, people of color and the poor).[124] As one scholar acknowledged, "race has been a factor limiting the geography of transit."[125] For example, wealthy white residents of suburban Atlanta, Georgia,[126] suburban San Francisco, California,[127] and Washington, D.C.,[128] have organized to oppose the locating of transit stops in their communities, at least in part because transit would enable people who live in poorer areas of the cities to easily access these wealthier areas.[129] Although the decision to locate a transit hub is typically made by elected local officials, those officials often act at the behest of their constituents.[130] When a locality is successful in its opposition, people who rely on transit to get around will not have access to those communities.[131]

As one scholar notes, "public transportation continues to be routed in a way that makes it difficult for some blacks to get to and from leisure venues that more affluent or more mobile persons freely enjoy."[132] While particular individuals' lack of access to any area is troubling, transit-siting decisions are also intimately connected to

employment opportunities for minorities and low-income individuals.[133] Decisions to exclude transit stops (and those who use them) from parts of the suburbs mean that many workers who would accept minimum-wage jobs in the suburbs cannot physically access those jobs.[134] For example, although many jobs in the Detroit suburbs lack sufficient workers, the city and the suburbs have not coordinated their public transportation systems. Thus, those who live in the inner city—and who are mostly black—cannot easily access suburban jobs, which are located in areas that are mostly white.[135] Similarly, employers in some suburban Atlanta areas were forced to pay higher than their typical near-minimum wage to attract retired and teenage workers from the surrounding community because lower-income people living in the central city could not easily access the jobs.[136] Residents and policymakers in those areas have rejected proposals to bring Atlanta's rapid transit network (MARTA) into their communities, which would have allowed inner-city workers easy access to these suburban jobs via public transit.[137] The inability to use public transit to access the suburbs is one of the primary barriers preventing black people from obtaining suburban jobs.[138] Moreover, as more low-income individuals move to the suburbs, they face continued difficulty accessing jobs in their communities due to the lack of transit options within suburban communities.[139]

Sometimes transit will allow a person to get close to a given area, but not all the way there, leaving the rider in a dangerous situation.[140] This was the scenario faced by Cynthia Wiggins, a seventeen-year-old woman who was hit and killed by a dump truck while she was attempting to cross a seven-lane highway to get to the mall where she worked.[141] Wiggins took the bus from the inner city, where she lived, to her job at the suburban mall.[142] However, the mall's owners had actively resisted requests to allow the bus to stop on its property; rather, the bus stopped outside the mall on the other side of the large highway.[143] Documents produced during trial revealed that this transit-siting decision was motivated at least in part by race or class bias; a local transport official wrote in an internal document that "'[mall decision-makers] feel it will not bring in the type of people they want to come to the mall."[144] One mall retail store owner recalled a conversation with a mall official who said something like, "The people who rode the Walden Avenue bus were not the kind of people they were trying to attract to the Walden Galleria."[145] The mall did, however, allow some charter buses to stop on its property.[146] Members of Buffalo's black community asserted that the mall was "trying to use the highway as a moat to exclude some city residents"[147]—a

classic example of architectural exclusion. The case settled, but it presents a stark example of the dangers inherent in exclusionary transit design.

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

Bridge exits and highway off-ramps are often located so as to filter traffic away from wealthy communities. The Robert F. Kennedy Bridge (formerly known as the Triborough Bridge), as it traverses the East River from Queens to Manhattan, "makes an almost perpendicular hard right turn north, so that the traffic lets out in Harlem, not on the wealthy Upper East Side."[148] According to one commentator, this terminus location was chosen due to "a combination of regard for the wealthy Upper East Side, disregard for the residents of Harlem, and plain old-fashioned graft."[149] It was not selected for convenience, as most traffic would be coming from and heading to areas below 100th Street.[150] Similarly, the Northern State Parkway avoids the affluent North Shore area of Long Island because wealthy homeowners in the area were able to convince Moses to reroute the location of the parkway, which resulted in a five-mile detour.[151]

The placement of highways so as to intentionally displace poor black neighborhoods is even more familiar.[152] Policymakers "purposeful[ly]" decided to route highways through the center of cities, often with the intent "to destroy low-income and especially black neighborhoods in an effort to reshape the physical and racial landscapes of the postwar American city."[153] Although this work was undertaken in order to make places more accessible to cars, it was also done with an eye towards eliminating alleged slums and blight in city centers.[154] These tactics were so common that they earned a name among critics: "white roads through black bedrooms."[155]
For example, in 1954, the City of Detroit was engaged in urban renewal.[156] It razed the black community of Black Bottom to build the I-375 highway and new developments such as the Mies van der Rohe-designed Lafayette Park[157] and public housing projects.[158] In the early 1950s, there were an estimated 140,000 black people living in Black Bottom, and while some middle-income families in the area were able to relocate to more prosperous neighborhoods, the urban renewal project forced many low-income residents into public housing.[159] Now Detroit is considering removing the architectural barrier of the aging I-375 highway and creating a pedestrian-friendly

parkway to connect Lafayette Park with the central business district.[160]

This story is not unique. Local government officials and state highway planners in Miami intentionally located I-95 so that it would cut through Overtown, an inner-city black community.[161] Although it had previously been known as "the Harlem of the South," Overtown became "an urban wasteland dominated by the physical presence of the expressway."[162] I-10 through New Orleans was constructed along a portion of North Claiborne Avenue, which was "the center of an old and stable black Creole community."[163] Highway 101 separates the Latino and black residents of East Palo Alto, California, from the west side of town.[164] Other examples include streets in Omaha, Nebraska;[165] I-880 in Oakland, California;[166] a turnpike in Delaware;[167] I-64 and I-77 through Charleston, West Virginia;[168] the list goes on.

To some extent, the placement of highways through city centers is a legacy issue, meaning that it is an issue that remains in the present because of decisions made in the past.[169] It was not illegal to tear apart poor neighborhoods at the time that urban renewal was in full swing, and the resultant features of the built environment are now hard to change.[170] However, the elimination of low-income and minority neighborhoods under the guise of clearing blighted areas is far from a legacy issue in and of itself; as the Supreme Court's decision in Berman v. Parker established, clearing "blight" is an acceptable use of the eminent domain power.[171] Notably, in the aftermath of Kelo, which reaffirmed the validity of takings for economic development purposes, many states passed laws restricting the use of eminent domain; however, many of those new laws retained exceptions allowing its use to clear blight.[172]

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

Another method of exclusion involves the creation and use of one-way streets. These streets function to funnel traffic away from certain areas and into others.[173] There are sometimes health- and safety-based reasons for the creation of one-way streets, including traffic-calming and pedestrian safety.[174] But they also may serve to exclude by making it difficult to gain access by car into or out of certain parts of a

community.[175] For example, Greenmount Avenue in East Baltimore separates the poor, predominantly African-American neighborhood of Waverly on its east side from the wealthy, predominantly white neighborhood of Guilford on its west.[176] While it is easy to access Waverly from Greenmount due to the existence of a grid pattern of two-way cross streets, that grid does not extend to the west side of Greenmount.[177]Rather, access to Guilford on the west is blocked by houses or bollards, and in the rare instance that there is a street crossing from the west over Greenmount, it is typically a one-way street headed east, toward Waverly.[178] In addition to making vehicular access difficult, one-way streets such as these are exclusionary in that they can confuse visitors, which might discourage their continued presence in a neighborhood, or make it hard for them to find their way to or from a specific home.[179] Many one-way streets were created during urban renewal with the stated goals of accommodating automobile traffic and allowing people to pass quickly through cities.[180] More recently, however, some communities have begun to convert formerly one-way streets into two-way streets, in part to reduce confusion and increase access.[181]

Communities also rely on other confusion techniques to keep people out, or to make it hard for them to find their way around an area. For example, in describing Darien, Connecticut,[182] one of many intentionally white communities in the United States, James Loewen notes, "[e]ven street signs are in short supply in Darien, . . . making it hard to find one's way around that elite sundown suburb. Darien doesn't really want a lot of visitors, a resident pointed out, and keeping Darien confusing for strangers might deter criminals—perhaps a veiled reference to African Americans."[183] A similar, though perhaps less nefarious, technique has been used to keep tourists and "city folks in search of weekend homes" out of Bolinas, California.[184] Citizens there have, for years, been removing directional signs that the State Department of Transportation places on Highway 1 to direct drivers toward Bolinas.[185] In fact, in 1989, the residents of the town held a nonbinding advisory vote, and approximately three-quarters of the residents voted to prohibit road signs that would direct travelers to Bolinas.[186] Further, the design of many suburban communities, with their cul-de-sacs and curvy streets, makes them confusing to outsiders who cannot see what lies on the other side of the neighborhood. This street layout also gives non-residents fewer reasons to enter the neighborhood in the first place; the multiple dead end streets and cul-de-sacs of a suburban neighborhood often all branch off a single arterial road. Thus, unlike the traditional urban grid pattern, these neighborhoods lack connectivity to other parts of the community, making them useless to those who want to cut through.[187] Further,

while perhaps successful from an exclusionary standpoint, these architectural elements often result in less efficient travel for residents.

4. Residential Parking Permits

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

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

The examples of architectural exclusion identified in this Part are concerning in that they reveal a number of underlying problems. For example, physical exclusion prevents members of minority groups from partaking in the civic life of the community; makes it extremely difficult or physically dangerous for some people to access wealthier communities and jobs; may result in stigma or harm to dignity; can often destroy existing communities of color; and may allow groups to conceal racially

discriminatory motives behind a veneer of health and safety rationales. These problems and others will be analyzed more fully in the remainder of this Article.