

# ARTICLES

## ONE MILE NORTH

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*Interstate 40 stretches across the entire country. This article concerns one small stretch of that interstate: a short “kink” in the road that occurs in Nashville, Tennessee. That kink—the result of a planning decision to move the road’s route one mile to the north—delivered an immense physical and psychological blow to Nashville’s black community. North Nashville (which this kink cut right through) lost six hundred homes and six churches; over a hundred businesses closed, and over a thousand people were displaced.*

*This sort of destruction frequently occurred during the era of interstate construction. Often, “freeway revolts” arose in response to the threat of interstate construction. These revolts frequently used all available political and legal levers to block, delay, or slow down interstate construction. In North Nashville, however, the freeway revolt was too late and too short to make a difference. Why? This article uses primary documents—from Nashville planners and the Supreme Court—and contemporary and historical accounts of the controversy to answer that question.*

*The story of the planning and construction of I-40 will reveal the segregation-fueled violations of law that doomed the political and legal*

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\* For inspiration, I owe thanks to Tiana Clark, Steven Hale, and Dayna Bowen Matthew. For helpful conversations and patient feedback, I owe thanks to Swapnil Agrawal, Molly Brady, Lauren Egan, Sharon Hurt, Lonnell Matthews Jr., Jianne McDonald, Jordan Minot, Anna Noone, Spencer Ryan, Varun Sharma, Zulfat Suara, Michael Weisbuch, Learotha Williams Jr., and Linda Wynn. For diligent editing, I owe thanks to Taylor Cross and the entire staff of the Belmont Law Review. I owe a special thanks to Richard Schragger, whose guidance made this article possible, and the late, great Reavis Mitchell Jr., whose encouragement meant the world to me and whose wealth of knowledge made this article far better. Any errors in this article are my own.

*resistance in North Nashville. A comparison with a nearby, more famous freeway revolt—over Overton Park, in Memphis—will further explain the failure of the North Nashville freeway revolt.*

*This article is the story of one road in one city. That story, though, leaves plenty of unsatisfactory answers in its wake that should force courts, commentators, and policymakers today to ask hard questions of themselves, their histories, and their built environments.*

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## INTRODUCTION

“1968,  
*they built the interstate. I-40 bisected the black community  
 like a tourniquet of concrete. There were no highway exits.  
 120 businesses closed. Ambulance siren driving over  
 the house that called 911, diminishing howl in the distance,  
 black bodies going straight to the morgue.*”

- Tiana Clark<sup>1</sup>

*“Once you sink that first stake, they’ll never make you pull it up.”*

- Robert Moses<sup>2</sup>

Interstate 40 (I-40) stretches nearly 2,600 miles, from California to the coast of North Carolina. This article is the story of one small stretch of that road: about 2.5 miles of it, to be exact.<sup>3</sup> This stretch of I-40 abandons straight lines and the “ruthless, single-minded logic of the engineer.”<sup>4</sup> Instead, it develops a kink that moves the interstate corridor a mile to the north from its straight-line path.<sup>5</sup> That kink is the subject of this article, and it occurs in Nashville, Tennessee.

Nashville is a city defined by the interstate: three major interstate highways (I-24, I-40, and I-65) meet there. Few cities are quite so crisscrossed by major highways.<sup>6</sup> I-40 runs across Tennessee from Memphis, through Nashville, and on to Knoxville. In Nashville, its route roughly parallels the route of US-70, which runs east through the city and becomes Charlotte Avenue close to downtown. Instead of following Charlotte all the way downtown, I-40 veers north at 39<sup>th</sup> Avenue, just before it passes Nashville’s famed Centennial Park. This new route cuts straight through a neighborhood, bisects historic Jefferson Street, and links with the downtown loop just off Jefferson, a mile or so north of Charlotte.

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1. Tiana Clark, *Nashville*, THE NEW YORKER, Oct. 9, 2017. The author thanks Tiana for writing her poem, which partially inspired this article, and for graciously allowing its use in the epigraph. For more of Tiana’s work, see TIANA CLARK, *I CAN’T TALK ABOUT THE TREES WITHOUT THE BLOOD* (2018).

2. This maxim is commonly attributed to Robert Moses, New York’s master builder and a giant of 20th century urban America. See, e.g., Paul Goldberger, *Robert Moses, Master Builder, is Dead at 92*, N.Y. TIMES, July 30, 1981.

3. For this figure, see Raymond A. Mohl, *Citizen Activism and Freeway Revolts in Memphis and Nashville: The Road to Litigation*, 40(5) J. URB. HIST. 870, 880 (2014).

4. ROBERT A. CARO, *THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK* 850 (1974). The opening framing of this article—and the title—owe much to Caro’s famous “One Mile” chapter. The quote here is from a portion of a larger section, discussing a similar bend in a highway (in that case, the Cross-Bronx Expressway).

5. John Seley first referred to the “kink” in I-40 through North Nashville. See JOHN E. SELEY, *The Kink in Nashville’s Interstate 40*, in THE POLITICS OF PUBLIC-FACILITY PLANNING (1983). For the mile figure, please see Mohl, *supra* note 3, at 880.

6. CHARLES A. ZUZAK ET AL., *BEYOND THE BALLOT: CITIZEN PARTICIPATION IN METROPOLITAN NASHVILLE* 9 (The University of Tennessee 1971).

This stretch of I-40 runs directly through North Nashville, the historic heart of black Nashville.<sup>7</sup>

The construction of I-40 along this route caused immense damage. Black Nashvillians lost more than six hundred homes and six churches. The road caused nearly thirty apartment buildings and over a hundred businesses to close; it displaced over a thousand people. The road physically separated three key pillars of the black community: Fisk University, Meharry Medical College, and Tennessee A & I University.<sup>8</sup> It permanently scarred North Nashville's commercial and cultural center, Jefferson Street, famous as an organizing hub for the Nashville sit-ins and as a proving ground for artists like Jimi Hendrix, Etta James, and Otis Redding. As one contemporary put it, the final route "literally [went] out of its way to devastate the Black business community, uproot Black homes and churches, and restrict the growth, operation, and interaction of three major Black institutions of higher learning."<sup>9</sup>

Up to this point, this story is tragic but all-too-familiar. State and federal highway planners consistently planned highway routes with a high human, commercial, and cultural cost. This harm disproportionately fell on black neighborhoods,<sup>10</sup> but was by no means limited to them. In city after city, potential interstate routes prompted "freeway revolts," where citizens fought to save their neighborhoods, their cultural landmarks, and their cities via activism, politics, and—eventually—the law. Successful campaigns to delay and halt highway construction occurred in many of Nashville's peer cities. Most famously, a committed group of citizens in Memphis prevented

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7. For a current map of the Nashville interstate system, that will likely illuminate much of this description, see Appendix A. Appendix B contains maps of North Nashville before and after I-40. The map included above is in Appendix B; it depicts the then-existing neighborhood, with the interstate overlaid on top of it (in pink). Jefferson Street is the street highlighted in blue.

8. For a fuller list of this damage, see Mohl, *supra* note 3, at 880; Robert Steuteville, *USDOT explores urban design ideas for Nashville highway and neighborhood*, CONG. FOR NEW URBANISM, Aug. 8, 2016 (noting that 1,400 Nashvillians were displaced). Tennessee A & I is now called Tennessee State University.

9. Mohl, *supra* note 3, at 880 (quoting Yale Rabin, *North Nashville and I-40*, unpublished report, Feb. 1968); see also *Hearings on Uniform Relocation Assistance and Land Acquisition Policies Before the House Comm. on Public Works*, 91st Cong., 1st Sess., ser. 30, at 502 (1970) (testimony of Yale Rabin) [hereinafter Rabin Testimony].

10. The literature on this subject is vast. For two contemporary examples, see Ashley Halsey III, *A crusade to defeat the legacy of highways rammed through poor neighborhoods*, WASH. POST, Mar. 29, 2016 (reporting on Charlotte, New York, and Miami, among others) and Alana Semuels, *The Role of Highways in American Poverty*, THE ATLANTIC, Mar. 18, 2016 (reporting on Syracuse); see also section I.

I-40 from bisecting Memphis' renowned Overton Park.<sup>11</sup> Nashville, though, was different. North Nashville's freeway revolt was too late and too short to make a difference.<sup>12</sup> Why was Nashville's freeway revolt so late, so abbreviated, and such a failure? This article offers a legal and historical answer to that question.

Traditional accounts of the I-40 controversy in Nashville largely fail to explain the late-developing freeway revolt in Nashville. When they do, many present the fight in North Nashville as unwinnable, part and parcel of the trends—urban renewal, highway construction, displacement, and de-industrialization—damaging black neighborhoods across the country. Others place the blame for the ineffectual revolt on black North Nashville itself, which is variously presented as disorganized or naive.<sup>13</sup> This article utilizes original planning documents, court records, original briefs, and the papers of the Supreme Court Justices themselves to offer an explanation different from existing scholarship. This article's use of Supreme Court archives especially made possible this novel interpretation of the North Nashville freeway revolt. In this account, segregation and repeated violations of federal highway statutes and administrative law principles were concurrent causes for the failure of the North Nashville freeway revolt. Segregation produced the attitudes that drove the decision to route I-40 through North Nashville. It also allowed for the administrative process violations that delayed and frustrated the potential North Nashville freeway revolt and doomed the efforts to halt I-40 in the federal courts.

This article will proceed in four parts. First, it introduces the Interstate Highway System and the relevant requirements imposed upon planners by statute during the 1950s and early 1960s. It then explains the "freeway revolts" that arose in response to highway construction, with a focus on the revolts in Nashville's peer cities. Second, it explores the planning of I-40 in detail. It draws on historical accounts and contemporary planning documents to reveal why and how the planners and politicians decided to route I-40 through North Nashville. This section also explores the black community's response to the planned route through North Nashville. Contemporary accounts and original archival material (including the papers of several Supreme Court Justices) explain the story of the failed North Nashville freeway revolt in the court of public opinion and the federal courts. Third, it will explain why and how the North Nashville freeway revolt failed even as other revolts succeeded. Segregation and legal process violations delayed the revolt and therefore doomed it in the federal courts. Finally, this article concludes by suggesting that the injury caused by I-40 deserves attention, repair, and redress.

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11. On Memphis, see *infra* Section I.

12. As Mohl put it, "Nashville's freeway revolt came late and didn't last long." Mohl, *supra* note 3, at 883.

13. See *infra* Section III.

## I. THE ROADS

### *“I Have Seen the Future”*

- famous pin from the Futurama Exhibit, 1939 World’s Fair

The Interstate Highway System represented the largest public works project yet undertaken by any nation, at a cost (more than World War I) that still boggles the mind. Some communities, however, bore most of the costs of this interstate construction and experienced few of the benefits. This section will explore the history behind the Interstate Highway System and locate the I-40 controversy within the “freeway revolts” that subsequently exploded in cities across the country.

### A. The Interstate Highway System

The most popular exhibit at the 1939 New York World’s Fair was General Motors’ Futurama exhibit.<sup>14</sup> It promised a future of fourteen lane expressways, zero traffic, and economic mobility.<sup>15</sup> The crowds lined up to see it—possibly because it contrasted so sharply with their experience in cars and on highways up to that point. The first highways did not deliver the results they promised. Congress first approved federal aid for highway construction in 1916 and 1921 and tried to give highway construction a shot in the arm during the New Deal.<sup>16</sup> Before World War II, though, road construction proceeded sluggishly due to political conflict at the federal and state level over who would pay and who would benefit.<sup>17</sup> Traffic, accidents, and central city congestion all increased to intolerable levels as a result.<sup>18</sup> Despite landmark legislation—the Federal-Aid Highway Act of 1944<sup>19</sup>—conditions hardly improved after the war.<sup>20</sup> Traffic and congestion kept

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14. MARK H. ROSE & RAYMOND A. MOHL, *INTERSTATE: HIGHWAY POLITICS AND POLICY SINCE 1939* 1 (3d ed. 2012). Some estimates put the numbers of visitors as high as 30 million over the course of two years. For that number, and the source of the famous pin, see Alex Davies, *The World’s Fair Future of 1939 and the Quest for Our Next Utopia*, WIRED, Dec. 31, 2017.

15. MARK H. ROSE & RAYMOND A. MOHL, *INTERSTATE: HIGHWAY POLITICS AND POLICY SINCE 1939* 1 (3d ed. 2012).

16. Gary T. Schwartz, *Urban Freeways and the Interstate System*, 8 TRANSP. L. J. 167, 173–76 (1976).

17. ROSE & MOHL, *supra* note 14, at 12.

18. *Id.* at 13.

19. Federal-Aid Highway Act of 1944, Pub. L. No. 78–521, ch. 626, 58 Stat. 838.

20. The Federal-Aid Highway Act of 1944 was itself the result of six years of study kicked off by the Federal-Aid Highway Act of 1938. *See* Schwartz, *supra* note 16, at 182–83; *see generally* ROSE & MOHL, *supra* note 14, at 15–40. As Schwartz explains, much of the actual legal structure of the Interstate Highway

increasing, reaching a “near crisis” level by the early 1950s.<sup>21</sup> Highway construction was still not proceeding quickly enough to alleviate traffic or boost future economic growth.<sup>22</sup> President Dwight D. Eisenhower resolved to fix this problem.<sup>23</sup>

Eisenhower’s solution was the Federal-Aid Highway Act of 1956. This solution was hard-won.<sup>24</sup> The legislation “incorporated long-sought goals” (namely, self-financing), “asked few significant sacrifices, and managed to sidestep difficult questions.”<sup>25</sup> It passed the House and the Senate by staggering margins.<sup>26</sup> The legislation promised to build upwards of 40,000 miles of highways.<sup>27</sup> It allocated \$24.8 billion (nearly \$165 billion today, when adjusted for inflation) to accomplish that goal.<sup>28</sup>

The bill’s basic structure was as follows. The federal government committed to paying for ninety percent of interstate construction; states would be responsible for the remaining ten percent.<sup>29</sup> The bill raised highway user taxes (most notably, the gas tax and a tire tax) to pay for the federal share.<sup>30</sup> This new revenue—and existing highway taxes—would be redirected into a Highway Trust Fund, which could only fund interstate

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System had been provided by the Federal-Aid Highway Act of 1944 (and policy adjustments to it in 1947 and 1955). The 1956 Act merely (“merely”) fixed the funding problem. SCHWARTZ, *supra* note 16, at 184–86, 196.

21. ROSE & MOHL, *supra* note 14, at 29–31, 41.

22. ROSE & MOHL, *supra* note 14, at 69–70.

23. Eisenhower apparently believed, since at least 1954, that the federal government itself had to boost highway spending to alleviate traffic nationally. ROSE & MOHL, *supra* note 14, at 70.

24. A previous effort went down in defeat in 1955. For a great summary of the failure of the 1955 effort, see ROSE & MOHL, *supra* note 14, at 69–84. The main antagonists to the previous effort appear to have been industry (opposed to differential tax rates) and Senator Harry F. Byrd of Virginia (who disliked the bond-based structure of the 1955 bill). *Id.*

25. ROSE & MOHL, *supra* note 14, at 89; see ROSE & MOHL, *supra* note 14, at 85–94 for a strong analysis of just why this effort cut the previous Gordian knot of highway financing politics. The short answer is, basically, by promising everyone everything they wanted.

26. The initial margin in the House was 388–19. ROSE & MOHL, *supra* note 14, at 88. It then went through the Senate and to a conference committee. The Senate approved the conference bill 89–1, and the House passed it by a voice vote (they did not bother to record the final tally). ROSE & MOHL, *supra* note 14, at 92.

27. One account puts that figure as high as 42,500. See Schwartz, *supra* note 16, at 168. Another puts it at 41,000. See Andrew Glass, *Federal-Aid Highway Act, June 26, 1956*, POLITICO (June 26, 2012, 4:25 AM), <https://www.politico.com/story/2012/06/this-day-in-politics-077803> [<https://perma.cc/WP4D-CZL3>].

28. Glass, *supra* note 27.

29. BEN KELLEY, PAVERS AND THE PAVED: THE REAL COST OF AMERICA’S HIGHWAY PROGRAM 25 (1971); Schwartz, *supra* note 16, at 188.

30. Schwartz, *supra* note 16, at 188.

construction.<sup>31</sup> This self-financing feature of the legislation was its key innovation. The legislation also included a sunset provision, so that the financing scheme would expire in 1972.<sup>32</sup> Two provisions of this statute stand out. First, the statute did not include any relocation assistance despite significant debate on the topic.<sup>33</sup> Second, the original legislation included a public hearing requirement for urban highways.<sup>34</sup> Section 116(c) required state officials to hold a public hearing (which had to address the “economic effects” of the interstate) and also mandated that state highway officials certify to the federal government that they had complied with the statute.<sup>35</sup>

So began, as Eisenhower said, the “biggest peacetime construction project of any description ever undertaken by the United States or any other country.”<sup>36</sup> The concrete poured for the interstates could have been used to “build eighty Hoover Dams or six sidewalks to the moon.”<sup>37</sup> This immense scale actually increased over time. Congress reauthorized the Interstate Highway System in 1959, 1961, 1965, 1966, 1968, 1970, 1973, and so on; it would eventually extend spending up through 1996.<sup>38</sup> These reauthorizations typically included either an increase in the highway taxes or a lengthening of their duration.<sup>39</sup> These reauthorizations—and cost overruns—caused the total amount spent by the federal government to balloon. All told, the United States federal government authorized just over half a trillion dollars to pay the federal share of highway funding.<sup>40</sup> World

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31. KELLEY, *supra* note 29, at 25; Schwartz, *supra* note 16, at 188.

32. KELLEY, *supra* note 29, at 25–26; Schwartz, *supra* note 16, at 196–97.

33. Schwartz, *supra* note 16, at 237. Robert Moses offered forceful testimony in favor of relocation assistance—which he saw as a way to cheaply buy off opposition—but it was to no avail. Schwartz, *supra* note 16, at 237. In a cruel twist, given the subject of this paper, Tennessee’s own Senator Albert Gore, Sr., spoke out against relocation assistance on the floor of the Senate on what Schwartz seems to believe were quite thin procedural grounds. *See* Schwartz, *supra* note 16, at 237, n.473.

34. *See* Federal-Aid Highway Act of 1956, Pub. L. No. 84-627, ch. 462, 116(c), 70 Stat. 385.

35. *See id.*; *see also* Schwartz, *supra* note 16, at 235, n.455.

36. Schwartz, *supra* note 16, at 196 (quoting DWIGHT D. EISENHOWER, MANDATE FOR CHANGE 548 (1963)).

37. *Id.* at n.228 (quoting EISENHOWER, *supra* note 36, at 548).

38. *Id.* at 197–98. For the 1996 year, *see* U.S. Department of Transportation, Federal Highway Administration, *Interstate Frequently Asked Questions*, <https://www.fhwa.dot.gov/interstate/faq.cfm#question6> [<https://perma.cc/79NJ-ZWM4>] (last updated Dec. 18, 2018).

39. Schwartz, *supra* note 16, at 197–99.

40. *See* U.S. Department of Transportation, Federal Highway Administration, *Interstate Frequently Asked Questions*, at <https://www.fhwa.dot.gov/interstate/faq.cfm#question6> [<https://perma.cc/79NJ-ZWM4>] (last updated Dec. 18, 2018). \$119 billion in 1992 dollars equals roughly \$510 billion in 2018 dollars.



War I cost less.<sup>41</sup> This program resulted in 42,785 miles of highways, but not without backlash.<sup>42</sup>

## B. The Freeway Revolts

The new interstates “permanently altered” American’s urban landscape.<sup>43</sup> Some of these changes—like new business development—were boons for cities.<sup>44</sup> Other developments were far more negative. Interstates destroyed established neighborhoods, undercut mass transit, and replaced community landmarks with off-ramps and other “dead and useless space.”<sup>45</sup> By the 1960s, interstate construction demolished almost 40,000 urban housing units annually. Some estimated interstate construction would displace a million people nationally.<sup>46</sup> Much of this displacement occurred in poor neighborhoods and black neighborhoods.<sup>47</sup> This destruction occurred across the country: in Birmingham;<sup>48</sup> Boston and Chicago;<sup>49</sup> Camden, New Jersey and Columbia, South Carolina;<sup>50</sup> Miami and

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41. Norwich University, *The Cost of U.S. Wars Then and Now*, <https://online.norwich.edu/academic-programs/masters/military-history/resources/infographics/the-cost-of-us-wars-then-and-now> [<https://perma.cc/R5Z9-5LXM>].

42. U.S. Department of Transportation, Federal Highway Administration, *Interstate Frequently Asked Questions*, <https://www.fhwa.dot.gov/interstate/faq.cfm#question3> [<https://perma.cc/79NJ-ZWM4>] (last updated Dec. 18, 2018).

43. ROSE & MOHL, *supra* note 14, at 96.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 100–04. As A.Q. Mowbray vividly wrote, these roads were quite literally “White Roads through Black Bedrooms.” A.Q. MOWBRAY, *ROAD TO RUIN* 177 (1969) (see the title of chapter eleven). Rose and Mohl point out, correctly, that interstate construction coincided almost entirely with the Great Migration from the South. The black population of every major non-Southern city increased by over 100% during this period, and black populations in cities across the South also spiked. ROSE & MOHL, *supra* note 14, at 103–04. That meant overcrowding (due to redlining and segregation) in crowded urban neighborhoods – the places road planners were most likely to direct interstates through. *Id.* For a magisterial exploration of the Great Migration, and its myriad consequences for America and the intrepid black Americans leaving the South behind, please see ISABEL WILKERSON, *THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA’S GREAT MIGRATION* (2010).

48. David Karas, *Highway to Inequity: The Disparate Impact of the Interstate Highway System on Poor and Minority Communities in American Cities*, 7 NEW VISIONS FOR PUB. AFF. 9, 14 (2015); ROSE & MOHL, *supra* note 14, at 107. The route in Birmingham ran through two historically black neighborhoods. *Id.*

49. ROSE & MOHL, *supra* note 14, at 110. The routes in both Boston and Chicago primarily affected working-class white communities.

50. ROSE & MOHL, *supra* note 14, at 107–08.

Montgomery;<sup>51</sup> New Orleans;<sup>52</sup> and New York.<sup>53</sup> Numerous other examples exist.<sup>54</sup>

In city after city, though, citizens fought back—sometimes successfully—against interstate construction. These “freeway revolts” would come to dominate the first two decades of highway policy after 1956. The first occurred in San Francisco in 1959, over plans to extend the Embarcadero Freeway into Golden Gate Park.<sup>55</sup> This revolt culminated in 1966 in the halting of construction on the Embarcadero Freeway, as the city rejected \$280 million in federal highway dollars earmarked for that purpose.<sup>56</sup> The San Francisco Freeway Revolt asked, essentially, whether the potential benefits of highways outweighed the very real costs.<sup>57</sup> Citizens soon began to ask the same question in city after city. Starting in the early 1960s, citizens in Baltimore waged a decade-long (and ultimately mostly successful) freeway revolt.<sup>58</sup> In New Orleans, opposition to the Vieux Carre Riverfront Expressway—which would have separated the French Quarter

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51. On Montgomery, see ROSE & MOHL, *supra* note 14, at 106–07. The original Montgomery route appeared to directly target the home of the famed civil rights leader Rev. Ralph Abernathy. *Id.* On Miami, see Karas, *supra* note 48, at 13 (interstate construction destroyed a predominantly black business district).

52. ROSE & MOHL, *supra* note 14, 105–06.

53. ROSE & MOHL, *supra* note 14, at 110. The Cross-Bronx Expressway is the most famous example in New York – it was an old dream of Robert Moses. Moses’ achievement of this dream utterly destroyed a working-class Jewish neighborhood and laid waste to much of the South Bronx. *Id.*

54. A short list of other cities where interstates destroyed primarily poor or minority neighborhoods includes Charlotte, Cleveland, Kansas City, Los Angeles, Pittsburgh, St. Paul, and basically every major city in Florida. ROSE & MOHL, *supra* note 14, at 108–09.

55. San Francisco’s battle over the Embarcadero Freeway included the features—citizen activism, grassroots and elite conflict, legal wrangling, environmental concerns, and stubborn planners—common to nearly every freeway revolt. ROSE & MOHL, *supra* note 14, at 115–16. The “blight by the bay” was eventually torn down (thanks, in part, due to the 1989 Earthquake) and returned to the street grid of the city. See Bill Van Niekerken, *An ode to the Embarcadero Freeway, the blight by the bay*, S.F. CHRON. (Aug. 1, 2017) [https://www.sfchronicle.com/chronicle\\_vault/article/An-ode-to-the-Embarcadero-Freeway-the-blight-by-11543621.php#photo-13184929](https://www.sfchronicle.com/chronicle_vault/article/An-ode-to-the-Embarcadero-Freeway-the-blight-by-11543621.php#photo-13184929) [<https://perma.cc/66QY-M52R>].

56. KELLEY, *supra* note 29, at 95–97; see also ROSE & MOHL, *supra* note 14, at 115.

57. KELLEY, *supra* note 29, at 96–97.

58. ROSE & MOHL, *supra* note 14, at 122–32. The Baltimore Freeway Revolt features many now-famous characters. The original plans for the east-west expressway that would eventually inspire such opposition actually came from Robert Moses. *Id.* at 122–23. U.S. Senator Barbara Mikulski first got involved in politics due to her opposition to the construction of highways through Baltimore.

from the Mississippi—inspired the “Second Battle of New Orleans.”<sup>59</sup> Most famously, a group of citizens in Memphis successfully took their fight against I-40’s proposed route through Overton Park all the way to the Supreme Court.<sup>60</sup>

The fight over Memphis’ Overton Park offers a telling perspective on the dynamics at play in many freeway revolts. This freeway revolt also concerned I-40; initial plans for the highway called for it to run west through Memphis to the Mississippi.<sup>61</sup> This route called for bisecting Overton Park, 342 acres of oak and hickory forest right in the middle of downtown Memphis.<sup>62</sup> Although Memphis’ civic elite strongly supported the route, grassroots opposition quickly formed. A well-attended 1961 public hearing catalyzed the opposition, and by 1964, the Citizens to Preserve Overton Park (CPOP) had fully inserted themselves into the debate over Overton Park’s future.<sup>63</sup> The subsequent political fight involved a long list of players: CPOP, the Memphis City Commission, Memphis’ Mayor and Congressman, all of Memphis’ business elite, transportation bureaucrats spanning two Presidential administrations, and key players in Tennessee state government, including two different Governors.<sup>64</sup> CPOP “sought to engage politically at every level to protect the park, with litigation as a final alternative.”<sup>65</sup> Led by the indefatigable Anona Stoner, CPOP did just that over the next five years, pressuring state, local, and federal officials and linking with other anti-freeway activists across the

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59. For an extremely thorough summary of this freeway revolt, see RICHARD O. BAUMBACH, JR. & WILLIAM E. BORAH, *THE SECOND BATTLE OF NEW ORLEANS: A HISTORY OF THE VIEUX CARRÉ RIVERFRONT-EXPRESSWAY CONTROVERSY* (1981).

60. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 400 U.S. 939 (1970). For an extremely thorough summary of the Overton Park fight, see PETER L. STRAUSS, *Citizens to Preserve Overton Park v. Volpe*, in *ADMINISTRATIVE LAW STORIES* (Peter L. Strauss ed., 2005). For a more recent perspective (from a UVA student), see Margaret Grace Haltom, *Citizens of the Old Forest: Roads, Race, and Resistance in Memphis’s Overton Park* (Mar. 26, 2018) (unpublished B.A. thesis, University of Virginia) (on file with author).

61. Tannera George Gibson, *Not in My Neighborhood: Memphis and the Battle to Preserve Overton Park*, 41 U. MEM. L. REV. 725, 729 (2011); STRAUSS, *supra* note 60, at 262–63.

62. Mohl, *supra* note 3, at 872–73; STRAUSS, *supra* note 60, at 263.

63. Gibson, *supra* note 61, at 726; Mohl, *supra* note 3, at 873–74; STRAUSS, *supra* note 60, at 286–88.

64. For a more thorough summary of this fight, please see STRAUSS, *supra* note 60, at 288–309. *See also* Gibson, *supra* note 61, at 726–27.

65. Mohl, *supra* note 3, at 874.

country.<sup>66</sup> This activism delayed final federal approval of the route until November 1969.<sup>67</sup>

CPOP quickly went to court to stop the approved route. In court, they argued that §4(f) of the 1966 Department of Transportation Act—operative due to the long delay before approval—required consideration of all possible “feasible or prudent” alternatives to the use of parks like Overton Park.<sup>68</sup> In 1970, this argument fell on deaf ears in the Western District of Tennessee and the 6<sup>th</sup> Circuit Court of Appeals.<sup>69</sup> CPOP appealed to the Supreme Court in 1971. Though closely divided over the initial certiorari grant,<sup>70</sup> a unanimous Court eventually agreed with CPOP that 4(f) required Secretary Volpe to formally demonstrate no feasible or prudent alternative route for I-40 existed.<sup>71</sup> Justice Marshall’s opinion for the Court became a “landmark...in environmental and administrative law.”<sup>72</sup> Though the fight would drag on for another decade in Tennessee, state planners eventually gave up, preserving Overton Park for future generations.<sup>73</sup> Like their counterparts across the country, CPOP pulled political, administrative, and eventually legal levers to delay and then stop the construction of I-40.

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66. Mohl, *supra* note 3, at 874-77; *see also* STRAUSS, *supra* note 60, at 288–309.

67. Mohl, *supra* note 3, at 877; STRAUSS, *supra* note 60, at 305. Final approval came from President Richard Nixon’s Secretary of Transportation, John Volpe.

68. Mohl, *supra* note 3, at 878; *see* Federal Highway Act of 1966, Pub. L. No. 89-574, 80 Stat. 766, 771. For more on the background behind this statutory requirement—and its codification in the 1968 Highway Act—*see* STRAUSS, *supra* note 60, at 272–78.

69. Mohl, *supra* note 3, at 878; STRAUSS, *supra* note 60, at 312–16. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 432 F.2d 1307 (6th Cir. 1970); Citizens to Preserve Overton Park, Inc. v. Volpe, 309 F.Supp. 1189 (W.D. Tenn. 1970). It does not seem the 6th Circuit was particularly receptive to inventive or forward-looking administrative law arguments of this sort during this period. *See infra* Section III.

70. Justice Brennan, Justice Black, and Justice Harlan supported granting certiorari; Chief Justice Burger and Justice Blackmun, Justice Stewart, and Justice White opposed. Justice Marshall (who eventually wrote the opinion) switched his vote twice before eventually voting to grant certiorari. *See* STRAUSS, *supra* note 60, at 319 (citing to the *Overton Park* file at the Library of Congress).

71. Citizens to Preserve Overton Park, Inc. v. Volpe, 400 U.S. 939 (1970). *See also* Mohl, *supra* note 3, at 878.

72. Mohl, *supra* note 3, at 878; *see generally* STRAUSS, *supra* note 60, at 328. There is, of course, disagreement over whether *Overton Park* is a good or necessary landmark, especially in administrative law. For a critical view, *see* Peter L. Strauss, *Revisiting Overton Park: Political and Judicial Controls Over Administrative Actions Affecting the Community*, 39 UCLA L. REV. 1251 (1992).

73. Mohl, *supra* note 3, at 878; STRAUSS, *supra* note 60, at 328–32.

CPOP was not alone. By 1969, federal policymakers determined that major freeway revolts were underway in sixteen cities, including Boston, Cleveland, Detroit, Nashville, Newark, New York, Philadelphia, Pittsburgh, Washington, D.C., and the four cities mentioned previously.<sup>74</sup> Many activists did not enjoy CPOP's success. Some of these revolts failed to coalesce or fight back successfully. A nascent revolt in Miami, for instance, never really got off the ground.<sup>75</sup>

What separated the failed revolts from the successful ones? While each revolt—or failed revolt—is slightly different, some common themes can be isolated. First, successful revolts featured a high level of public attention. Typically, committed citizens and local activists drove this attention.<sup>76</sup> It required a certain amount of political savvy and relied on the law. One contemporary observer urged citizens not to adopt a wait and see approach, and to demand full public hearings to stir up opposition.<sup>77</sup> Second, freeway revolts eventually needed the support of local political leaders and civic institutions, especially the newspapers.<sup>78</sup> Finally, legal action was crucial—both to slow down construction and, eventually, to halt it, either through court order or bureaucratic decision.<sup>79</sup> Grassroots opposition always served as the spark in each freeway revolt. But, without the necessary political, institutional, and legal ingredients, it was usually not enough to halt highway construction.<sup>80</sup> The next section explores, at length, what happens when grassroots opposition, absent legal or political support, runs headlong into a highway.

## II. THE ROAD

*“Like a gun...right at the heart of the slums”*

- I-40 Planner

*“In retrospect, it may well have been more desirable to locate the highway on a different line”*

- Secretary of Transportation Boyd

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74. KELLEY, *supra* note 29, at 94 (quoting a letter to Congress from Highway Administrator Turner).

75. ROSE & MOHL, *supra* note 14, at 117–22.

76. *Id.* at 114–15.

77. KELLEY, *supra* note 29, at 129–30, 135–40.

78. ROSE & MOHL, *supra* note 14, at 114–15.

79. *Id.* at 115. Kelley recognizes as much, as his chapter is chock-full of advice about which laws should be used to resist roadbuilding. *See generally* “How to Halt a Highway”, in KELLEY, *supra* note 29.

80. ROSE & MOHL, *supra* note 14, at 115.

This section tells the story of the construction of I-40 through North Nashville. It begins with a brief overview of black Nashville's history, with a focus on the North Nashville community and Jefferson Street. Next, it explores the planning of I-40, the decision to build through North Nashville, and the ten crucial years (from 1957-1967) before litigation commenced. After that, it examines the failed attempt to stop the road in the federal courts: *Nashville I-40 Steering Committee v. Ellington*.<sup>81</sup> Finally, it analyzes the aftermath of I-40's construction and the failure (or abandonment) of mitigation and remedial efforts.

### A. North Nashville History

Nashville's black minority has been an integral part of Nashville's story since the founding of the city. A biracial group (of free people, black and white, and enslaved persons, entirely black) established Fort Nashborough, the forerunner to the city of Nashville.<sup>82</sup> Nashville's black population remained sizable up to the eve of the Civil War.<sup>83</sup> Nashville's free black population first began to congregate in the northern part of the city in the antebellum period.<sup>84</sup> The postbellum era saw explosive growth in the black population of Nashville—it tripled in the three decades after the Civil War—with an increasing concentration of that population in North Nashville.<sup>85</sup> During this era, key black institutions like Fisk University also began.<sup>86</sup> Fisk gradually became an elite beacon of black higher education, graduating luminaries like W.E.B. Du Bois. Other institutions like Meharry Medical College formed and eventually thrived, despite white hostility or indifference.<sup>87</sup> Successful black businesses like the *Nashville Globe* also

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81. *Nashville I-40 Steering Committee v. Ellington*, 387 F.2d 179 (6th Cir. 1967), *cert. denied*, 390 U.S. 921 (1968).

82. BOBBY L. LOVETT, *THE AFRICAN-AMERICAN HISTORY OF NASHVILLE, TENNESSEE, 1780-1930*, at 2–3 (1999).

83. It never fell lower than twenty percent of the city. *Id.* at 6–7. The free black population typically comprised a large sub-portion of the black population in Nashville. *Id.*

84. *Id.* at 15.

85. *Id.* at 88–89.

86. *Id.* at 73. Fisk's Jubilee Singers became world-famous during this era, and an (apparently apocryphal) story claims that Queen Victoria dubbed Nashville "Music City" after hearing the Jubilee Singers perform. See Mack Linebaugh, *Curious Nashville: Why We're 'Music City'*, *According to Ken Burns*, NASHVILLE PUB. RADIO (Nov. 4, 2016), <http://www.nashvillepublicradio.org/post/curious-nashville-why-were-music-city-according-ken-burns#stream/0> [https://perma.cc/E7ND-VWZQ].

87. LOVETT, *supra* note 82, at 156–62.

developed.<sup>88</sup> Over 100 black churches stood in Nashville, with most in North Nashville.<sup>89</sup>

During the first half of the 20<sup>th</sup> Century, North Nashville cemented itself as the center of black Nashville culture and commerce. North Nashville's Jefferson Street emerged as the principal black business district during this time, and the city's first park for black Nashvillians (Hadley Park) opened nearby.<sup>90</sup> University buildings (like Fisk's Jubilee Hall), cultural centers (like the Bijou Theater), and churches (like the original Mt. Zion Baptist Church, now the largest church in the city) lined Jefferson Street.<sup>91</sup> Because of institutions like Fisk and Meharry, a relatively prosperous and educated black elite and sizable middle class lived in North Nashville.<sup>92</sup> Most importantly, Jefferson Street became a cultural and musical mecca. By mid-century, clubs like Club Baron, the Del Morocco, and Maceo's developed a lively music scene. They featured a who's who of rising rock and R&B stars like Etta James, Jimi Hendrix, and Little Richard.<sup>93</sup> This scene contributed much to the development of both genres.<sup>94</sup> This cultural centrality was not limited to music alone. When Nashville college students (among them were a young Marion Barry, John Lewis, and Diane Nash) launched the sit-in movement in the early 1960s, they did so from Clark Memorial Methodist, near Jefferson Street.<sup>95</sup>

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88. See generally Christopher M. Scribner, *Nashville Offers Opportunity: The Nashville Globe and Business as a Means of Uplift, 1907-1913*, in TRIAL AND TRIUMPH: ESSAYS ON TENNESSEE'S AFRICAN AMERICAN HISTORY 264 (Carroll Van West ed., 2002).

89. LOVETT, *supra* note 82, at 197; see also Reavis L. Mitchell, Jr., *Jefferson Street in Leaders of Afro-American Nashville*, [https://www.nashville.gov/Portals/0/SiteContent/Planning/docs/trans/EveryPlaceCounts/2\\_%20Leaders%20of%20Afro%20American%20Nashville\\_Jefferson%20Street.pdf](https://www.nashville.gov/Portals/0/SiteContent/Planning/docs/trans/EveryPlaceCounts/2_%20Leaders%20of%20Afro%20American%20Nashville_Jefferson%20Street.pdf) [https://perma.cc/P9XL-5JCF].

90. LOVETT, *supra* note 82, at 120, 126. See also Mitchell, *supra* note 89.

91. Christopher Dean Hall, *I-40's Route Through North Nashville: The Path of Least Resistance* 7 (1996) (unpublished master's thesis, University of Texas) (on file with author).

92. LOVETT, *supra* note 82, at 120.

93. A good summary of this still relatively unknown history can be found here: Daniel Cooper, *Scuffling: The Lost History of Nashville Rhythm and Blues*, THE NASHVILLE SCENE (Dec. 12, 1996, 4:00 AM), <https://www.nashvillescene.com/news/article/13001092/scuffling> [https://perma.cc/Q74V-UBZS]; see also Mitchell, *supra* note 89; Sabre J. Rucker, *The Highway to Segregation* (May 2016) (unpublished master's thesis, Vanderbilt University) (on file with author). For a visual depiction of this cultural center, please see Appendix C.

94. Cooper, *supra* note 93. In a sad but familiar twist, the subsequent emergence of the Grand Ole Opry has almost entirely displaced the memory of Jefferson Street in Nashville's popular memory.

95. BOBBY L. LOVETT, THE CIVIL RIGHTS MOVEMENT IN TENNESSEE: A NARRATIVE HISTORY 122 (2005). For an excellent account of this history, see

By the late 1950s and early 1960s, black Nashville revolved around Jefferson Street and North Nashville. Three successful black centers of higher education clustered in North Nashville and Jefferson Street alone contained most of the black-owned businesses in the city.<sup>96</sup> Segregation, particularly in housing, explains much of the development patterns in North Nashville.<sup>97</sup> So, too, does indifferent or nakedly destructive government policy. During the 1950s, city leaders used urban renewal to clear out a black “slum”—and its many businesses—just south of Jefferson Street, near Capitol Hill.<sup>98</sup> Some residents moved to Edgehill (another black neighborhood, where another urban renewal project soon started),<sup>99</sup> while still other residents and businesses moved north to Jefferson Street.<sup>100</sup> North Nashville became a cultural, business, and educational center, in part due to the pernicious effects of segregation and destructive government policy elsewhere in the city. The next section describes what happened when those twin forces (segregation and indifferent government policy) went to work on Jefferson Street.

## **B. I-40 and North Nashville (1946-1967)**

This sub-section details the planning of I-40, the decision to build through North Nashville, and the political and administrative wrangling before litigation began over I-40. First, it covers the planning phase of I-40, from 1946-1957. Next, it covers the period from 1957-1967, the so-called “quiet phase” before litigation began. Numerous decisions made quietly during these two decades kneecapped the North Nashville freeway revolt before it even began.

### *1. The Planning Phase (1946-1957)*

Plans for a highway through Nashville began before the Interstate Highway system even existed. In the early 1950s, Nashville city leaders contracted with a New York engineering firm, Clarke and Rapuano, to draw up potential plans for a proposed interstate highway through Nashville.<sup>101</sup>

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DAVID HALBERSTAM, *THE CHILDREN* (1999) (narrating the stories of the student leaders of civil rights activism in 1960’s Nashville).

96. BENJAMIN HOUSTON, *THE NASHVILLE WAY: RACIAL ETIQUETTE AND THE STRUGGLE FOR SOCIAL JUSTICE IN A SOUTHERN CITY* 205–06 (2012).

97. LOVETT, *supra* note 82, at 88–91.

98. HOUSTON, *supra* note 96, at 203–04.

99. For a thorough summary of urban renewal in the Edgehill area of Nashville, see ANSLEY T. ERICKSON, *MAKING THE UNEQUAL METROPOLIS: SCHOOL DESEGREGATION AND ITS LIMITS* 132–37 (2016).

100. HOUSTON, *supra* note 96, at 204–05.

101. Hubert James Ford, *Interstate 40 Through North Nashville, Tennessee: A Case Study in Highway Location Decision Making* 28 (1970) (unpublished



City leaders commissioned this study in the hope that completed plans would make them more competitive for federal dollars when the Federal-Aid Highway Act eventually passed.<sup>102</sup> This study was not the first to examine a highway through Nashville. A 1946 study (by H.W. Lochner and Co., out of Chicago) recommended an east-west route between Broadway and Charlotte Avenue.<sup>103</sup> This east-west route would have allowed engineers to widen an existing road and use a railroad path (the Louisville and Nashville Railroad), minimizing the destruction that normally accompanies highway construction.<sup>104</sup> This route came too close, however, to white Nashville's most exclusive enclave, Belle Meade, and white Nashville institutions like Vanderbilt University and Centennial Park.<sup>105</sup> State planners preferred a route that would hug Charlotte, neatly avoiding Centennial Park and demarcating the line between segregated white and black neighborhoods.<sup>106</sup>

Clarke and Rapuano completed their study for the city in 1955. The final report stated that it was "the result of detailed study based on criteria established by the Bureau of Public Roads for the inter-state highway system."<sup>107</sup> These criteria included, among others, population density, land-use patterns, highway service, land value, traffic, topography, and existing neighborhoods.<sup>108</sup> This report for the city endorsed the Charlotte route.<sup>109</sup>

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master's thesis, University of Tennessee) (on file with author); Hall, *supra* note 91, at 17–18. Clarke and Rapuano had experience in Nashville: they had been involved in the Capitol Hill urban renewal project. HOUSTON, *supra* note 96, at 205. Soon, they would become involved in the Edgehill and Music Row urban renewal projects. Hall, *supra* note 91, at 17–18.

102. Ford, *supra* note 101, at 28; Hall, *supra* note 91, at 17.

103. See Appendix D; see also Ford, *supra* note 101, at 28–29; Hall, *supra* note 91, at 17.

104. HOUSTON, *supra* note 96, at 204–05.

105. *Id.* It is unclear if the concern about the 1946 route was political (taking land from prominent Nashville citizens in Belle Meade could be political suicide), practical (acquiring land in Belle Meade or along the L+N Railroad might be exorbitantly expensive), or both. ZUZAK, *supra* note 6, at 15.

106. HOUSTON, *supra* note 96, at 205.

107. Gilmore D. Clarke and Michael Rapuano, *Report on the Inter-State Controlled-Access Highway System*, Davidson County, Tennessee 1 (September 30, 1955) (on file with Metropolitan Nashville Planning Commission). Though the final report dates itself to September 30, 1955, it appears from a reference to April (and from subsequent historical events) that the report for the city was likely completed in the first half of the year.

108. *Id.*

109. *Id.*; see also Ford, *supra* note 101, at 29–33; Hall, *supra* note 91, at 17–18. One source of confusion for previous scholars (and this author) is whether the preliminary study for the city was a "corridor" study or a "route" study. Although it does not influence the final conclusions of this article, it is an interesting question of framing. This author decided to refer to it as a "route" study—despite compelling evidence to the contrary—because that's how the original Clarke and

The Tennessee State Highway Department soon contracted with Clarke and Rapuano to prepare a final recommendation for an interstate highway system in Nashville.<sup>110</sup>

The decisions made over the next several months changed the route of I-40—and the arc of North Nashville. First, state and city planners and a representative from Clarke and Rapuano met in late June 1955. A memorandum exhaustively detailing the discussions in the meeting suggests the state planners had significant concerns about the “Memphis route” (I-40).<sup>111</sup> These stated concerns included its proximity to railroad lines (previously thought a feature, not a bug, of the route), its lack of access points, and its path through difficult topography.<sup>112</sup> The unstated, more pressing concerns were confirmed over a decade later by Federal Highway Administrator Lowell Bridwell. The Charlotte route would intrude too closely upon white businesses, residencies, and an all-white hospital just south of Charlotte.<sup>113</sup> In early July 1955, the planners and Clarke and Rapuano met again. It appears that Rapuano himself recommended pushing the route through North Nashville. Routing I-40 through North Nashville directly could allow the city and state to combine a highway project with a potential urban renewal project in the same area.<sup>114</sup> This two-step would allow the city and state to save money by using the more generous federal funding available for highway construction to condemn land needed for subsequent urban renewal.<sup>115</sup> Planners strongly backed such policy combinations at the time; one planner involved in the Nashville process advocated for “aim[ing]” the interstate system “like a gun, right at the heart of the slums.”<sup>116</sup> The memo for this second meeting contained little detail about the proposed change. The memo stated that planners agreed upon “the route proposed by the State Highway Department.”<sup>117</sup>

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Rapuano report obtained by the author refers to itself. If interested, turn to Appendix D to observe this route.

110. Ford, *supra* note 101, at 33; Hall, *supra* note 91, at 18.

111. Ford, *supra* note 101, at 34–36, 123–26 (Appendix B).

112. Ford, *supra* note 101, at 34–36, 123–26 (Appendix B). *See also* Mohl, *supra* note 3, at 880 (citing Ford, *supra* note 101, at 28–31); ZUZAK, *supra* note 6, at 16–18. Some of these concerns were legitimate ones. *See* ZUZAK, *supra* note 6, at 16–18 (describing why the Charlotte route appears, in hindsight, to have been an unwise logistical choice to begin with).

113. Ford, *supra* note 101, at 38 (summarizing a conversation between Lowell Bridwell and the leaders of the I-40 Steering Committee. Flournoy Coles summarized this conversation and published a copy of it in the *Fisk News*, which this author could not find. Ford’s summary of Coles’ letter is the best source available).

114. HOUSTON, *supra* note 96, at 206; ZUZAK, *supra* note 6, at 20–22.

115. ZUZAK, *supra* note 6, at 20–22.

116. HOUSTON, *supra* note 96, at 206.

117. Ford, *supra* note 101, at 36, 127–29. The author looked for any evidence or correspondence about this meeting—or the decision—in the papers of Frank G.

The new route cut straight through North Nashville. It, too, paralleled Charlotte, before veering north around 39<sup>th</sup> Avenue North, crossing over 28<sup>th</sup> Avenue North and through Hadley Park, and bisecting Jefferson Street around 25<sup>th</sup> Avenue North.<sup>118</sup> It then ran between Jefferson Street and Scovel Street before connecting with the planned “inner loop” between 11<sup>th</sup> and 12<sup>th</sup> Avenue North.<sup>119</sup> The interstate’s aim at the heart of North Nashville—Jefferson Street—was true (Appendix B and D visually demonstrate this point). To minimize possible damage in North Nashville, Clarke and Rapuano proposed that the interstate run through a natural depression in the land so it would be out of sight of most residents. Furthermore, Clarke and Rapuano proposed to cover the interstate with a deck, where relocated businesses and homes could move.<sup>120</sup> They also recommended development of an urban renewal project for North Nashville.<sup>121</sup>

State and city planners agreed upon this new route with Clarke and Rapuano less than three weeks after their original meeting on the Charlotte route. No one involved completed a feasibility study on this new route—nor could they have, given the quick turnaround.<sup>122</sup> Such a feasibility study might have examined the impact of this route on traffic or the neighborhoods affected (as the original report by Clarke and Rapuano had).<sup>123</sup> Most importantly, such studies likely would have compared the accepted route, through cost-benefit analysis, to alternate routes.<sup>124</sup> One contemporary examination was “surprised to find that little, if any, scientific method was used in determining the final route recommendation in regard to the Memphis route...other alternatives were ruled out on the basis of a mental thought process considering the problems and the criteria.”<sup>125</sup> This lack of planning makes the final I-40 route look like a

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Clement, who served as Governor of Tennessee at the time. It does not appear there is any further information about this decision-making process in Governor Clement’s papers.

118. Hall, *supra* note 91, at 18–19; HOUSTON, *supra* note 96, at 205. For a pictorial reference, see Appendix B and Appendix D.

119. Ford, *supra* note 101, at 33. For a pictorial reference, see Appendix B and Appendix D.

120. ZUZAK, *supra* note 6, at 23–24.

121. HOUSTON, *supra* note 96, at 206–07. This project never developed, and it remains unclear why, even to historians. *Id.*

122. Ford, *supra* note 101, at 36. Later court testimony from a representative of both Clarke and Rapuano and the State Highway Department confirms this conclusion. *See id.* at 98–100 (describing the testimony of Alexander Koltowich, of Clarke and Rapuano, and Bill Wilson, of the State Highway Department).

123. Mohl, *supra* note 3, at 880.

124. *Id.*

125. Ford, *supra* note 101, at 33.

solution in search of a problem.<sup>126</sup> One Clarke and Rapuano staffer confirmed as much, stating bluntly that “[no studies] had been prepared, since the routing through the black community was the only obvious feasible alternative.”<sup>127</sup>

Further study of the route would have revealed the scope of potential destruction: I-40 looked set to “virtually disembowel” North Nashville.<sup>128</sup> The stretch of I-40 through North Nashville would “demolish a hundred square blocks, including sixteen blocks of stores along Jefferson Street that represented 80 percent of black-owned businesses in North Nashville.”<sup>129</sup> I-40 promised to either directly or indirectly (by cutting off access to clients) destroy these businesses.<sup>130</sup> Many of them had been in the neighborhood for over twenty years.<sup>131</sup> Nearly six hundred and fifty homes and twenty-seven apartment buildings stood in the path of I-40.<sup>132</sup> So, too, did six churches.<sup>133</sup> All told, this route affected twice as many homes as the Charlotte route, three times as many apartment buildings, and three times as many businesses and churches.<sup>134</sup>

No one involved in planning I-40 even cursorily studied the potential impact of the road on North Nashville.<sup>135</sup> On July 14, 1955, the city presented the final Interstate System plan for Nashville to the planning

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126. Alternatively, of course, North Nashville itself *was* the problem to the planners involved. The specific route eventually chosen did serve two goals of city and state leaders at the time. First, it slowed desegregation: North Nashville residents would later note that the route chosen would isolate area public schools and make desegregation difficult. *See* Mohl, *supra* note 3, at 880–81. Second, it benefitted suburban development at the expense of Jefferson Street. *See id.* at 881 (referencing Yale Rabin’s work). Rivergate Mall, a shopping mall north of Jefferson (and just off the Interstate), opened in 1971.

127. Ford, *supra* note 101, at 33.

128. HOUSTON, *supra* note 96, at 205.

129. *Id.* All told, 128 businesses lay along the route eventually approved. Ford, *supra* note 101, at 39.

130. HOUSTON, *supra* note 96, at 205–06. It is important to note here that the concentration of these businesses in North Nashville was, as explained earlier, a consequence of segregation. So too, were the lower margins (due to higher rents charged in black neighborhoods) and lack of city-wide professional connections (due to being barred from professional associations and organizations) that they endured. These disadvantages made them uniquely susceptible to a sudden loss of clientele. *Id.* at 206.

131. *Id.*

132. Ford, *supra* note 101, at 39; HOUSTON, *supra* note 96, at 206.

133. Ford, *supra* note 101, at 39.

134. *Id.*

135. In later testimony, a person involved in the planning admitted that no economic data was compiled about the effect of the road. The closest this person could get to consideration or study of the impact of I-40 on North Nashville was his blunt statement that I-40 was “considered to be a benefit to them.” SELEY, *supra* note 5, at 60–61.

commission.<sup>136</sup> Final action to approve or reject this plan would have to wait until the Federal-Aid Highway Act became law.

## 2. *The “Quiet” Years (1957-1967)*

The Federal-Aid Highway Act passed in June 1956. As previously described, the Act required a public hearing on planned interstate routes.<sup>137</sup> Under §116(c), state highway departments had to certify to the Commissioner of Roads that they held, or afforded the opportunity for, a public hearing, and considered the economic effects of the proposed route.<sup>138</sup> State highway departments must also submit a copy of the transcript of the hearing(s) to the Commissioner.<sup>139</sup> Neither the statute nor federal highway policy memoranda clearly explained how to give notice of such hearings.<sup>140</sup>

State planners moved quickly to hold a public hearing after the Federal-Aid Highway Act went into effect. They planned a hearing for May 15, 1957.<sup>141</sup> Notice of this hearing was weak for several reasons. First, state planners only posted notices in post offices in white neighborhoods.<sup>142</sup> Second, they put no notices in local newspapers.<sup>143</sup> Finally, the notices used

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136. Ford, *supra* note 101, at 40.

137. See Federal-Aid Highway Act of 1956, Pub. L. No. 84-627, ch. 462, 116(c), 70 Stat. 385; see also Ford, *supra* note 101, at 40; Glass, *supra* note 27 (confirming that Congress passed the Highway Act in June 1956).

138. “Any State highway department which submits plans for a Federal-aid highway project involving the bypassing of, or going through, any city, town, or village, either incorporated or unincorporated, shall certify to the Commissioner of Roads that it has had public hearings . . . and has considered the economic effects of such a location.” Federal-Aid Highway Act of 1956, Pub. L. No. 84-627, ch. 462, 116(c), 70 Stat. 385.

139. “...if such hearings have been held, a copy of the transcript of said hearings shall be submitted to the Commissioner.” *Id.* at 385–86. For a good summary of the hearing requirement, and its numerous flaws, see Note, *Pressures in the Process of Administrative Decision: A Study*, 108 U. PA. L. REV. 534, 569–73 (1960). For a more pointed critique of the general lack of notice in the then-existing administrative state, see Charles A. Reich, *The Law of the Planned Society*, 75 YALE L. J. 1227, 1242, 1244–46 (1966).

140. Ford, *supra* note 101, at 41; Appendix D.

141. Ford, *supra* note 101, at 41.

142. Less than ten notices were posted. *Id.* The closest to Jefferson Street was posted at 6th and Monroe, several blocks north of Jefferson. 6th and Monroe is part of Germantown, a historically working- and middle-class white area of town. The author’s own grandmother grew up several blocks north of this post office, at 6th and Buchanan. Then, as it does again today, 8th Avenue divided largely white and entirely black neighborhoods from one another.

143. *Id.*; Mohl, *supra* note 3, at 882. A previous article (in *The Tennessean*) had mentioned the route but included an incomplete map and proved to be

the wrong date. They stated that the hearing (actually held on May 15<sup>th</sup>) would be on May 14<sup>th</sup>.<sup>144</sup> The hearing itself, once it occurred, left much to be desired. The transcript is incomplete—making certification that the hearing met procedural requirements exceedingly difficult.<sup>145</sup> The hearing appears to have focused on the economic effect of the interstate system as a whole.<sup>146</sup> The final I-40 route apparently did not come up.<sup>147</sup> Some accounts actually suggest officials presented on the Charlotte route instead.<sup>148</sup> These accounts are difficult to comprehensively analyze, given the incomplete transcript. Most importantly, it appears that no black Nashvillians attended the hearing.<sup>149</sup> Despite these process flaws, state highway planners filed the plan in September 1958, and the Federal Highway Administration approved it later that year.<sup>150</sup>

The state waited seven years after federal approval—until 1965—before beginning to purchase the right-of-way.<sup>151</sup> During that time,

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substantially wrong in its description of the details of construction. Mohl, *supra* note 3, at 882. See also Ford, *supra* note 101; Appendix F (the newspaper article).

144. See Ford, *supra* note 101, at 41; Appendix D; Appendix E.

145. Ford, *supra* note 101, at 42; Mohl, *supra* note 3, at 882. The transcript is difficult to decipher because it only includes the statements of the public officials present. Ford, *supra* note 101, at 42; Appendix E.

146. Ford, *supra* note 101, at 42. This focus is arguably a flaw of the hearing requirement in the law, not the organizers of the hearing. *Id.*

147. Hall, *supra* note 91, at 25; SELEY, *supra* note 5, at 61.

148. ZUZAK, *supra* note 6, at 24.

149. Mohl, *supra* note 3, at 882. There is some disagreement on this point. Ford cites subsequent testimony from a Bureau of Public Roads official that “a predominance of Negroes attended the 1957 hearing.” Ford, *supra* note 101, at 42. Other sources disagree. See Mohl, *supra* note 3, at 882. This author believes the subsequent testimony of Metro Councilman Harold Love, who “could not find a single person in the community who remembered the so-called public hearing the state said was held in 1957.” Hall, *supra* note 91, at 25. Councilman Love’s testimony substantiates Mohl’s claim.

150. The histories of the I-40 controversy are sometimes unclear who the plan was filed with and who it was filed by. It is clear that the FHA approved the final routing of I-40 in 1958. See Ford, *supra* note 101, at 44; Hall, *supra* note 91, at 27. Houston suggests the plan was filed *with the state highway department* in September, 1958—which is a strange way to explain that process, given that state highway administrators were active participants in planning and actually led the 1957 public hearing. See HOUSTON, *supra* note 96, at 206–07. To the author, this confusion suggests that the central question of this article—the systematic administrative process failures and violations during the construction of I-40—leaves even modern historians confused as to who was responsible for what. It is easy to imagine, then, why Nashvillians in the 1950’s and 1960’s might have been confused as to who was responsible for what.

151. Ford, *supra* note 101, at 44; Hall, *supra* note 91, at 27. The original plans had called for earlier right-of-way acquisition but had to be revised when the BPR significantly slowed the scheduled rollout of the whole system.

policymakers and planners continually misled North Nashville leaders and residents about I-40. Contemporary accounts, subsequent court records, and present-day historical analysis of that time period thoroughly document policymakers' obfuscation.<sup>152</sup> Policymakers informed many concerned citizens that the route was preliminary or subject to change.<sup>153</sup> Others citizens left meetings with state or city officials with the impression that neither the when nor the where of the route had been finalized.<sup>154</sup> The state highway department refused to release any information and claimed the department was still studying the route.<sup>155</sup> One state highway planner went so far as to say that "we can't give out any information. In fact, we don't know any of the designs, plans, or what. Designs and plans are all done by out of town architects."<sup>156</sup> Land surveyors putting down stakes along the route told citizens they had "no cause for alarm."<sup>157</sup> Community pillars, like churches, did not fare much better with the planners.<sup>158</sup> One church in North Nashville navigated a truly Kafkaesque situation with state highway planners before abandoning their hunt for information.<sup>159</sup> Even prominent political and civic leaders in North Nashville could not get their hands on the information.<sup>160</sup> The black community of North Nashville felt strongly

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152. For a contemporary account, see Ford, *supra* note 101; SELEY, *supra* note 5; ZUZAK, *supra* note 6, at 31–32. For a modern history, see HOUSTON, *supra* note 96. For court records, see *supra* section II. Note that Ford, *supra* note 101, at 43, is where the "quiet phase" name for this era originated.

153. Ford, *supra* note 101, at 43.

154. HOUSTON, *supra* note 96, at 206–07.

155. HOUSTON, *supra* note 96, at 207.

156. For this quote, see HOUSTON, *supra* note 96, at 206; SELEY, *supra* note 5, at 63. This quote contains some kernels of truth (Clarke and Rapuano, after all, were out of town architects) but is, on the whole, false and extremely misleading.

157. ZUZAK, *supra* note 6, at 30–31.

158. ZUZAK, *supra* note 6, at 31–32. Much of the communication about the proposed route was directed at property owners. Of course, this structural factor was a problem in and of itself – over half the homes, apartments, and businesses in North Nashville were rented. *Id.* Renters had less access to information about the route, especially (as was often true in the Jim Crow South) if owners of the property were absentee (read: white) owners.

159. Zuzak describes the situation (to the extent it can be explained clearly) well: "One clergyman whose church is located along Jefferson Street noted that the proposed highway held up the building program for his church for many years. From the 1950's until 1968, his parishioners did not know for sure whether the highway would take their land. Finally they bought another piece of property, although, as it turned out, the original property was not taken. A loss was taken on the new land they had purchased. The highway now runs right up to the back of their church at the old location. This clergyman reports that state officials would tell him one thing and then another, depending upon which person he talked to. His members developed a sense of futility over the whole affair." ZUZAK, *supra* note 6, at 31–32.

160. See Mohl, *supra* note 3, at 882.

that the only private citizens who did seem to know exactly where the interstate would be built were real estate speculators.<sup>161</sup>

This obfuscation was not entirely malicious. There does seem to have been genuine confusion about what specific route I-40 would take through North Nashville. In 1957, *The Tennessean* printed a story about the proposed route. This story included a “deceptively incomplete” map of the route and provided the public with misleading information about the route.<sup>162</sup> Later, an editor and reporter from the same newspaper admitted that even they could get no firm answer on a final, specific route for I-40.<sup>163</sup> This lack of confirmation may be because the state highway department had not yet finalized every segment of I-40 (even though the route decision itself was final) and did not want to commit themselves publicly for that reason.<sup>164</sup> As a result, the jumbled messaging from the highway department made citizens, and even *The Tennessean*, believe that the decision about whether to put I-40 through North Nashville was not finalized—when the reality was that only the specific route the interstate would take *through* North Nashville was not entirely finalized.<sup>165</sup> Whatever the genuine confusion within the highway department about the final route, it did have a route map available as early as 1964.<sup>166</sup> This route map was not shared widely with the public.

Three final developments occurred during this “quiet phase” that heightened the future destruction caused by I-40. First, the original Clarke and Rapuano plan included both a deck (for businesses to relocate onto) and a depression (to hide the interstate from public view). State planners

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161. Hall, *supra* note 91, at 28; ZUZAK, *supra* note 6, at 30. Both authors describe a form of reverse blockbusting, where real estate speculators would convince North Nashville residents to sell (at an advantageous rate), make minor improvements to the property, and then get a “good price” from the state and sell at a “large profit.” Hall, *supra* note 91, at 28; ZUZAK, *supra* note 6, at 30.

162. See Ford, *supra* note 101, at Appendix F; Mohl, *supra* note 3, at 882. The story inaccurately suggested that construction on the route would begin in 1957 and be completed by 1963 or 1964. Ford suggests that this story should have provided notice to the residents of North Nashville about the potential route and prompted them to begin litigation. Ford, *supra* note 101, at 43–44. The Sixth Circuit would make the same claim in *Nashville I-40 Steering Comm. v. Ellington*, 387 F.2d 179 (6th Cir. 1967). This author disagrees with Ford’s conclusion. It seems rational for citizens not to believe details in a story that turned out to get other key details wrong, especially when state highway planners assured those same citizens the route was not final.

163. HOUSTON, *supra* note 96, at 206.

164. ZUZAK, *supra* note 6, at 32–33.

165. See ZUZAK, *supra* note 6, at 32–33. This may have violated then-existing DOT policy. See Ford, *supra* note 101, at 50.

166. ZUZAK, *supra* note 6, at 32.



deemed this approach too costly during this period and abandoned it.<sup>167</sup> Second, the proposed urban renewal program for North Nashville never developed. Contemporary observers and historians cannot explain why this program failed to materialize.<sup>168</sup> Nashville city leaders and metropolitan planners may have been too distracted by then-ongoing consolidation between the city and county governments to take on anything else.<sup>169</sup>

The abandonment of urban renewal may also relate to the final development: the cost of the right-of-way. Both city leaders and Clarke and Rapuano expected the state to route I-40 right along Jefferson Street. This plan would force the state to fairly compensate business owners on Jefferson and would make future urban renewal cheaper to boot (due to the more generous federal dollars available for highway construction).<sup>170</sup> State planners, however, used an “administrative sleight of hand” to pass costs off onto the city.<sup>171</sup> They plotted I-40 just north of Jefferson instead. This alternative allowed them to take homes in that stretch of property and plot the road just up to the rear of the businesses. The effect on the businesses was the same. Some would be effectively closed due to isolation from their customers to the north, while others would be taken by the city, which now had to widen Jefferson Street as a highway access road.<sup>172</sup> This move allowed the state to save money and political capital.<sup>173</sup> For the city, it was “the worst of all possible worlds.”<sup>174</sup> The state route looked set to effectively destroy Jefferson Street, without reasonable compensation for the damage to local businesses or urban renewal to rebuild the area.<sup>175</sup>

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167. *Id.* at 23–24. Years later, state officials would admit that it could have been done, just at a higher cost. *Id.* at 24.

168. HOUSTON, *supra* note 96, at 204–05; ZUZAK, *supra* note 6, at 21–23.

169. Zuzak makes this same point when explaining why city leaders did not push back against the route of I-40. ZUZAK, *supra* note 6, at 29–30.

170. HOUSTON, *supra* note 96, at 205–06; ZUZAK, *supra* note 6, at 22–23.

171. HOUSTON, *supra* note 96, at 206.

172. *Id.* at 206–07; ZUZAK, *supra* note 6, at 22–23. It seems that widening the road was a functional necessity, and possibly a requirement of the highway program, as well.

173. HOUSTON, *supra* note 96, at 206.

174. ZUZAK, *supra* note 6, at 23. One helpful way to think of this sleight of hand is in terms of available federal dollars. City policymakers expected and hoped that state road planners would plot the road directly along Jefferson (and thus directly *through* the numerous businesses on the street) and use the generous federal highway funds available to fairly compensate the business owners. After that, the city could use the (less generous) urban renewal funds available to more cheaply complete urban renewal projects (because the businesses would have already been compensated).

175. *Id.* at 23. Of course, as previously described, this author is well aware that urban renewal very well could have been a net negative for the area (although it is difficult to imagine it being worse than I-40). Ironically, the I-40 corridor did not need urban renewal in 1960 (when 70 percent of housing in the area was sound),

Property acquisition for the right-of-way began in 1964 or 1965.<sup>176</sup> By 1967, the state had purchased all but 90 of over 1,000 total parcels of land.<sup>177</sup> That fall, the State Highway Department finalized plans for I-40. It set a date of September 28, 1967, for the modification of these plans and October for the letting of the contracts.<sup>178</sup> Jefferson Street businesses worth around \$4.5 million (\$34.5 million today) with annual sales of \$11.5 million (\$80 million today) stood in the path of the road.<sup>179</sup> So, too, did dozens of churches and apartment buildings, hundreds of homes, three elite educational institutions, and one newly formed, determined citizen's group.<sup>180</sup> The next section will cover the fight of that citizen's group: the I-40 Steering Committee.

### C. The I-40 Steering Committee (1967-1968)

This subsection explains the legal battle over the construction of I-40. First, it explains the formation of the I-40 Steering Committee. Next, it unpacks the trials and decisions in the district court and the circuit court. Finally, it uses original archival sources to explain the Supreme Court's denial of certiorari—a first in available scholarship on this subject.

#### 1. *The Committee Forms*

The state's fall 1967 announcement produced frantic action in North Nashville. Many North Nashvillians felt stunned.<sup>181</sup> Others took action. Fisk's President quickly called a meeting of representatives from Fisk, Meharry, and the black business community.<sup>182</sup> This group sent a telegram (dated September 26, 1967) to Tennessee Governor Buford

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but did by 1968, when that number had been flipped on its head. I-40's potential construction creating housing instability in North Nashville. Ford, *supra* note 101, at 89–90.

176. SELEY, *supra* note 5, at 61, suggests it was 1964. Hall, *supra* note 91, at 27, suggests it was 1965, as does Ford, *supra* note 101, at 44.

177. SELEY, *supra* note 5, at 61.

178. Hall, *supra* note 91, at 28. There is some disagreement over the actual date the contracts were to be let. Hall suggests the date was October 31. *Id.*; HOUSTON, *supra* note 96, at 207; ZUZAK, *supra* note 6, at 34 (both believe the date to have been October 1). It seems likely that Hall's reference to October 31 is a typo, but the above the line text just references "October" to be safe.

179. SELEY, *supra* note 5, at 59.

180. See SELEY, *supra* note 5, at 59–60, for the first several figures.

181. One longtime resident had no warning of the final route until she saw a story in *The Tennessean*. She didn't know anyone on her street that knew of the route either. Hall, *supra* note 91, at 28–29.

182. Fisk, Meharry, and later TSU (then Tennessee A&I) faculty would be crucial leaders (for good and for ill) of the I-40 response for years. Fisk's Lawson called this first meeting. ZUZAK, *supra* note 6, at 34.

Ellington, requesting that he explore shifting the route north and delay the deadline for modifications to examine alternatives to the present route.<sup>183</sup> Governor Ellington's State Highway Commissioner responded bluntly that too much time and money had been sunk into this route to change it.<sup>184</sup> About a week later, citizens and community leaders of North Nashville formed the I-40 Steering Committee.<sup>185</sup> The committee included about 100 people, representing a broad cross-section of the North Nashville community.<sup>186</sup> Dr. Flournoy Coles, a Fisk Professor, directed the committee.<sup>187</sup> The committee's goals were threefold. It sought to halt I-40 before construction began, to review the full impact of the final route on North Nashville with all relevant policymakers, and to consider feasible alternatives that would be best for the whole community.<sup>188</sup>

Each of the committee's goals proved difficult to accomplish. First, the state had no interest in delay. Construction was already behind schedule, and there appeared to be a genuine possibility of a cutback in federal funding.<sup>189</sup> As a result, state and business leaders spent 1967 pushing to accelerate construction on I-40.<sup>190</sup> Unsurprisingly, the committee's second goal—cooperation with policymakers—also proved to be a challenge.<sup>191</sup> The state had already made its position clear. Nashville

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183. Hall, *supra* note 91, at 29.

184. Ford, *supra* note 101, at 45–46; Hall, *supra* note 91, at 29–30. Specifically, the memorandum (dated September 29, 1967) from State Highway Commissioner Speight stated that: “A firm of consulting engineers had spent the last three years preparing the construction plans, and had received approximately \$360,000 for its efforts, more than \$10 million had been expended for the acquisition of rights-of-ways...” Ford, *supra* note 101, at 45.

185. This unincorporated association formed officially on October 10, 1967. Ford, *supra* note 101, at 46; Hall, *supra* note 91, at 30.

186. It included: businessman; educations from Fisk, Meharry, Peabody, and Vanderbilt; NAACP members; religious leaders (white and black); and white-collar and blue-collar professionals. ZUZAK, *supra* note 6, at 35, has a good general summary.

187. Ford, *supra* note 101, at 46; Hall, *supra* note 91, at 30. Coles had actually just gone to Washington, D.C. to find out how to stop the road. ZUZAK, *supra* note 6, at 35.

188. Ford, *supra* note 101, at 46; Hall, *supra* note 91, at 30.

189. ZUZAK, *supra* note 6, at 36. The Nashville system was two to three years behind schedule. State leaders were already concerned about the political (and traffic) consequences of further delay when Secretary of Transportation Boyd asked all state leaders to consider the effects of a fifty percent cutback in federal funding in early October, 1967. *Id.*

190. ZUZAK, *supra* note 6, at 36.

191. As Mohl explains, the committee likely would have benefitted from a combination of activism and negotiation with key decision-makers. Mohl, *supra* note 3, at 883. But, likely because of structural factors (the class background of the committee members) and historical context (wariness of black power activism, especially in light of a controversial April 1967 appearance by Stokely Carmichael

Mayor Beverly Briley claimed to be both sympathetic and powerless, an unhelpful combination for the steering committee.<sup>192</sup> The committee did hire a planner: The University of Pennsylvania's Yale Rabin developed a feasible alternative that entirely avoided black neighborhoods.<sup>193</sup> But the state highway department never seriously considered this alternative route.<sup>194</sup>

The committee did advance the ball in three ways during the first month after it formed. First, and most importantly, it unearthed the original Charlotte route.<sup>195</sup> Second, it discovered the existence of the public hearing in 1957 and, with Rabin's assistance, demonstrated the practical inadequacy of that hearing. Furthermore, a 1967 Department of Transportation policy memorandum required additional hearings where considerable time had gone by since the original hearing; I-40's decade-long gap between the original hearing and construction seems to meet this requirement.<sup>196</sup> Finally, the committee whipped up public support for their position. At an October 16<sup>th</sup> meeting with Mayor Briley and state and federal highway officials, committee members requested a ninety-day delay of the construction so

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in Nashville), they never pursued this approach. *Id.* This reticence to take to the streets likely hurt their cause—especially because, as Mohl suggests, key white decision makers thought it was radical for the committee to even presume to negotiate over their future. *Id.*

192. HOUSTON, *supra* note 96, at 208; Mohl, *supra* note 3, at 883. Some modern observers remain skeptical that Briley was actually sympathetic at all. See HOUSTON, *supra* note 96, at 208. What seems more likely is that Briley—a savvy pol if there ever was one—thought the route was poorly planned but that it was too late (and too much of an uphill political battle) to stop it. See ZUZAK, *supra* note 6, at 38, who seems to agree with this point.

193. See Ford, *supra* note 101, at 30 (figure 2), 46; see also Mohl, *supra* note 3, at 883. This route would have moved I-40 northward and largely tracked the Cumberland River. It is not necessarily great planning, either—it would have cut off access to the river for a huge swathe of North Nashville and would have to be built through a floodplain—but it is no worse than the actual route I-40 took.

194. Mohl, *supra* note 3, at 883.

195. HOUSTON, *supra* note 96, at 208; ZUZAK, *supra* note 6, at 39–40. This discovery understandably angered and confused many committee members, especially when the planners they spoke with either did not know or could not explain why the route had been changed. Many had the sense (fairly or unfairly) that the bureaucrats were trying to pull wool over their eyes. See ZUZAK, *supra* note 6, at 39–41, for a good description of this frustration.

196. Ford, *supra* note 101, at 46–47. It is unclear at this point whether Rabin or the committee members knew about the notice failures. They did establish, however, that the public hearing had been held more than 10 years previously, that it did not cover the specific final route now on the table, and that the proposal actually analyzed at that meeting were so vague and general as to make actual examination of the impact of the route on North Nashville impossible. *Id.*; see also Hall, *supra* note 91, at 31.

they could better study the road.<sup>197</sup> Similar stall tactics were common in highway fights and freeway revolts.<sup>198</sup> This delay received support from the Metro Council, Mayor Briley, Congressman Richard Fulton, and *The Tennessean*.<sup>199</sup>

The steering committee appealed to federal administrators for delay and resolved to file for an injunction if no delay was granted. The steering committee's appeals to the federal government would be in vain. First, in late October, a representative from the FHA replied that delay of I-40 construction would not be in the public interest.<sup>200</sup> This reply stated that federal planners had thoroughly analyzed the situation, but recognized the final decision was Transportation Secretary Allan Boyd's.<sup>201</sup> Committee members hoped their letter to Secretary Boyd would convince him to grant the delay.<sup>202</sup> But Boyd declined. He did not reply to the Steering Committee directly, but did provide an explanation to *The Tennessean* on October 25: "I am satisfied that the right decision has been reached in this controversy, given the fact that all rights of way already have been obtained and substantial clearing has already taken place."<sup>203</sup> The Steering Committee had prepared for this result by hiring Avon Williams, the famous local civil

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197. ZUZAK, *supra* note 6, at 40–41.

198. See *infra* notes 331–41 and accompanying text.

199. See ZUZAK, *supra* note 6, at 41. The Metro Council actually voted unanimously to endorse the delay, a rare move for a group that Mayor Briley himself famously called "40 jealous whores." For a reference to this quote, see John Spragens, *Rite of Spring*, THE NASHVILLE SCENE (Dec. 23, 2004), <https://www.nashvillescene.com/news/article/13011169/rite-of-spring> [<https://perma.cc/XZ95-YBMN>].

200. This reply came either on October 20 or 24, depending on which source one draws from. For the 20th, see Hall, *supra* note 91, at 32. For the 24th, see ZUZAK, *supra* note 6, at 41.

201. ZUZAK, *supra* note 6, at 41.

202. Hall, *supra* note 91, at 32. Incidentally, this letter basically predicted every harm that would come from the construction of I-40 through North Nashville. It is depressingly prophetic. *Id.* at 32–34.

203. Ford, *supra* note 101, at 50; ZUZAK, *supra* note 6, at 42.

rights attorney, the day before.<sup>204</sup> The Steering Committee filed suit in the Middle District of Tennessee on October 26th.<sup>205</sup>

## 2. *I-40 Steering Committee v. Ellington (The Lower Courts)*

*I-40 Steering Committee v. Ellington* came before Judge Frank Gray, Jr. on October 30, 1967, on an expedited schedule.<sup>206</sup> The I-40 Steering Committee's case advanced two principal claims. First, the plaintiffs argued that federal and state policymakers had violated administrative process requirements. Section 116(c) of the Federal-Aid Highway Act required a public hearing on the route and certification of consideration of the economic effects of the route.<sup>207</sup> The plaintiffs contended that notice for the hearing and the hearing itself had been inadequate and that the full economic effects of the route went unconsidered.<sup>208</sup> Second, the plaintiffs claimed the routing of I-40 through North Nashville "constitutes discrimination on the grounds of race, color, and socioeconomic condition" in violation of the 14<sup>th</sup> Amendment.<sup>209</sup> They asked for an injunction to halt the road.

Avon Williams made a strong case before Judge Gray. Contemporary accounts and subsequent briefing in the case paint a detailed picture of the trial itself.<sup>210</sup> First, Williams demonstrated that notice for the

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204. See ZUZAK, *supra* note 6, at 41. Williams was closely affiliated with the local and national NAACP. See Mohl, *supra* note 3, at 883. Avon Williams is a legend in Nashville. He was a leader in the battle to desegregate Nashville schools. He argued before the Supreme Court seven times. He also served as a State Senator from 1968-1990 (one of the first black Tennesseans to serve in that body since Reconstruction). See James Barron, *Avon Williams, 72, A Lawyer Who Fought to End Segregation*, THE NEW YORK TIMES (Aug. 31, 1994), <https://www.nytimes.com/1994/08/31/obituaries/avon-williams-72-lawyer-who-fought-to-end-segregation.html> [<https://perma.cc/ZKT2-2MU6>]. Avon was also Thurgood Marshall's cousin, a connection that benefitted Nashville (and him) immensely over the years.

205. Ford, *supra* note 101, at 50; ZUZAK, *supra* note 6, at 42-43. The suit named Governor Ellington, his Highway Commissioner, and Mayor Briley as defendants.

206. ZUZAK, *supra* note 6, at 43.

207. Federal-Aid Highway Act of 1956, Pub. L. No. 84-627, ch. 462, 116(c), 70 Stat. 385: "Any State highway department which submits plans for a Federal-aid highway project involving the bypassing of, or going through, any city, town, or village, either incorporated or unincorporated, shall certify to the Commissioner of Public Roads that it has had public hearings, or has afforded the opportunity for such hearings, and has considered the economic effects of such a location[.]"

208. See Ford, *supra* note 101, at 50-51 (citing original briefing on the case).

209. Ford, *supra* note 101, at 51 (quoting directly from the original briefing).

210. This section will draw on the contemporary scholarship of Hubert James Ford, who evaluated the transcript thoroughly, and the later Supreme Court briefing

hearing had not been posted in black neighborhoods or any major newspapers and that the notices that did exist referenced the wrong date.<sup>211</sup> He made such a convincing case that Judge Gray asked him to move on and assume he had made out a prima facie case on the notice issue.<sup>212</sup> Second, state planners—including the state’s Planning and Research Director, Clarence Harmon—could not explain why the route had been changed and admitted that no studies about the economic effect of I-40 on North Nashville existed.<sup>213</sup> The best state bureaucrats could offer was that “[they] considered [I-40] to be a benefit to [North Nashville].”<sup>214</sup> Yale Rabin’s expert testimony confirmed the insufficiency of the state planning process and demonstrated that another feasible alternative existed.<sup>215</sup> Finally, testimony and evidence presented at trial strongly suggested that racial discrimination or indifference lay behind the I-40 planning process.

Williams set out to prove racial discrimination in two ways. First, he showed that, in contrast to the lack of planning or study for North Nashville, planners attempted to avoid white neighborhoods and areas, sought to minimize or prevent damage to them, and even studied the impact of the interstates on white institutions down to granular details, like campus

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in the case, which references the transcript repeatedly. The author was not able to find the full transcript of the hearing itself.

211. Petition for Writ of Certiorari To the United States Court of Appeals for the Sixth Circuit at 13–14, *Nashville I-40 Steering Committee v. Ellington*, (No. 995) (U.S. Jan. 8, 1968) [hereinafter *Cert Petition Brief*].

212. See *Cert Petition Brief*, *supra* note 211, at 14, n.7:

“Mr. Williams: Well, Your Honor, if Your Honor pleases, I have a whole lot more. I have some additional witnesses on this question of notice.

Judge Gray: Well, I’m not interested in any further ones on the question of notice...let’s just assume that you have established by certain proof subject to their coming in if they want to offer something else, you have made out a prima facie case on that for whatever value it may have.”

213. The record is frankly devastating for the state’s case here. The testimony of one planner, Leon Cantrell, is instructive. Cantrell variously testified that explaining the route change decision would take the better part of a week; that numerous studies had supported the route change (and examined the economic effect); and that he did not understand the reasoning behind any of these studies. Williams asked Cantrell to make these studies available to the court at lunch. They do not come up again in the transcript. Ford, *supra* note 101, at 52–53; *Cert Petition Brief*, *supra* note 211, at 12–13. Clarence Harmon’s testimony is even more devastating. He flatly admitted no studies on the economic effect of I-40 through North Nashville existed. *Cert Petition Brief*, *supra* note 211, at 12–13. One planner actually denied knowledge of the existence of the original Charlotte route, before being confronted with a map of the route, and minutes of a meeting that *he actually attended*. Only then did he admit knowledge of the route. *Id.*

214. SELEY, *supra* note 5, at 60–61.

215. Mohl, *supra* note 3, at 884.

parking at Vanderbilt.<sup>216</sup> Testimony of numerous witnesses also demonstrated the obfuscation North Nashville citizens experienced concerning the finality of the location of the I-40 route.<sup>217</sup> This strain of evidence suggested a purpose to discriminate.<sup>218</sup> Second, in a proof likely intended to evoke *Gomillion v. Lightfoot* or *Yick Wo v. Hopkins*,<sup>219</sup> Williams demonstrated that the impact of I-40 on black people, black businesses, and black community institutions was so stark that only racial discrimination could explain it. Most North Nashville businesses (accounting for over eighty percent of black businesses in Nashville) were on Jefferson; of these, nearly all of them would either be destroyed or physically separated from most of their customer base.<sup>220</sup> These businesses had nowhere to move—due to exclusionary zoning and Jim Crow—and it seemed likely their customers would begin to frequent the white-owned shopping mall just to the north.<sup>221</sup> I-40 would permanently divide Fisk, Meharry, and Tennessee A&I from one another and channel heavy traffic through each campus; take a large chunk out of one of the only black parks in the city; and destroy or damage hundreds of homes, fifty-one black churches, and dozens of apartments.<sup>222</sup> All told, “many black residents poured out several hundred pages of testimony on the social and economic consequences they faced when their homes, businesses, schools, churches, and jobs disappeared.”<sup>223</sup> The plaintiffs felt they had a strong case on both counts.<sup>224</sup>

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216. Cert Petition Brief, *supra* note 211, at 8–10 (citing to the transcript from the district court trial).

217. Cert Petition Brief, *supra* note 211, at 15. The main citizens testifying included both Metro Council Members for North Nashville (Harold Love, Sr. and John Driver). The others included civic leaders, business leaders, and academic leaders. *See id.* (citing to the transcript).

218. For a history of this doctrine over time (which may explain some of the petitioner’s difficulties here), see Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213 (1991).

219. The SCOTUS Briefing itself makes this point. *See* Cert Petition Brief, *supra* note 211, at 22.

220. Cert Petition Brief, *supra* note 211, at 8. Much of this evidence came from expert witness Yale Rabin. *See* Ford, *supra* note 101, at 51.

221. This point comes from the testimony of black business owners themselves. *See* Ford, *supra* note 101, at 52; Cert Petition Brief, *supra* note 211, at 8. Yale Rabin seemed to strongly believe this, too. *See* Mohl, *supra* note 3, at 880–81.

222. Ford, *supra* note 101, at 51–52; Cert Petition Brief, *supra* note 211, at 8–9.

223. Mohl, *supra* note 3, at 884.

224. *Id.*



Judge Gray partially disagreed and denied the request for an injunction.<sup>225</sup> Judge Gray's November 1<sup>st</sup> decision—read from the bench—made three principal points. First, he found, as a matter of fact, that a public hearing had been held. Questions about notice or the inadequacy of the hearing or the hearing transcript were not matters for the court. Instead, these questions were for the Bureau of Public Roads and the state highway department.<sup>226</sup> Second, Judge Gray found that the plaintiffs had demonstrated “inadequate consideration” of the effect of I-40 on North Nashville, but not a “deliberate purpose to discriminate against the residents of North Nashville on the basis of race.”<sup>227</sup> Finally, Judge Gray chastised the plaintiffs for not initiating this suit earlier, suggesting that either the 1957 article in *The Tennessean* or the acquisition of right-of-way should have prompted protest or litigation from the plaintiffs.<sup>228</sup> Judge Gray concluded by noting that, although he had “grave doubts...as to the wisdom of the [route] selection made,” he could not “find that an adequate basis [had] been laid for the use of the injunctive power of this court.”<sup>229</sup>

It is important here to note the tensions in Judge Gray's decision: The plaintiffs erred by not bringing their suit earlier, but issues of inadequate notice were not a matter for the courts. The state could violate notice and procedural requirements, and the only party with an interest was the Bureau of Public Roads—not, as the statute mandated, those citizens potentially affected by the construction. Meanwhile, those same citizens—with their procedural hearing rights deemed merely a matter for government bureaucrats to wrangle over—received reprimands for not relying on an (incomplete) newspaper article to launch a lawsuit, and for failing to quickly acquire smoking gun evidence of intent to discriminate. The *Yick Wo* parallels were all but ignored; it is difficult to understand what further evidence would have been enough for the court.

The I-40 Steering Committee appealed the case to the 6<sup>th</sup> Circuit. The 6<sup>th</sup> Circuit fast-tracked the case and set a hearing date for December 8.<sup>230</sup> During the month before this hearing, a dizzying array of luminaries weighed in, either to support further delay or urge that I-40 be completed as

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225. See Cert Petition Brief, *supra* note 211, Oral Findings of Fact and Conclusions of Law of the District Court, Appendix at 1a. Note here that the Cert Petition Brief includes the entirety of the District Court's decision (read from the bench). It was not available anywhere else.

226. Cert Petition Brief, *supra* note 211, Oral Findings of Fact, at 1a.

227. *Id.* at 2a.

228. *Id.* at 3a. The author will leave it up to the reader to determine for themselves why Judge Gray felt it necessary to go out of his way to reprimand the plaintiffs from the bench after he had already denied their request for an injunction.

229. *Id.*

230. ZUZAK, *supra* note 6, at 46.

quickly as possible.<sup>231</sup> Federal Highway Administrator Bridwell came to Nashville, met with all parties involved (including the Steering Committee), and promised that the federal government would complete an investigation before approving the contract.<sup>232</sup> The national NAACP also supported the Steering Committee. Famed Legal Defense Fund attorney Jack Greenberg helped the plaintiffs to refine the arguments they would make before the 6<sup>th</sup> Circuit.<sup>233</sup> The basic case remained the same, but the plaintiffs placed additional emphasis on administrative process failures in their briefing and argumentation before the 6<sup>th</sup> Circuit.<sup>234</sup>

The 6<sup>th</sup> Circuit Court of Appeals upheld Judge Gray's decision. The court found that notice had been unsatisfactory, but believed that the newspaper reporting on the road meant that "no literate citizen of the Nashville community" could say they did not have notice of the proposed I-40 route.<sup>235</sup> The 6<sup>th</sup> Circuit also suggested the hearing itself was inadequate, but could not say that Judge Gray abused his discretion in denying a preliminary injunction.<sup>236</sup> Furthermore, the 6<sup>th</sup> Circuit took the testimony of the state planners with respect to the study of economic effects at face value. The court held that "justification existed for reliance upon the presumption of regularity of public records and compliance by public officials with duties imposed upon them by statute."<sup>237</sup> The 6<sup>th</sup> Circuit agreed with Judge Gray's conclusions on the alleged racial discrimination.<sup>238</sup> The 6<sup>th</sup> Circuit, as had the District Court, felt strongly that North Nashville would be adversely affected by I-40, but believed they

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231. During this time, U.S. Senator Howard Baker, Jr., Congressman Fulton, and the presidents of Fisk and Vanderbilt all weighed in, urging Governor Ellington to delay awarding the contract and lobbying Secretary of Transportation Boyd to block the Governor from awarding the contract. ZUZAK, *supra* note 6, at 45–47. On the other side, members of the Tennessee House and Senate, Mayor Briley, the whole Chamber of Commerce, and the state highway department were weighing in publicly and privately in favor of moving forward with construction as quickly as possible. *Id.* at 46–49.

232. *Id.* at 47–50.

233. Mohl, *supra* note 3, at 884.

234. *Id.*

235. Cert Petition Brief, *supra* note 211, at 10a. The cert petition brief also includes the entirety of the 6th Circuit decision.

236. *Id.*

237. *Id.* at 12a. One commentator was (justifiably) extremely skeptical of this view, writing that "it would appear that highway departments need only to act as though a decision is technically rational and others respond accordingly." Ford, *supra* note 101, at 57. Ford also thought that "the court was sold on the technical, engineering aspect of highway location and closed its mind to the fact that location can possibly be highly intuitive and political." *Id.*

238. Cert Petition Brief, *supra* note 211, at 12a.

ought to trust the decision-making process and good faith of the bureaucrats involved.<sup>239</sup>

The 6<sup>th</sup> Circuit's decision contains many of the same tensions as the district court's. It finds that notice was inadequate and takes issue with the hearing, but it assumes that public officials always comply with the duties imposed on them by statute. If that were true, of course, imposing requirements by statute on public officials would not be necessary. Under the 6<sup>th</sup> Circuit's logic, public officials must merely say that a hearing occurred, that they considered economic effects on affected communities, and that notice was adequate. Further evidence is not required. The 6<sup>th</sup> Circuit also went a step beyond Judge Gray and blamed the community: it shifted the notice burden to the North Nashville community (by claiming that one newspaper article meant that every "literate" citizen should have had notice of the hearing) and away from the government.

The 6<sup>th</sup> Circuit denied the appeal on December 18, 1967, but granted the plaintiffs a 20-day stay to appeal the case up to the Supreme Court.<sup>240</sup> The plaintiffs promptly did so.

### 3. *I-40 Steering Committee v. Ellington (The Supreme Court)*

The Supreme Court granted the parties more time to prepare their briefings. Justice Potter Stewart issued a stay order on December 29, halting construction until the Court could decide whether to grant certiorari.<sup>241</sup> The plaintiffs filed their petition for certiorari on January 8, 1968.<sup>242</sup> The petition focused on the two core claims: the 14<sup>th</sup> Amendment equal protection claim and the violation of §116(c)'s public hearing and economic effect study requirements.<sup>243</sup> Greenberg and Williams made a stronger case for each claim than made previously.<sup>244</sup> First, the petition argued that *I-40 Steering Committee* resembled *Yick Wo* or *Gomillion*. The evidence supporting this point, according to the petition, was overwhelming: I-40 substantially harmed the black community and did no such damage to the white community; planners sought to avoid damaging

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239. *Id.* at 13–15a.

240. For the date of the decision, see Cert Petition Brief, *supra* note 211, at 4a; see also Mohl, *supra* note 3, at 884. For the information on the 20-day stay, see ZUZAK, *supra* note 6, at 51.

241. See ZUZAK, *supra* note 6, at 51 (citing the date of the stay order); Conference Notes of Justice Hugo L. Black (Jan. 26, 1968) (on file with the Library of Congress) (copy available on file with the author) (confirming that Justice Stewart has granted the stay).

242. See Cert Petition Brief, *supra* note 211 (cover page).

243. *Id.* at 5.

244. It is important to note here that Avon Williams had only about a week to brief and prepare the original district court case, and Greenberg and Williams had less than a month to do the same before the 6th Circuit.

white interests and offered no reason why they shifted the route through North Nashville; and at least one, if not two, alternative routes existed that were not fully considered.<sup>245</sup> Second, the petition used legislative history of the highway acts to demonstrate why the public hearing (and notice of it) were inadequate under then-existing statutory requirements.<sup>246</sup> The petition made its best case in the economic effects section. There, the petition cited a then-recent landmark 2<sup>nd</sup> Circuit decision (*Scenic Hudson Preservation Conference v. Federal Power Commission*) and recent Congressional enactments (including the now-famous §4(f) of the Department of Transportation Act).<sup>247</sup> The petition posited that both sets of evidence, as well as the requirements of §116(c), strongly suggest that planners must perform thorough economic studies of proposed interstate routes and consider alternatives to those routes.<sup>248</sup> All told, the petition argued compellingly that the Court would, sooner or later, have to put a judicial check on unfettered executive discretion over interstate highway construction.<sup>249</sup>

The grant of certiorari seemed likely to turn on delay and sunk costs. Both courts below employed versions of the doctrine of laches, arguing that the plaintiffs should have protested or filed suit earlier.<sup>250</sup> The briefs of both respondents also invoked this argument repeatedly.<sup>251</sup> The

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245. See Cert Petition Brief, *supra* note 211, at 21–23.

246. See Cert Petition Brief, *supra* note 211, at 23–28. The public hearing and notice requirements were meant to inform the citizenry (especially those affected) of the potential construction and hear out any complaints or grievances interested citizens may have. In the I-40 case, the citizens most affected did not receive notice of the hearing in their neighborhood, or accurate notice as to the date of the hearing. Moreover, as far as we know, few black residents of North Nashville attended the hearing. *Id.*

247. See Cert Petition Brief, *supra* note 211, at 29–31. *Scenic Hudson Preservation Conference v. FPC* returned a case to the Federal Power Commission for a new hearing. *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966). In logic foreshadowing *Overton Park*, the 2nd Circuit required the Commission to consider all relevant factors and do a thorough study of all possible alternatives before making a decision. On the importance of this decision, see Reich, *supra* note 139, at 1248–51. On Section 4(f), please see Barbara Miller, Comment, *Department of Transportation's Section 4(f): Paving the Way Toward Preservation*, 36 AM. U. L. REV. 633 (1987) (describing the section and its role in *Overton Park*). For a criticism of broad readings of 4(f), see *Scope of Judicial Review of Federal Decision to Route Highway Through Public Park*, 85 HARV. L. REV. 315 (1971) (on the Supreme Court's 1970 term).

248. See Cert Petition Brief, *supra* note 211, at 29–35.

249. See Cert Petition Brief, *supra* note 211, at 17–21.

250. See *supra* notes 225–40 and accompanying text.

251. Brief for Respondent Ellington On Petition For a Writ of Certiorari To the United States Court of Appeals for the Sixth Circuit at 13–14, *Nashville I-40 Steering Committee v. Ellington*, No. 995 (U.S. Supreme Court, Jan. 23, 1968)

petitioners rebutted this argument at length. They noted that administrative process violations had made litigation impossible for years. They also noted that perhaps the most harmful decision (the state's administrative sleight of hand along Jefferson)<sup>252</sup> had been made recently, without any notice to the public.<sup>253</sup> The sunk costs argument was a different version of basically the same claim. Both briefs from the respondents focused upon it: The state had invested millions in right-of-way acquisition, and thus the balance of equities favored them.<sup>254</sup> The petitioners' brief (correctly) pointed out that the state could do many things with that land that would likely be less destructive, including reselling it to the community or utilizing it in a "comprehensive neighborhood renewal plan."<sup>255</sup> The petitioners implicitly argued what is now clear with the benefit of hindsight: the state's key legal argument relied on delays that the state had caused.

The Supreme Court met on January 26 to determine whether to grant certiorari. Previous studies of the I-40 controversy do not analyze the Court's certiorari decision at length—at most, the decision is given several sentences—and typically get crucial details wrong.<sup>256</sup> Archival sources from the Library of Congress reveal just how close the final decision in conference was. Four justices must vote to grant cert before the Court can hear a case. Here, three Justices voted to grant cert, with the remainder voting against. Chief Justice Earl Warren appears to have voted to grant cert, as did Justice Thurgood Marshall (recently elevated to the Court) and

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(opposing certiorari); Brief for Respondent Briley On Petition For a Writ of Certiorari To the United States Court of Appeals for the Sixth Circuit at 13–14, *Nashville I-40 Steering Committee v. Ellington*, No. 995 (U.S. Supreme Court, Jan. 23, 1968) (not opposing certiorari, but arguing for quick resolution of the case).

252. See *supra* notes 171–75 and accompanying text.

253. See Cert Petition Brief, *supra* note 211, at 35.

254. See sources cited *supra* note 251.

255. Cert Petition Brief, *supra* note 211, at 36.

256. For reference, see Ford, *supra* note 101, at 58 (devoting three sentences to the Supreme Court, and getting the date of the cert denial wrong); Hall, *supra* note 91, at 41 (same); Mohl, *supra* note 3, at 884 (devoting one sentence to the Supreme Court decision, and getting the date wrong, to boot); ZUZAK, *supra* note 6, at 51 (getting the dates right, but only devoting several sentences to the Court's decision-making).

Justice Potter Stewart.<sup>257</sup> The remaining Justices (including liberal icons like Justice Brennan and Justice Douglas) voted to deny cert.<sup>258</sup>

Although they are imperfect sources,<sup>259</sup> bench memos written to two key justices (Earl Warren, who voted to grant, and William O. Douglas, who voted to deny) may reveal what issue the denial of cert turned upon. A memo written by Earl Dudley, one of Warren's clerks, argued in favor of granting cert: Both of the petitioners' claims have merit, this memo suggested, but especially the claim that the District Court misinterpreted §116(c)'s statutory notice and hearing requirements.<sup>260</sup> In contrast, the memo to Douglas arguing against cert sided with Governor Ellington. Douglas's clerk concluded that laches was a "reasonable ground" for denying the temporary equitable relief.<sup>261</sup> It seems that the other Justices agreed with this point or, at the very least, did not agree that the case raised important issues. It is worth briefly dwelling on the consequences of laches argument. This argument allowed states to use delay as a sword (to prevent the public from having a voice in the process) and as a shield (to win later litigation). As a result, it nearly fully excised the public from the process,

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257. See Conference Notes of Chief Justice Earl Warren (Jan. 26, 1968) (on file with the Library of Congress) (copy available on file with the author). Chief Justice Warren's notes can be found in Appendix E. Brennan's notes on the same conference confirm the votes of Warren and Marshall. See Conference Notes of Justice William J. Brennan (Jan. 26, 1968) (on file with the Library of Congress) (copy available on file with the author). Brennan records (incorrectly, in this author's view, given Warren's notes and Stewart's stay grant) Justice Stewart as a no.

258. See sources cited *supra* note 257.

259. Indeed, a conversation between the author and Earl Dudley (the author of the memo to Chief Justice Warren, and an Emeritus Professor of Law at the University of Virginia) reveals the imperfections. Professor Dudley had two main points. The first is not surprising but important: justices vote to grant or deny certiorari for many reasons, and so drawing firm conclusions from those votes is difficult. This paper has sought to use restrained language for that reason. Second, and equally importantly, the voting coalition (as evidenced by Warren's notes) is unusual: Stewart was not a doctrinaire liberal. On the other side, Brennan usually voted with the Chief, Fortas was a reliable liberal, and Douglas was arguably the most liberal Justice on the court at the time (excluding Marshall, who had not yet compiled enough of a voting record). Brennan and Douglas would later vote to grant certiorari in *Overton Park*. The author thanks Professor Dudley for an illuminating conversation.

260. See Memorandum from Earl Dudley to Chief Justice Earl Warren on *I-40 Steering Committee v. Ellington* (Jan. 24, 1968) (on file with the Library of Congress) (copy available on file with the author).

261. See Memorandum to Justice William O. Douglas on *I-40 Steering Committee v. Ellington* (Jan. 25, 1968) (on file with the Library of Congress) (on file with the author). The author owes thanks to Michael Weisbuch for helping draw out the arguments in this paragraph, especially the one immediately after this note.

even as it implicitly sanctioned delay as a legitimate tactic. The Supreme Court announced the denial of certiorari for *I-40 Steering Committee v. Ellington* on January 29.<sup>262</sup> The state awarded a construction contract worth six million dollars nearly immediately.<sup>263</sup>

#### D. The Aftermath

This subsection will explain the aftermath of the failed attempt to stop I-40 in the federal courts. It will explain the failed attempts at remediation and mitigation and the damage I-40 caused to North Nashville. It will conclude with a brief overview of the Congressional reforms adopted (partially) in response to the I-40 controversy.

After the Supreme Court denied the Steering Committee relief, Steering Committee members turned to federal bureaucrats instead. Over the next several months, Steering Committee members negotiated with Federal Highway Administrator Bridwell and Secretary Boyd, asking that they either deny approval of the construction contract or adopt serious remedial and mitigation efforts.<sup>264</sup> Both Boyd and Bridwell believed they had no choice but to move forward, given the investment already sunk into the project. They blamed “decisions made in the 1950’s” for the difficult choices they now faced.<sup>265</sup> Bridwell thus approved the beginning of construction in late February.<sup>266</sup> His approval of construction included some concessions to the Steering Committee (like an underpass at 21<sup>st</sup> Avenue North) that would be incorporated into the design of I-40.<sup>267</sup>

Other efforts at mitigation and remediation failed or did not materialize, however. At one point, Bridwell proposed an air rights deck as a remedy.<sup>268</sup> Infighting and bureaucratic irresponsibility doomed it.<sup>269</sup> Relocation of people and compensation of businesses also failed. The federal government and Nashville civic leaders promised millions for

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262. ZUZAK, *supra* note 6, at 51.

263. HOUSTON, *supra* note 96, at 210.

264. *See id.* at 210–11; ZUZAK, *supra* note 6, at 52–53. Nashville’s political and civic elite (including the Chamber of Commerce) remained deeply involved in this process. *See* ZUZAK, *supra* note 6, at 52–55.

265. Mohl, *supra* note 3, at 885.

266. ZUZAK, *supra* note 6, at 57.

267. *Id.*; *see also* Ford, *supra* note 101, at 62–66 (detailing the 5 meager concessions made by the FHA that were incorporated into the design).

268. *See* ZUZAK, *supra* note 6, at 56–57, where Bridwell proposes this solution in a meeting with the Steering Committee. Ford, *supra* note 101, at 70–74, includes a thorough explanation of what the proposed air rights project would actually look like. This proposal, of course, was originally proposed by Clarke and Rapuano in their altered route for I-40 through North Nashville. *See supra* notes 120, 167–68 and accompanying text.

269. *See* HOUSTON, *supra* note 96, at 211 (bureaucratic failures); ZUZAK, *supra* note 6, at 62–67 (infighting).

relocation assistance and loans for businesses, but most in North Nashville never saw any of it.<sup>270</sup> Relocation of people proved to be a failure,<sup>271</sup> and the compensation that was paid out primarily went to business owners, not North Nashville's many renters.<sup>272</sup> The final effort at mitigation was Model Cities funding. The construction of I-40, in a perverse twist, helped North Nashville qualify for this funding.<sup>273</sup> Not much came of this program, though, because of poor management, inconsistent funding, and weak community participation.<sup>274</sup> Black Nashvillians were mystified by the Model Cities program: "[they] did not understand why one federal agency would be building up the community while another would be tearing it down."<sup>275</sup> And so, as one historian put it, "the road came to Nashville," with only meager efforts at mitigation or remediation in place.<sup>276</sup>

I-40's subsequent impact on North Nashville was devastating. It is difficult to overstate how destructive the road was: I-40 was "a bitter thing which tore the community apart. Destroyed it."<sup>277</sup> I-40 completely flipped the housing conditions in North Nashville before it was even built; many blocks, severed by the final path of I-40, went from solidly middle class in 1960 to overwhelmingly "substandard" housing by 1968. I-40 eventually displaced 1,400 people.<sup>278</sup> Once built, it directly "demolished more than 620 black homes, twenty-seven apartment homes, and six black churches. It dead-ended fifty local streets. . . [and] separated children from their playgrounds and schools, parishioners from their churches, and businesses from their customers."<sup>279</sup> It permanently divided Fisk, Meharry, and Tennessee A & I from each other and the larger black community.<sup>280</sup> In practical terms, it cut in half a thriving academic cluster, throwing up

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270. SELEY, *supra* note 5, at 64–65.

271. See ZUZAK, *supra* note 6, at 59.

272. See ZUZAK, *supra* note 6, at 56–59.

273. HOUSTON, *supra* note 96, at 206–07.

274. See ERICKSON, *supra* note 99, at 139; SELEY, *supra* note 5, at 58. HOUSTON, *supra* note 96, at 213–219, includes a good summary of the failure of the Model Cities program to bring meaningful change to North Nashville. The most thorough summary—offering largely the same conclusions—can be found in ALLAN GATES ET AL., *NASHVILLE MODEL CITIES: A CASE STUDY IN GROWING METROPOLIS: ASPECTS OF DEVELOPMENT IN NASHVILLE* 191 (James. F. Blumstein and Benjamin Walter ed., 1975).

275. Mohl, *supra* note 3, at 883.

276. HOUSTON, *supra* note 96, at 212.

277. HOUSTON, *supra* note 96, at 212 (quoting Kelly Miller Smith). Kelly Miller Smith was the pastor of black First Baptist in Nashville. He was the most influential black religious leader in the city for years and a key figure in Nashville's civil rights struggle. See, e.g., HALBERSTAM, *supra* note 95, at 52–53.

278. Ford, *supra* note 101, at 89–90; Steuteville, *supra* note 8. The statistics on standard versus "substandard" can be found in Ford.

279. Mohl, *supra* note 3, at 880.

280. *Id.*



enormous roadblocks to the exchange of students, information, and ideas. For an accessible comparison, imagine the damage to Cambridge if MIT and Harvard had an interstate in between them. Jefferson Street lost dozens of businesses and its place as a commercial and cultural center in Nashville.<sup>281</sup> Most perniciously, the road caused lasting expressive harm to North Nashville. It demonstrated “literally how cheap the black community was in white eyes.”<sup>282</sup> This harm still lingers today: The poem that opened this article demonstrates how keenly the injury of the interstate is still felt and remembered in black Nashville.

The I-40 controversy did catalyze some Congressional and administrative reform. *I-40 Steering Committee v. Ellington* appears to have been the first racial discrimination lawsuit against an agency administering interstate construction.<sup>283</sup> As a result, the controversy received national attention, spurred in part by a CBS documentary that critiqued “the construction of highways solely based on economic considerations, rather than people considerations.”<sup>284</sup> The lawsuit resulted in federal policy that no highway or public work could be based on hearings more than five years old.<sup>285</sup> Key actors in the I-40 controversy (including Mayor Briley and Yale Rabin, the NAACP planner) testified on their experience before Congress.<sup>286</sup> This testimony spurred on the 1968 Federal-Aid Highway Act, which mandated a “two-year hearing procedure for citizen participation in highway planning.”<sup>287</sup> Soon after, the 1970 Uniform Relocation Assistance Act (motivated by stories like Nashville’s) drastically expanded the relocation payments available to residents or businesses affected by highway construction.<sup>288</sup> Still, these positive reform efforts came too late to make a difference for North Nashville. These new statutory requirements benefitted other freeway revolts, but not Nashville’s.<sup>289</sup> Federal

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281. See Ford, *supra* note 101, at 81–85.

282. HOUSTON, *supra* note 96, at 211.

283. ZUZAK, *supra* note 6, at 68.

284. *Id.*

285. *Id.*

286. Rabin’s testimony was particularly forceful. See Rabin Testimony, *supra* note 9, at 502.

287. ZUZAK, *supra* note 6, at 68.

288. *Id.* Zuzak references the “Highway Assistance Act,” but it seems clear he is referring to the URA. The URA (42 U.S.C. §§ 4601 *et seq.* (1970)) authorized construction of replacement housing and significantly expanded available relocation payments. In so doing, it improved upon (and effectively repealed) the 1968 Highway Act (The Highway Act of 1968, Act of Aug. 23, 1968, Pub. L. No. 90-495 § 30, 82 Stat. 830–33, *replaced by* 42 U.S.C. §§ 4601 *et seq.* (1970)). That act required state highway officials to assure federal policymakers that decent, safe, and sanitary housing was available for displaced residents. For a good summary of these two acts, see *In the Path of Progress: Federal Highway Relocation Assurances*, 82 YALE L. J. 373, 378–79 (1972).

289. Mohl, *supra* note 3, at 886–87.

administrators recognized as much. Secretary of Transportation Boyd wrote to Flournoy Coles, after the controversy had ended, that “in retrospect, it may well have been more desirable to locate the highway on a different line.”<sup>290</sup>

### III. THE FREEWAY REVOLT THAT WASN'T

*“Nashville’s freeway revolt came late and didn’t last long.”*

- Raymond Mohl

This part will compare and contrast Nashville’s too-little, too-late freeway revolt with the successful revolt in Memphis. It will conclude that severe violations of the text and spirit of the Federal Aid Highway Act of 1956 delayed the North Nashville freeway revolt for so long that, once it began, it was already too late (in the minds of judges and policymakers) to stop the construction of the road. Because the revolt arose so late (and because of the racial dynamics at play), it lacked the organization and power to delay construction that other freeway revolts demonstrated. As a result, the revolt came just a bit too early to take advantage of Congressional and judicial reform of the interstate highway laws.<sup>291</sup>

While this episode has gone largely unexamined in legal academia, existing historical and sociological accounts of the failed freeway revolt wrongly blame black Nashvillians for their inaction, or misleadingly claim the fight was unwinnable from the start. Contemporary accounts from planners and sociologists tend to blame black Nashvillians for their inaction. John Seley chides civic leaders in North Nashville for their naiveté.<sup>292</sup> Hubert James Ford argues the Steering Committee should have formed and gone to court sooner; his only piece of evidence for this contention is the article published in *The Tennessean* in the late 1950s.<sup>293</sup> Charles Zuzak also criticizes the delayed response in North Nashville, although he and his co-authors blame state and local planners for their obfuscation, too.<sup>294</sup> Later accounts, from both planners and historians, tend to portray the fight as unwinnable. Ansley Erickson and Benjamin Houston both (correctly) identify the construction of I-40 as part and parcel of larger

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290. *Id.* at 885.

291. Indeed, this time period saw a roiling debate—and reformation—of administrative law requirements, as both Congress and, eventually, the federal courts stepped into the breach. *See, e.g.,* Richard B Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975).

292. SELEY, *supra* note 5, 61–63. Seley specifically blames North Nashville residents for not understanding who was approving what (an administrative process failure) and for blindly trusting the city and state leaders. *Id.*

293. Ford, *supra* note 101, at 43–44.

294. ZUZAK, *supra* note 6, at 52–53; *see also* Ford, *supra* note 101, at 25–33.

trends buffeting black Nashville at the time. Both accounts, however, largely present the outcome of the fight—and specifically the outcome at the Supreme Court—as a *fait accompli*.<sup>295</sup> Christopher Dean Hall concludes that I-40 was a planning disaster that devastated North Nashville but does not present that disaster as legally avoidable.<sup>296</sup> Raymond Mohl offers perhaps the best account. His suggestion that timing doomed the Steering Committee politically and legally is spot on, but he fails to connect the ill-timed revolt to violations of law.<sup>297</sup> This part will do just that, by using the Supreme Court papers to fill in a gap in the existing scholarship. Legal violations delayed the freeway revolt and gave the courts an easy out; this clear connection makes the lingering wound in North Nashville today all the more galling.

Violations of law explain much of the delay of the North Nashville freeway revolt. State planners violated the text and spirit of §116(c) of the Federal-Aid Highway Act of 1956 in three ways. First, and most importantly, they failed to give adequate notice of the hearing. State planners should have advertised the hearing in newspapers and failed to do so. They should have posted notice of the hearing in community pillars—like churches—in North Nashville. Instead, they only posted notices in post offices in white neighborhoods. Perhaps most tellingly, the notices they did post advertised the wrong date. Both lower courts went out of their way to sharply criticize the notice given of the hearing.<sup>298</sup> Councilman Harold Love later testified that he could not find a single resident of North Nashville who had been present at the 1957 hearing.<sup>299</sup> This legal violation likely slowed down the organization of the North Nashville freeway revolt by nearly a decade.

Next, state planners failed to adequately consider and study the economic effects of I-40 construction. §116(c) required that the state highway department certify that it had “considered the economic effects of

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295. ERICKSON, *supra* note 99, at 138–39; HOUSTON, *supra* note 96, at 210–13.

296. *See generally* Hall, *supra* note 91.

297. Mohl, *supra* note 3, at 886.

298. *See supra* notes 125–40 and accompanying text. The Middle District of Tennessee and the 6th Circuit, despite their clear misgivings, rejected the plaintiffs’ contention on this point for different, equally flawed reasons. The Middle District of Tennessee assumed that notice flaws were between the state and federal bureaucrats. This assumption ignored both the purpose of notice (i.e., engaging citizens) and then-ongoing developments in administrative law (like *Scenic Hudson*) moving the field towards judicial review of such administrative decisions. The 6th Circuit assumed that the article in *The Tennessean* should have given the plaintiffs notice. This assumption a) ignores the clear text of §116(c) and b) presumes (incorrectly) that *The Tennessean* article was factually accurate. *See, e.g.*, Mohl, *supra* note 3, at 882.

299. Hall, *supra* note 91, at 25.

such a location” of the highway.<sup>300</sup> As this article makes clear, the evidence on this point is comprehensive: The state highway department commissioned no studies justifying the route through North Nashville—economically or otherwise.<sup>301</sup> The economic effects on North Nashville did not come up at the public hearing.<sup>302</sup> Both the district court and the circuit court agreed that the consideration of the economic effects had been “inadequate.”<sup>303</sup> This lack of consideration matters to the outcome of the freeway revolt for two reasons. First, a real study of the economic (or overall) effects of I-40 on North Nashville likely would have resulted in engagement with residents of North Nashville, thus giving them notice and catalyzing citizen activism. Second, it matters because thorough study takes time—time the Steering Committee ended up desperately needing.

Finally, state planners violated the spirit of §116(c) by continually misleading North Nashville residents about the location and finality of the route.<sup>304</sup> Internal policy documents and the legislative history of §116(c) reveals that the purpose of the public hearing requirement was to provide citizens information and an opportunity to be heard and allow the state planners to incorporate any raised concerns into their planning. This hearing requirement was further augmented by later Department of Transportation policy requiring additional public hearings if too much time had elapsed since the first public hearing.<sup>305</sup> The state directly undercut both of the purposes above, and (although it was not well briefed) clearly violated the additional hearing requirement. The state’s dismissive approach to information sharing meant that North Nashville residents did not know about the final route location until the eve of construction.

The state’s dismissive reaction originates with the other driver of the delay in the North Nashville freeway revolt: segregation itself. Segregation shaped politics and policy in the South in the first half of the 20<sup>th</sup> century.<sup>306</sup> It still profoundly influences attitudes and policy today.<sup>307</sup> In

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300. See *supra* notes 137–38 (§116(c)).

301. See *supra* notes 122–27 and accompanying text.

302. See *supra* notes 141–50 and accompanying text.

303. See *supra* notes 225–40 and accompanying text. Here, both the district court and the Circuit Court assumed that no judicial review of the state’s (or the federal government’s) action here was available, essentially, contra *Scenic Hudson*.

304. See *supra* notes 152–61 and accompanying text.

305. See 96 Cong. Rec. 13005–13006 (1950) (debate between Senators Saltsonstall, Chavez, and Kerr); Cert Petition Brief, *supra* note 211, at 25–26, n.14, n.16 (citing the Senatorial debate, and Policy and Procedure Memorandum 20-8, on the purpose of the public hearing requirement). For the additional hearing requirement, see sources cited *supra* note 196.

306. For the magisterial treatment on this subject, see V.O. KEY JR., SOUTHERN POLITICS IN STATE AND NATION (1949). Key’s Tennessee chapter is particularly brilliant and the maps it includes do much to explain the political history of the state. Recent work (includes Enos’, cited below) explicitly builds on Key. For one prominent example, see MAYA SEN ET AL., DEEP ROOTS: HOW

this case, segregation (and the overt racism that undergirded it and flowed from it) both drove the administrative law violations that delayed the freeway revolt and heightened their impact. Consider the three violations discussed above. First, absent Jim Crow, the notice violation would not have been possible. Limiting notice to post offices in white neighborhoods was only possible because Nashville was already segregated into black and white neighborhoods. Similarly, Jim Crow may have limited the policymakers' conception of who the public *was*—explaining their lack of concern about the incorrect date, the location of the notice, or the absence of black Nashvillians at the meeting itself.<sup>308</sup> Second, the failure to study or consider the economic effects of I-40 on North Nashville is difficult to imagine absent Jim Crow. State planners knew how to thoroughly study the effects of highways—recall the Vanderbilt parking study.<sup>309</sup> State planners “considered [I-40] to be a benefit to them,” and trial testimony indicates that is about the only consideration North Nashville received.<sup>310</sup> This attitude only makes sense in the blinkered world of Jim Crow, as the planners involved likely spent little, if any, time in North Nashville or on Jefferson. To them, the entire area was a slum, ripe for clearance. So they “aim[ed]” I-40 “like a gun, right at the heart of the slums” and considered that creative destruction to be beneficial to the neighborhood.<sup>311</sup> Finally, of course, Jim Crow undergirds every bit of the obfuscation over I-40's finality and its route. State officials do not appear to have viewed black Nashvillians as members of a public they were obligated to serve and

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SLAVERY STILL SHAPES SOUTHERN POLITICS (2018) (finding that counties with a higher percentage of slaves in 1860 are more conservative today than other Southern counties).

307. *See, e.g.*, RYAN D. ENOS, *THE SPACE BETWEEN US: SOCIAL GEOGRAPHY AND POLITICS* (2017) (showing that racial segregation heightens prejudice, precludes cooperation, and so on). Enos' work explicitly builds on Key. He uses lab experiments and natural experiments where Key mostly relied on analysis and observation.

308. On this point the testimony of the BPR official—that a “predominance” of black people attended the meeting—is instructive. It contrasts sharply with Councilman Love's testimony that no members of his North Nashville community attended the hearing. Even if we take the BPR official's statement at face value, it does not contradict Councilman Love's testimony. That is a consequence of segregation – to the officials, any black person present should have been able to represent the black community. The North Nashville community, of course, had specific interests and concerns about I-40 that could not be represented by just any black person. Moreover, those opinions did diverge on key questions—yet another reason to hear them out at a public hearing. *See* sources cited *supra* note 149.

309. *See supra* note 217 and accompanying text.

310. SELEY, *supra* note 5, at 60–61.

311. HOUSTON, *supra* note 96, at 206. Houston's work here includes both the original quote and the comparison of this thought process to creative destruction.

assist.<sup>312</sup> White real estate speculators somehow got more information than black civic leaders.<sup>313</sup> The racial exclusion of Jim Crow thus laid the foundation for the administrative process violations that delayed and, eventually, kneecapped the North Nashville freeway revolt.

Nashville's freeway revolt "came late and didn't last long."<sup>314</sup> This paper posits that segregation-fueled administrative process violations account for the freeway revolt's late start. But why didn't it last long? The late start itself accounts for the brief revolt. Because Nashville's freeway revolt started so late, its leaders (the Steering Committee) found themselves without political and legal firepower. An earlier revolt would have helped the Steering Committee politically. It would have allowed them to organize themselves—and the North Nashville community—gradually, and to use long-term pressure to push local, state, and federal bureaucrats. Some sources suggest that the state planners only became aware of the problems with the Jefferson Street route in 1967; by that point, the planners believed it was too late to make a change. An earlier revolt could have called attention to these problems and forced the state back to the drawing board before it spent millions on right of way.<sup>315</sup> More importantly, the late start doomed the Steering Committee's legal case in two ways. First, the delay gave each reviewing court an easy out: laches. On this theory, too much time had passed—and the state and the city had spent too much money—and so an injunction to halt construction should not be granted. The plaintiffs should have sued earlier. The district court said as much,<sup>316</sup> and the 6<sup>th</sup> Circuit strongly implied it.<sup>317</sup> This reasoning seems to be why the crucial fourth vote to grant certiorari at the Supreme Court—that of Justice Douglas—never materialized.<sup>318</sup> This easy out allowed the Supreme Court to avoid weighing in on the violations of §116(c) presented by *I-40 Steering Committee v. Ellington*.

Second, the late start meant that litigation had to proceed rapidly. The Steering Committee requested an injunction on the eve of construction, and the state wanted to move quickly.<sup>319</sup> *I-40 Steering Committee v. Ellington* thus got expedited consideration at the district court and circuit court level and received prompt consideration from the Supreme Court.<sup>320</sup>

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312. See *supra* Section II.

313. See sources cited *supra* note 161 and accompanying text.

314. Mohl, *supra*, note 3, at 883.

315. For this point, see ZUZAK, *supra* note 6, at 28–29.

316. See *supra* note 230 and accompanying text.

317. See *supra* note 236 and accompanying text. It is difficult not to read the 6<sup>th</sup> Circuit's statement that any "literate citizen of the Nashville community" should have had notice of I-40's route as making this exact point (its extreme racial condescension aside).

318. See *supra* notes 259–63 and accompanying text.

319. See *supra* notes 189–205 and accompanying text.

320. See *supra* notes 206, 231, 242 and accompanying text.

Practically, this meant that the plaintiffs could not and did not benefit from ongoing Congressional reform of the highway program's administrative requirements. Administrator Bridwell approved the construction contract in late February, 1968, only a month after the Supreme Court denied certiorari; the Federal-Aid Highway Act of 1966 went into effect on July 1, 1968.<sup>321</sup> It required a two-year hearing procedure for citizen participation in planning. It mandated that federal highway administrators must engage in "all possible planning, including consideration of alternatives...to minimize any harm to....[any] park."<sup>322</sup> I-40 reduced the size of Hadley Park—North Nashville's primary park—by a third.<sup>323</sup>

A deeper dive into the fight over Overton Park throws the reasons for the failure of the Nashville freeway revolt into sharp relief. In stark contrast with the battle over I-40 in North Nashville, Memphis's revolt to protect Overton Park started early and lasted over a decade. The fight in Memphis shared much in common with that in Nashville: The same road (I-40), similarly destructive planning, and the same powerful forces (local and state civic and political elites) aligned behind the road.<sup>324</sup> CPOP itself was about the same size (and arguably smaller) than the I-40 Steering Committee.<sup>325</sup>

The similarities end there, however. Three key differences stand out. First is notice. As early as 1957, multiple Memphis newspapers printed the correct map of the proposed route through Overton Park and, crucially, "indicated that the public would get its chance to speak out on routing issues."<sup>326</sup> Memphis then had two public meetings on I-40; the first directly led to the formation of CPOP, and hundreds attended the second meeting to express their opposition to building through Overton Park.<sup>327</sup> Effective notice thus led to widely attended public hearings that fomented early

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321. It is unclear to this author why Greenberg and Williams did not re-initiate litigation after Bridwell approved construction in February 1968 and utilize § 4(f) of the 1966 Department of Transportation Act. This section would later be crucial in *Overton Park*. See *supra* notes 68–71 and accompanying text. The 1966 Act went into effect in April, 1967. See STRAUSS, *supra* note 60, at 273. Greenberg and Williams were clearly aware of 4(f)'s importance—it makes an appearance in their brief requesting certiorari. See Cert Petition Brief, *supra* note 211, at 31.

322. On the new hearing procedure, see *supra* note 290 and accompanying text. On the new parks mandate, see Federal-Aid Highway Act of 1966, Pub L. No. 89-574, 80. Stat. 766, 771. See STRAUSS, *supra* note 60, at 273 for a good description of the background here.

323. See *supra* notes 90, 223 and accompanying text.

324. On this last point, see *supra* note 64 and accompanying text.

325. See STRAUSS, *supra* note 60, at 285. Like The I-40 Steering Committee, academics and employees at local universities were key members of CPOP. *Id.*

326. *Id.* at 284.

327. *Id.* at 284–87. The first meeting, organized by the City Commission, occurred in 1957. The second (the one required by § 116(c) and organized by the state) occurred in 1961. *Id.*

opposition to the route of I-40 through Overton Park—virtually the opposite of what occurred in Nashville.<sup>328</sup> Second is the planning process itself. The obfuscation and lack of information that frustrated North Nashville did not occur as much in Memphis. In contrast, the well-attended public hearing convinced state and federal planners of the seriousness of the opposition, causing them to slow down construction to study the I-40 route through Overton Park further and work with CPOP and other stakeholders.<sup>329</sup> For CPOP, the primary benefit of this further study was that it delayed final approval of the route and allowed the heightened protections of § 4(f) to kick in.<sup>330</sup> Finally, race looms large. White Memphians like Anona Stoner ran CPOP, and its visible presence was largely white. At the 1961 hearing, for instance, a “largely white and well-dressed audience” voiced firm opposition to I-40’s route through Overton Park.<sup>331</sup> Perhaps unsurprisingly, this white-driven opposition may be because Overton Park was, for much of the controversy, mostly available to white Memphis only.<sup>332</sup> Local and state civic and political elites did not bend over backwards for CPOP. But they did meet with CPOP repeatedly and hear out their concerns—a position that it is difficult to imagine Memphis leaders taking had CPOP’s leadership or membership been largely black.<sup>333</sup>

Ultimately, then, the eventual success of Memphis’ freeway revolt over Overton Park clarifies the reasons for the failure of the similar revolt in North Nashville. In Memphis, effective notice allowed for early opposition. This opposition packed the subsequent public hearings, forcing delay and relatively straightforward engagement from state and federal planners. Significantly, white Memphians led this opposition and, in their effort to protect Overton Park, sought to primarily benefit themselves. The early, consistent opposition to Overton Park that CPOP fomented allowed it to delay construction of the road through Overton Park. This delay meant

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328. See *id.* at 281 (discussing the difference in notice between Memphis and Nashville: “As would not be the case in Memphis, the required public hearing was—perhaps intentionally—obscure; notices were only sent to the County Judge, to the Mayor, and to a few post offices located in white neighborhoods. The notices were unspecific about the route, and they gave as the date for the hearing May 14, 1957; in fact, the hearing occurred May 15.”)

329. *Id.* at 287, n.61 (quoting a report to Federal Highway Administrator Bridwell that opposition at the 1961 public hearing—and subsequent letters received opposing the route, likely sent by CPOP—caused the State Highway Department to slow down and study alternate routes further).

330. *Id.* at 289.

331. STRAUSS, *supra* note 60, at 287.

332. *Id.* at 280; see Haltom, *supra* note 60.

333. See STRAUSS, *supra* note 60, at 280–84; see generally ARAM GOUDSOUZIAN, “If The March Cannot Be Here, Then Where?” *Memphis and the Meredith March*, AN UNSEEN LIGHT: BLACK STRUGGLES FOR FREEDOM IN MEMPHIS, TENNESSEE (Aram Goudsouzian and Charles W. McKinney Jr., ed. 2018).



that when Congress inserted heightened administrative protections into the highway and transportation statutes, CPOP could take advantage of them. North Nashville was not so lucky. Poor notice, an obscure public hearing, and a lack of information delayed the North Nashville freeway revolt. Because it started so late, it did not last long in the court of public opinion or the federal courts. This abbreviated length meant that it was over just a bit too early to take advantage of subsequent reform put into place by Congress.

### CONCLUSION: WHAT NOW?

One mile. That short distance is the subject of this article. That distance is the difference between a thriving neighborhood and the destruction of hundreds of homes. It is the distance between vibrant clubs and successful businesses and vacant stores and shuttered businesses. It is the distance between elite educational institutions and nearly financially insolvent ones. It is churches separated from their congregations and children from their schools. It is “there were no highway exits.”<sup>334</sup>

That difference is the result of an ill-considered decision to move a road one mile to the north, and the segregation-fueled violations of law that delayed and, eventually, short-circuited the grassroots opposition to that road. And that difference still has enormous implications today. As one recent exploration of the legacy of I-40 put it:

This is 37208, the heart of historically black North Nashville and a community in which Nashville’s proud progress has often had a poisonous side. The local and federal government’s treatment of North Nashville for at least a century has ranged from neglect to outright racist hostility. Around 50 years ago, the construction of Interstate 40 displaced more than a thousand black residents, destroyed a business and cultural district on Jefferson Street that was thriving against all odds, and slashed across the neighborhood of the 37208 ZIP code, cutting it in half...North Nashville is plagued by a lack of opportunity and scant public investment, and alongside its rich cultural history is a history of poverty, crime, violence, aggressive policing and mass incarceration.<sup>335</sup>

What can be done—if anything—to repair this injury? This paper has attempted to look, clear-eyed, at why I-40 went through North Nashville, why it was not stopped, and what came of it. Courts, legislators,

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334. See Tiana Clark, “Nashville,” *supra* note 1.

335. Steven Hale, *History Repeats Itself in North Nashville*, THE NASHVILLE SCENE (Jun. 7, 2018). For more on 37208, see also Appendix G.

and lawyers cannot look away from this wound in North Nashville. Looking away would “[ignore] not just the sins of the past but the sins of the present and the certain sins of the future.”<sup>336</sup> Policy solutions could possibly repair the wound in North Nashville, but scant policy progress has been made in Nashville so far.<sup>337</sup>

Legal remedies, at first glance, do not offer much more optimism. Many state and federal highway administration actions with respect to North Nashville would be flagrant violations of administrative law today (or, in some cases, just one year later). State highway planners would have to demonstrate they studied the effects of the proposed route and considered its economic, environmental, and social impact.<sup>338</sup> They would have to hold a hearing on the location of the road and a later hearing on its design.<sup>339</sup> Much broader notice is required, and the hearing itself must include information on alternatives considered by the department and must be

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336. Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (June 2014).

337. Some local policymakers proposed tearing down I-40 and returning the road to the local street grid. See NASHVILLE CIVIC DESIGN CENTER, THE PLAN OF NASHVILLE: AVENUES TO A GREAT CITY 76–77 (Christine Kreyling ed., 2005). Many cities have followed this approach. See, e.g., Raymond A. Mohl, *The Expressway Teardown Movement in American Cities: Rethinking Postwar Highway Policy in the Post-Interstate Era*, 11(1) J. PL. HIST. 89 (2012). In 2016, Nashville became one of four cities selected by the Obama Department of Transportation for its “Every Place Counts” program. This initiative sought to engage with the community to develop ideas to remedy the harm done by I-40. See Steuteville, *supra* note 8. The engagement produced ideas for multiple “land bridges” over I-40 that would restore neighborhood and community connectivity and green space destroyed by I-40. See Tony Gonzalez, *To Restore Jefferson Street, Nashville Considers A ‘Land Bridge’ Over I-40*, NASHVILLE PUB. RADIO (Jul. 13, 2016). One example of these proposals can be seen in Appendix F. Ironically, these proposals largely mirror the air rights deck proposed and then abandoned by the Department of Transportation nearly fifty years before. See *supra* notes 270–71 and accompanying text. As of this writing, nothing has come of these 2016 meetings.

338. Jerry L. Mashaw, *The Legal Structure of Frustration: Alternative Strategies for Public Choice Concerning Federally Aided Highway Construction*, 122 U. PA. L. REV. 1, 10, n.37 (1973), contains a good history of this requirement: “This requirement was previously contained in FHWA Policy and Procedure Memorandum 20-8, ¶ 10b (Jan. 17, 1969) (codified at 23 C.F.R. § 790.9 (1973)), which also elaborated 23 nonexclusive factors which should be included in “social, economic and environmental effects.” *Id.* ¶ 4c. This list has been consolidated to 7 factors. 23 C.F.R. § 790.3(c) (1973). Pursuant to the requirement of 23 U.S.C. § 109(h) (1970), the Secretary issued, in 1972, new guidelines to ensure full consideration of these factors at each stage in the development of highway projects on the federal-aid systems. These guidelines are set forth at 23 C.F.R. ch. I, pt. 1 App. A (1973).”

339. 23 CFR § 790.3(b). See Mashaw, *supra* note 338, at 12.

recorded by a verbatim transcript.<sup>340</sup> Federal highway administrators would have to demonstrate that no feasible alternative route existed.<sup>341</sup> These requirements—most of which went into effect either during or just after the I-40 controversy—were not met by state or federal highway planners in North Nashville. Of course, state and federal highway planners did not meet the bare-bones requirements—of a public hearing, adequate notice, and economic effects study—already imposed on them before 1968. That *Nashville I-40 Steering Committee v. Ellington* would likely come out differently in 2020, or even later in 1968, is cold comfort to the plaintiffs in that case—and past and current residents of North Nashville. That the case should have come out differently in 1968, even with the minimal procedural protections of that era, is even colder comfort. That knowledge certainly does not offer them a legal remedy.

So far, the only concrete effort at repairing the damage caused by I-40 is the Gateway to Heritage Plaza. This plaza, at the I-40 underpass on Jefferson Street, features pictures and stories of Jefferson Street's history on the columns supporting the interstate; it is the result of years of community-led coalition building.<sup>342</sup> It is unclear what could adequately repair the injury to North Nashville. It is unclear what could remedy the violations of law committed during the construction of I-40. But the North Nashville community deserves more than a couple of decorated columns under the interstate that decimated it. Repairing this damage is more important now than ever before; recent tornadoes devastated North Nashville, and the rebuilding process may force out longtime black residents who are the heart and soul of North Nashville.<sup>343</sup> The construction of I-40 was but the first blow to the soul of North Nashville.<sup>344</sup> Understanding how and why that damage occurred—and why it has not been repaired—may help us better rebuild after this latest crisis.

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340. 23 CFR § 790.3(b).

341. See 23 U.S.C. § 138 (1970) (codifying the 4(f) requirements); see, e.g., *Citizens to Preserve Overton Park, Inc. v. Volpe*, 400 U.S. 939 (1970).

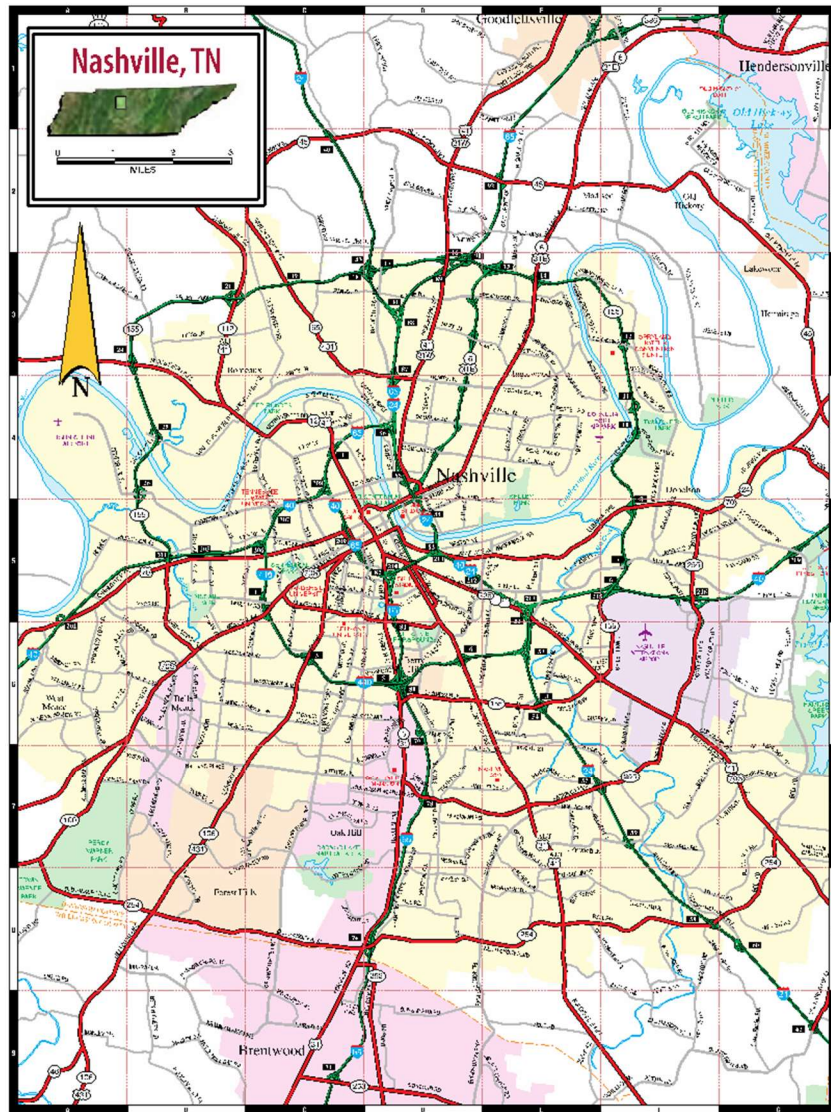
342. See Hale, *supra* note 335. Thanks to Councilwoman Sharon Hurt for filling me in on some of the details here. This story—which features Councilwoman Hurt, two Mayors, and Eddie George, among others—deserves its own larger exploration.

343. Richard Fausset & Steve Cavendish, *A Tornado Decimated North Nashville; The Rebuilding May Destroy Its Soul*, N.Y. TIMES, (Mar. 4, 2020).

344. Credit to my friend Lonnell Matthews Jr. for linking these twin blows to the soul of North Nashville. I owe him thanks for helpful conversations on this subject.

## APPENDIX

## Appendix A – Nashville's Interstate System



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For more maps, please visit [www.TRIPinfo.com](http://www.TRIPinfo.com)

**Appendix B – North Nashville Before and After**

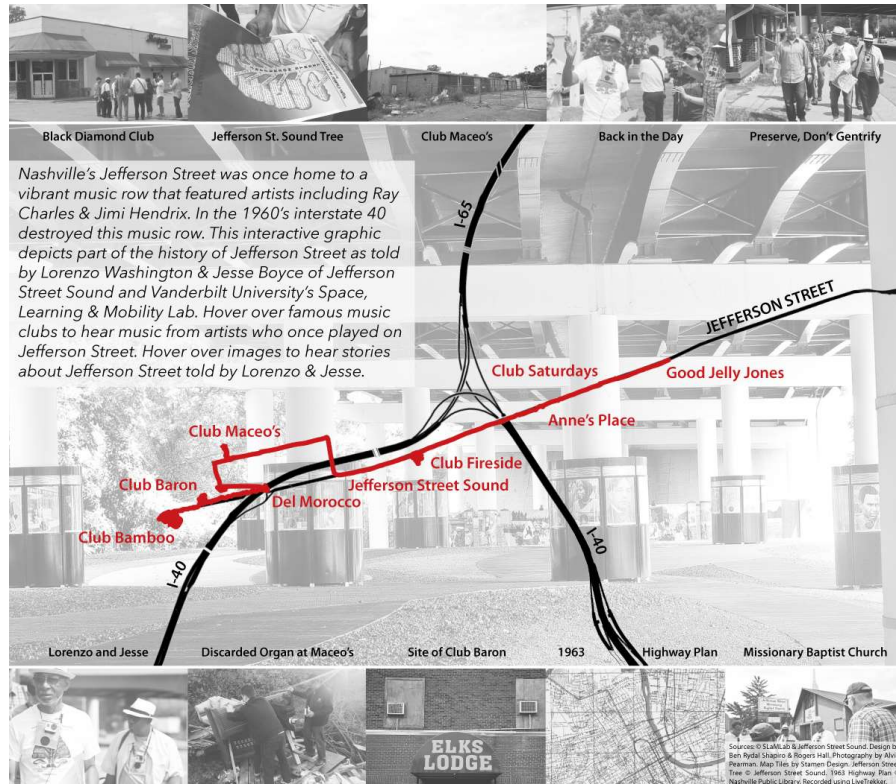
*This map of North Nashville is from 1959, before the construction of the Interstate.*





*This map shows the path of I-40 through North Nashville overlaid onto the then-existing neighborhood. For the source of these two pictures, see Nashville's page on "Every Place Counts": <https://www.nashville.gov/Planning-Department/Long-Range-Planning/Local-Planning-Studies/Every-Place-Counts.aspx>.*

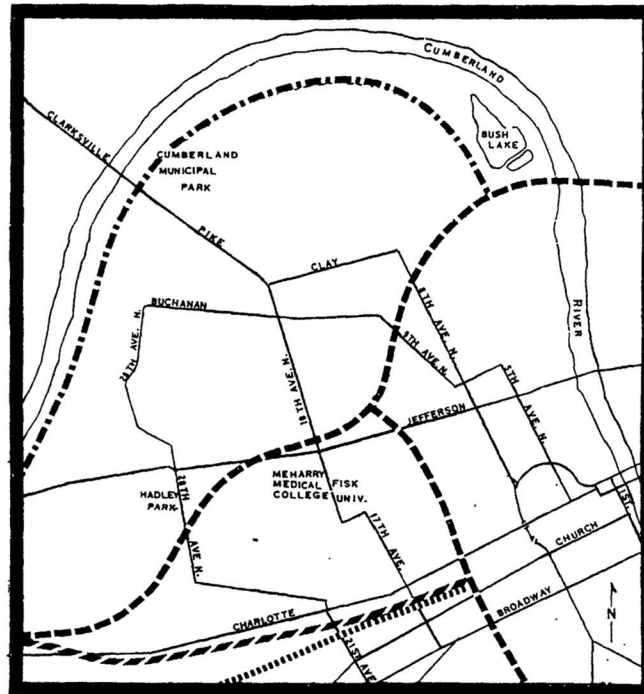
## Appendix C – Jefferson Street Clubs



Source: Please visit the Jefferson Street Sound, a group and website dedicated to preserving the memory of Jefferson Street. See <http://jeffersonstreetsound.com>.

## Appendix D – Potential I-40 Route

Figure 4



LEGEND: Freeway Routing Recommended by H. W. Lochner and Company, 1946  
 ..... Preliminary "Route" (Corridor) Clarke and Rapuano, 1955  
 // Final Routing Recommended by Clarke and Rapuano and the State Highway Department, 1955  
 - - - - Alternative Route Recommended by Advocate Planner Yale Rabin and the I-40 Steering Committee, 1967

Figure 2. Proposed westerly freeway routings, northwest Nashville.

*For the source of this map, see Ford, supra note 101, at 30.*



	CERT.	JURISDICTIONAL STATEMENT	MERITS	QUESTION	ABSENT	NOT VOTING
G D N Post Dis App Rev App No Yes						
Marshall, J.....	✓					
Fortas, J.....		✓				
White, J.....		✓				
Stewart, J.....	✓					
Brennan, J.....		✓				
Harlan, J.....		✓				
Douglas, J.....		✓				
Black, J.....		✓				
Warren, Ch. J.....	V...-70					

**Appendix F – Sample Land Bridge Proposal**

*This proposal largely mirrors the “air rights” project proposed in the late 1960s. It would reconnect Jefferson and Scovel Streets.*

**Appendix G – Map of 37208 (2018)**

*For the source of this map, please see Hale, supra note 335.*