

2010

## Race Audits

Robin A. Lenhardt

*Fordham University School of Law*, [rlenhardt@law.fordham.edu](mailto:rlenhardt@law.fordham.edu)

Follow this and additional works at: [https://ir.lawnet.fordham.edu/faculty\\_scholarship](https://ir.lawnet.fordham.edu/faculty_scholarship)

Part of the [Civil Rights and Discrimination Commons](#)

---

### Recommended Citation

Robin A. Lenhardt, *Race Audits*, 62 *Hastings L.J.* 1527 (2010-2011)

Available at: [https://ir.lawnet.fordham.edu/faculty\\_scholarship/457](https://ir.lawnet.fordham.edu/faculty_scholarship/457)

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

# Race Audits

R.A. LENHARDT\*

*The persistence of the problems that attend the American color line makes clear the need for greater experimentation and innovation in the area of race. For years now, we have looked primarily to courts for solutions. But current jurisprudence offers very little that is useful in dealing with the modern realities of durable racial inequality and segregation. As cases such as Parents Involved in Community Schools v. Seattle School District No. 1 and Ricci v. DeStefano make clear, it limits dramatically the tools available to address racial inequality, regarding as “bad cities” localities that try affirmatively to grapple with matters of race. This Article thus urges a focus on localities and the deep potential that such entities—because of their intimate experience with race and how it operates on the ground—have to do “good,” to be “equality innovators.”*

*The Article develops a proposal for the “race audit,” a voluntary, evaluative measure designed to identify the sources of persistent racial inequality that can be productively deployed by localities. This tool, grounded in the tenets of structuralism, eschews a singular focus on intentional discrimination. Instead, it seeks to uncover the specific structural mechanisms that create cumulative racial disadvantage across domains, time, and generations by, inter alia, being attuned to the spatial dimensions, meaning, and operation of race in the United States. The race audit process, in addition to highlighting the capacity of localities to be important change agents, would help produce a counternarrative about race and the seeming naturalness of the racial segregation and disadvantage now evident in urban and suburban areas alike. The Author contends that, in doing so, the race audit would identify better, more effective strategies for alleviating structural racial inequality. Situating the race audit proposal in a larger project on the commitments underlying civil rights advocacy more broadly, she highlights the potential that the race audit and other innovative tools might have to spur democratic conversations about race and the conditions necessary for belonging at the local level; generate a thicker, more substantive account of equality than has thus far been forthcoming in U.S. Supreme Court cases; and reconcile the perceived tensions between notions of equality and liberty in the area of race.*

---

\* Associate Professor, Fordham University School of Law. I am grateful to Michelle Adams, Rick Banks, David Barron, Elise Boddie, Jack Boger, Bennett Capers, Devon Cardado, Guy Charles, Nestor Davidson, Richard Ford, Sheila Foster, Katherine Franke, Jerry Frug, Suzanne Goldberg, Rachel Godsil, Jennifer Gordon, Kristin Johnson, Olati Johnson, Pam Karlan, Eduardo Peñalver, Catherine Powell, Aaron Saiger, Susan Sturm, Rose Villazor, Benjamin Zipursky, and members of the Fordham University School of Law, Columbia Law School, Cornell University Law School, Hofstra Law School, Lutie A. Lytle, NYC Area Scholarship Group, Stanford Law School, UNC School of Law, and Washington University School of Law workshops for helpful comments and suggestions on this Article. I thank the editors of the *Hastings Law Journal* for their hard work on this Article, and Sirrah Harris, Maria Marulanda, Lani Medina, Ernestine Narcisse, Chauncey Smith, and the Fordham University School of Law library staff for helpful research assistance.

## TABLE OF CONTENTS

PROLOGUE: A CITY NARRATIVE .....	1528
INTRODUCTION: LOCALITIES AND PERSISTENT RACIAL INEQUITY.....	1530
I. RACE AUDITS AND THE MEASUREMENT OF RACIAL INEQUALITY.....	1539
A. EXPLORING THEORETICAL UNDERPINNINGS .....	1540
B. FORMULATING A PROPOSAL FOR ASSESSING STRUCTURAL INEQUALITY .....	1544
1. <i>Developing a Program of Assessment</i> .....	1545
2. <i>Setting Criteria and Objectives for the Race Audit</i> .....	1549
3. <i>Building a “Community of Inquiry”</i> .....	1551
C. LOCATING THE PROPOSAL IN OTHER AUDIT MECHANISMS .....	1552
II. IMPLEMENTING THE RACE AUDIT PROPOSAL .....	1556
A. THE CITY CONTEXT.....	1557
B. THE REGIONAL CONTEXT .....	1560
C. A ROLE FOR STATES AND THE FEDERAL GOVERNMENT?.....	1563
III. NAVIGATING THE CURRENT DOCTRINAL LANDSCAPE.....	1566
IV. LOCAL INCENTIVES AND POTENTIAL CONCERNS.....	1570
A. LOCAL INCENTIVES FOR INNOVATION.....	1570
B. POTENTIAL ISSUES IN RACE AUDIT IMPLEMENTATION .....	1572
CONCLUSION: LOCALITIES, RACE, AND THE “GOOD LIFE” .....	1575

## PROLOGUE: A CITY NARRATIVE

Picture a city. In it reside roughly 600,000 people. At its incorporation nearly 140 years ago, the city operated as a “sun-down town,” with white residents and officials actively excluding nonwhites like Native Americans and later Chinese immigrants.<sup>1</sup> Today, though, the city boasts a fairly diverse population. While Whites remain in the majority, racial minorities comprise a sizeable segment of the overall population. African Americans and Asian Americans constitute the largest minority groups at just over eight and thirteen percent of all residents, respectively. Latinos represent about five percent of the population, while Native Americans comprise approximately one percent.<sup>2</sup>

---

1. See JAMES W. LOEWEN, *SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM* 4–5 (2005); *SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM*, <http://sundown.afro.illinois.edu/sundowntowns.php> (last visited July 4, 2011) (listing Seattle, Washington, as a possible sundown town).

2. See Fact Sheet: *Seattle city, Washington*, U.S. CENSUS BUREAU, <http://factfinder.census.gov/servlet/ACSSAFFacts> (in the search field, enter “Seattle” as the city and “Washington” as the state, then follow the “Seattle city, Washington” hyperlink on the results page) (last visited July 4, 2011).

Local officials hope to promote their metropolis as one of the most attractive and racially diverse in its region. But statistics on segregation levels paint a troubling counterpoint to this vision. While minorities exist within their jurisdiction in meaningful numbers, the mix of people reflected in the overall population is missing from the city's various neighborhoods. Indeed, the numbers show that, where racial minorities are concerned, "hypersegregation" has become the norm.<sup>3</sup> They live, work, and go to school in effective isolation, separated physically, socially, and often politically from their nonminority counterparts.<sup>4</sup> Whites typically reside in the northern communities of the city, while racial minorities are clustered in southern neighborhoods.<sup>5</sup> In earlier days, racially restrictive covenants helped to maintain residential homogeneity, ensuring white exclusivity in neighborhoods with housing stock, public schools, and other city resources that made them especially desirable.<sup>6</sup> Such provisions have been outlawed for years,<sup>7</sup> but racial segregation has nevertheless been persistent. Indeed, the racial isolation of African Americans and Latinos in particular has been an open secret for decades. Among other things, members of these groups, like their counterparts in other cities, are more likely to reside in poverty, to be unemployed, to be victims of crime, and to attend racially isolated public schools.<sup>8</sup> The range of opportunities afforded them pales in comparison to those enjoyed by the city's white residents.

School board members, persuaded that hypersegregation negatively affects students' classroom experiences and learning, voluntarily adopted a race-conscious school assignment plan designed to enhance building-level diversity in the city's high schools years before.<sup>9</sup> Impressed by the school board's resolve to act affirmatively to address the effects of ongoing racial segregation and the overall effectiveness of the assignment plan in combating racial isolation, the mayor's staff and members of the city council now begin to wonder whether they might also adopt measures to address persistent racial inequality in other areas. They feel confident that intentional discrimination, while perhaps not obsolete, has been significantly reduced by the enforcement of antidiscrimination laws—local, state, and federal—and the change in

---

3. See DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 76–77 (1993).

4. See Robert S. Chang & Catherine E. Smith, *John Calmore's America*, 86 N.C. L. REV. 739, 748–51 (2008) (discussing racial isolation of Whites in Seattle).

5. See Goodwin Liu, *Seattle and Louisville*, 95 CALIF. L. REV. 277, 287 (2007).

6. See Chang & Smith, *supra* note 4, at 745–47.

7. See *Shelley v. Kraemer*, 334 U.S. 1, 4–5, 22–23 (1948).

8. See Liu, *supra* note 5, at 278 (discussing segregation nationally and in Seattle); see also R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 806–08 (2004).

9. See Liu, *supra* note 5, at 278, 313–16; see also *infra* note 17 and accompanying text.

social norms regarding cross-racial interactions. Nevertheless, they have questions about how their city came to look the way it does where race is concerned, appreciating that, realistically, “every level of government—local, state, and federal—has . . . played an integral and underappreciated role in fostering residential segregation by race.”<sup>10</sup> Even more, they have concerns about the availability of effective tools to determine whether city policies have unwittingly served to exacerbate the cumulative effects of past race discrimination by state actors, as well as private individuals and groups.<sup>11</sup> In their view, real doubts exist about the ability of existing law and programs to respond adequately to the structural dimensions of racial inequality.

As a preliminary step, officials have started to meet with community leaders, as well as outside experts skilled in developing creative strategies to curb racial inequality. A number of approaches intrigue them, including some that might have the added advantage of improving the city’s bottom line.<sup>12</sup> Uncertainty about the range of alternatives they can lawfully pursue, however, has made some nervous about experimenting with new programs. Before they move forward with any new measure, not to mention one that might involve open consideration of race, they want a clear answer to one question: what strategies can a city committed to addressing persistent racial inequity in its jurisdiction adopt?

#### INTRODUCTION: LOCALITIES AND PERSISTENT RACIAL INEQUITY

In the United States Supreme Court’s race cases, there are only two kinds of cities: one bad, the other good. The iconic “bad cities” have local officials who—as Bull Connor and other Southern officials infamously did a generation ago—actively try to achieve racial segregation through measures designed to isolate and disadvantage racial minorities. Very counterintuitively, “good cities,” in the current Court’s view, are not those whose officials—like those in the opening narrative—seek affirmatively to combat the ongoing effects of the discrimination and segregation wrought by past policies. Instead, “good cities” have emerged as ones that completely ignore race and the racially segregative effects of government policies and programs. Pure, untainted motivations get imputed to these cities, whereas those cities that try to take account of race in positive ways have increasingly been met with skepticism.<sup>13</sup> For a majority of the current Supreme Court, city officials who work

---

10. James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 140–41 (2007).

11. See Chang & Smith, *supra* note 4, at 755 (advocating “account of institutional responsibility”).

12. See *infra* note 255 and accompanying text.

13. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 223 (1995) (listing “skepticism” as one of the three propositions the Court embraces in evaluating governmental racial classifications).

expressly to combat racial segregation and inequity are indistinguishable from those who use race to foster it.<sup>14</sup>

The Court's recent decisions in *Parents Involved in Community Schools v. Seattle School District No. 1*<sup>15</sup> and *Ricci v. DeStefano*<sup>16</sup> help illustrate how vast the ranks of the "bad" cities have become under the strict scrutiny analysis embraced by the Rehnquist and Roberts Courts. Both cases involved municipalities concerned with minimizing the negative effects of racial segregation and past discrimination. In *Parents Involved*, school officials in Seattle and Louisville adopted race-conscious school assignment plans designed to foster school-level diversity and stem the resegregation of public educational facilities.<sup>17</sup> The Court invalidated both programs, chastising the municipalities for classifying students on the basis of race in administering their programs and, in the case of a plurality of Justices, for seeking even to address segregation at all.<sup>18</sup> In *Ricci v. DeStefano*, a conservative majority of the Court went farther still. In that case, New Haven, Connecticut officials trying to avoid running afoul of the racial antidiscrimination provisions of Title VII of the Civil Rights Act of 1964, in contrast to their counterparts in Seattle and Louisville, employed no formal racial classifications at all.<sup>19</sup> Instead, these officials merely considered the disparate racial impact that a municipal firefighters examination would have on promotions within the fire department.<sup>20</sup> For the Court, however, the fact that concerns about disparate racial impact led city officials to invalidate the test and the results of the most recent sitting for the examination was more than enough to create a problem under the Equal Protection Clause.<sup>21</sup>

*Parents Involved* and *Ricci* have been widely criticized.<sup>22</sup> The cases reflect, among other things, the extent to which a commitment to

---

14. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 741 (2007) (plurality opinion) (applying strict scrutiny to all uses of race); see also *id.* at 747–48 (regarding arguments for deference to school boards utilizing race-conscious measures as indistinguishable from those made by segregationists defending de jure separation of the races).

15. 551 U.S. 701 (2007).

16. 129 S. Ct. 2658 (2009).

17. 551 U.S. at 806–19 (Breyer, J., dissenting).

18. *Id.* at 747–48 (plurality opinion).

19. *Ricci*, 129 S. Ct. at 2666–67.

20. *Id.* at 2669–71.

21. See Michelle Adams, *Is Integration a Discriminatory Purpose?*, 96 IOWA L. REV. 837, 840 (2011) [hereinafter Adams, *Discriminatory Purpose*]; see also Elise C. Boddie, *The Way Forward: Racial Integration After Ricci: A Response to Michelle Adams*, IOWA L. REV. BULL. (forthcoming 2011) (manuscript at 2–3, 10) [hereinafter Boddie, *The Way Forward*].

22. For articles critiquing *Parents Involved*, see, for example, Michelle Adams, *Stifling the Potential of Grutter v. Bollinger: Parents Involved in Community Schools v. Seattle School District No. 1*, 88 B.U. L. REV. 937, 939–41 (2008); Ruth Colker, *Reflections on Race: The Limits of Formal Equality*, 69 OHIO ST. L.J. 1089, 1090–91 (2008); Goodwin Liu, "History Will Be Heard": An Appraisal of the Seattle/Louisville Decision, 2 HARV. L. & POL'Y REV. 53, 53 (2008); Kimberly Jenkins Robinson,

colorblindness and the application of strict scrutiny limits the Court in its ability to conceive of a constructive role for local governments to play in addressing racial inequality.<sup>23</sup> In recent cases, localities and their officials are either bungling bureaucrats or unabashed racists.<sup>24</sup> With only a few exceptions, there has been no in-between for the majorities that have carried the day.<sup>25</sup> Indeed, the limits of strict scrutiny are such that the Court, until very recently, has been unwilling to grant even minimal legal significance to the disparities—often derisively referred to as “societal discrimination”—typically associated with such inequity.<sup>26</sup> Local strategies attempting to deal with persistent racial disadvantage, likewise, have not been favorably received. “The way to stop discrimination on the basis of race,” Chief Justice John Roberts simplistically declared in his opinion for the plurality in *Parents Involved*, offering cold comfort to the Seattles and Louisvilles of the nation, “is to stop discriminating on the basis of race.”<sup>27</sup>

Outside the judicial context, there exists more freedom at least to imagine a productive role for localities. Accordingly, legal scholars have increasingly begun to consider possibilities for transforming more expansively the role that localities play in providing services and

---

*Resurrecting the Promise of Brown: Understanding and Remediating How the Supreme Court Reconstitutionalized Segregated Schools*, 88 N.C. L. REV. 787, 837–39 (2010). For articles critiquing *Ricci*, see, for example, Adams, *Discriminatory Purpose*, *supra* note 21, at 856–62; Mario L. Barnes et al., *A Post-Race Equal Protection?*, 98 GEO. L.J. 967, 994–95 (2010); Girardeau A. Spann, *Disparate Impact*, 98 GEO. L.J. 1133, 1154–56 (2010).

23. Even with strict scrutiny, the failure to entertain a more productive role for local governments in addressing racial inequality is curious. The virtues of local government have been extolled since this country's early days, when the Framers asserted the view that “the most effective democracy occurs at local levels of government, where people with firsthand knowledge of local problems have more ready access to public officials responsible for dealing with them.” *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 575 n.18 (1984) (Powell, J., dissenting). The Court itself has talked in almost poetic terms about “local, democratic self-government.” *See id.* at 575. In countless decisions, it has affirmed the exercise of power and control by local officials on issues ranging from residential zoning to education and waste removal. *See, e.g., Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 9–10 (1974) (zoning ordinance); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 58–59 (1973) (education); *United Haulers Ass'n Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 347 (2007) (waste management).

24. I utilize the terms “city” or “cities” frequently in this Article. However, I mean also to include local governments more generally. The language of “the city,” in my view, more readily evokes the hard-scrabble realities of racial disparity and the promise of local entities.

25. *E.g., Grutter v. Bollinger*, 539 U.S. 306, 343–44 (2003) (allowing consideration of race in law school admissions to further interest in a “diverse student body”).

26. The term “societal discrimination” has become a regular coda in the Court's race cases. *See, e.g., Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 296 n.36 (1978) (Powell, J., concurring) (describing societal discrimination as “social injury” too speculative to warrant race-based remedy); *see also City of Richmond v. Croson*, 488 U.S. 469, 497 (1989) (O'Connor, J., plurality opinion) (same). Yet, the Court has never clearly defined it. Michael Selmi, *Remediating Societal Discrimination Through the Spending Power*, 80 N.C. L. REV. 1575, 1581 (2002).

27. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (plurality opinion).

confronting pressing social problems.<sup>28</sup> Gerald Frug's influential book, *City Making*, which conceives of cities as vehicles for community building and belonging, stands out as an important example.<sup>29</sup> Frug writes eloquently about the untapped potential of cities and the kinds of intergovernmental alliances or organizations that would be necessary to ensure that they have the power to recreate the "urban landscape" and stem the flow of individuals to the suburbs, a phenomenon that contributes greatly to spatial segregation.<sup>30</sup> This Article takes off from that location, focusing specifically on matters of race. Part of a larger inquiry considering the normative commitments underlying current race scholarship and civil rights advocacy, this Article focuses on a more discrete inquiry into the possibilities for identifying and eliminating the sources of race-based structural discrimination and its effects. It concerns itself, more particularly, with a variation of the question asked in the opening narrative: what strategies should a locality interested in addressing persistent racial inequity in its jurisdiction be permitted to adopt?

In conducting this inquiry, this Article takes existing race jurisprudence at face value, looking for ways to navigate through current doctrine rather than reform it. The willingness—for purposes of this exercise—to accept the status quo ends there, however. First, the Article looks to local communities as a site for potential innovation and change, resisting the view that only courts can provide direction in this area. Further, the Article does not accept the proposition, latent in current doctrine, that cities and other localities attempting to play an affirmative role in combating racial disadvantage are doomed forever to face the following no-win situation: refuse ever to consider race and allow racial inequity and segregation to flourish, or consider race and risk running afoul of current law. Nor does it regard as fixed the boundary lines between the "good" and "bad" cities mapped by current race jurisprudence. Its fundamental premise is that even localities regarded as "bad" by the Court can do good. It thus seeks to provide an innovative yet useful evaluative tool for municipalities looking to deal with the negative externalities of racial inequity in their jurisdictions. In doing so, it hopes not only to expand the universe of cities that could potentially be regarded as "good," but to change the understanding of the criteria relevant to such a designation.

---

28. See, e.g., John A. Powell, *Addressing Regional Dilemmas for Minority Community Regionalism*, in *REFLECTIONS ON REGIONALISM* 218 (Bruce Katz ed., 2000) [hereinafter Powell, *Regional Dilemmas*].

29. GERALD E. FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* (1993).

30. *Id.* at 12; see also *id.* at 10 (discussing need for regional organizations); GERALD E. FRUG & DAVID J. BARRON, *CITY BOUND: HOW STATES STIFLE URBAN INNOVATION* 159–63 (2008) (discussing innovative capacity of cities).



Toward this end, this Article seeks to answer the question posed in the opening narrative by imagining the possibilities for a voluntary tool called the “race audit” that can be utilized by localities interested in grappling with the inequalities that attend the color line. Social scientists concerned with racial disparities have increasingly advocated a focus on the “mechanisms” that foster inequality, rather than the preoccupation with discriminatory motive or intent that characterizes current race cases.<sup>31</sup> Accordingly, this audit would provide municipalities with a device for determining how their systems and procedures, past and present, may have contributed to racial inequity within their borders. It would offer a way—completely independent of courts—to identify and assess the racially segregative effects of particular events, policies, and entities. We can understand the enterprise that those conducting the audit would undertake as one that would ultimately create a counternarrative about race, a retelling of how race operates in the jurisdiction and how some members of the community came to be so disadvantaged.

Audit mechanisms have become commonplace in the race area.<sup>32</sup> What distinguishes the intervention I undertake from these more familiar examples is its focus on structural, rather than intentional, discrimination and its attempt to map the specific impacts of racial disadvantage within a jurisdiction.<sup>33</sup> This means that, under the audit measure I propose, the search for the proverbial wrongdoer that currently characterizes most inquiries about race would be replaced with a focus on local systems and procedures, and the extent to which municipal policies or entanglements with certain private entities have contributed to ongoing racial disparities and spatial segregation.<sup>34</sup> Further, the audit would focus on multiple life domains—for example, education, housing, and employment—rather than just one, as many of the more common audit mechanisms do.<sup>35</sup> Interesting work on opportunity mapping now being conducted by John A. Powell and others seeks to chart what the structural effects of race and discrimination mean for the range of economic and noneconomic opportunities people have in

---

31. See DOUGLAS S. MASSEY, *CATEGORICALLY UNEQUAL: THE AMERICAN STRATIFICATION SYSTEM*, at xv (2007).

32. See *infra* notes 148–49 and accompanying text.

33. See John A. Powell, *Structural Racism: Building upon the Insights of John Calmore*, 86 N.C. L. REV. 791, 796–800 [hereinafter Powell, *Structural Racism*]; see also Michelle Adams, *Radical Integration*, 94 CALIF. L. REV. 261, 278–85 (2006) [hereinafter Adams, *Radical Integration*] (discussing structural effects of segregation).

34. Elise C. Boddie, *Racial Territoriality*, 58 UCLA L. REV. 401, 427–34 (2010) (emphasizing spatial dimensions of segregation) [hereinafter Boddie, *Racial Territoriality*]; see also Adams, *Radical Integration*, *supra* note 33, at 278–79 (same); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1861 (1994) (same).

35. See NAT'L RESEARCH COUNCIL, PANEL ON METHODS FOR ASSESSING DISCRIMINATION, *MEASURING DISCRIMINATION* 247–48 (2004) (discussing importance of looking across domains).

the various areas of their lives.<sup>36</sup> As explained herein, race audits would complement this research and other similar work on structural discrimination by helping to make clear how our opportunity maps came to look the way they do. Likewise, they would also point to potential solutions that would broaden access to opportunity across a wide range of areas.<sup>37</sup>

Part I starts the Article by developing the broad race audit proposal. Part I.A begins by locating race audits in the literature on structuralism. Legal scholars have long advocated a focus on both how the structural dimensions of a workplace or agency can influence outcomes and how outcomes in such domains can be improved by greater attention to physical settings, procedure, and decisionmaking processes.<sup>38</sup> Much of this research has focused on particular agencies, workplaces, or educational facilities rather than local governments. But, as I explain later, it is applicable where the project of determining how a local government's procedures or programs promote racial stratification is concerned. Also extremely relevant is research by business scholars on the corporate social audit and corporate social responsibility ("CSR") generally.<sup>39</sup> In its most limited form, the social audit, which has been little discussed in legal scholarship, concerns itself only with a corporation's productivity levels and profitability. It has also been broadly deployed as a mechanism for measuring a business's social impact on and contributions to the community in which it operates, as well as the social conditions and policies affecting employee groups, such as women or minorities.<sup>40</sup> Obviously, the operations of a corporation are different in kind from those of a municipality. And, given recent events implicating the ethics and responsibility of corporations, real questions about the wisdom of mirroring exactly the social actions of corporate executives exist. But this literature and other work in the area of CSR and social accounting, in my view, nevertheless provide an important foundation for the racial audit mechanism.

Part I.B returns to the earlier narrative and tries to imagine what experts might recommend our fictional city do in trying to obtain an institutional account of its possible role in creating or perpetuating racial inequality.<sup>41</sup> Race scholars have succeeded in making the term "structural

---

36. See *infra* note 81 and accompanying text.

37. See JOHN A. POWELL ET AL., KIRWAN INSTITUTE FOR THE STUDY OF RACE AND ETHNICITY, COMMUNITIES OF OPPORTUNITY: A FRAMEWORK FOR A MORE EQUITABLE AND SUSTAINABLE FUTURE FOR ALL 7-11 (2007) [hereinafter POWELL ET AL., COMMUNITIES OF OPPORTUNITY]. Organizations have also begun to focus their civil rights work on questions of opportunity. See, e.g., THE OPPORTUNITY AGENDA, THE STATE OF OPPORTUNITY IN AMERICA: 2009 REPORT SUMMARY 9-13 (2009).

38. See *infra* notes 78-79 and accompanying text.

39. See *infra* notes 83-97 and accompanying text.

40. See *infra* note 91 and accompanying text.

41. See Chang & Smith, *supra* note 4, at 754-55.

inequality” almost common in legal scholarship.<sup>42</sup> But it is not clear that consensus exists on what that term means. This Part’s objective is thus to begin a conversation about the structural conditions that are relevant in measuring inequality by setting forth in preliminary form an overview for how a race audit might be conducted. In addition to synthesizing key social science insights on the factors that have ensured the durability of racial inequality in the United States,<sup>43</sup> this Part sets out specific aspects of the race audit: (1) a clearly delineated set of criteria and objectives for its implementation; and (2) the establishment of a “community of inquiry,”<sup>44</sup> a group consisting of stakeholders from government, academia, community and nonprofit groups, philanthropy, and business that, as part of the audit, would engage in an evaluative process focusing on the racial impact of systems and procedures within the relevant locality. The goal of the race audit process is to produce a dynamic account of the operation of race in the jurisdiction, a window on the “micro- and macro-aspects of racial signification and racialized social structure.”<sup>45</sup>

Part I.C concludes by situating the race audit in other mechanisms for assessing inequality or, more generally, the negative effects of particular policies or actors. Environmental Impact Statements and traditional housing audits naturally come to mind.<sup>46</sup> But there are other useful analogues. Congress and legislatures in states such as Iowa and Connecticut have recently adopted audit measures to evaluate race-based disparities in areas like public school education,<sup>47</sup> juvenile justice,<sup>48</sup> and sentencing.<sup>49</sup> Further, there is a useful track record of equity audits

42. See, e.g., Christopher A. Bracey, *Thinking Race, Making Nation*, 97 NW. U. L. REV. 911, 937 (2003) (reviewing GLENN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY* (2000)); John O. Calmore, *The Law and Culture-Shift: Race and the Warren Court Legacy*, 59 WASH. & LEE L. REV. 1095, 1116–17 (2002); Sheila Foster, *Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CALIF. L. REV. 775, 778 (1998); Cheryl I. Harris, *Whitewashing Race: Scapegoating Culture*, 94 CALIF. L. REV. 907, 926 (2006); Cassandra Jones Harvard, *Democratizing Credit: Examining the Structural Inequities of Subprime Lending*, 56 SYRACUSE L. REV. 233, 275 (2006); Jennifer S. Hendricks, *Contingent Equal Protection: Reaching for Equality After Ricci and PICS*, 16 MICH. J. GENDER & L. 397, 399 (2010); Olatunde C.A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374, 379 (2007) [hereinafter Johnson, *Disparity Rules*]; Reginald Leaman Robinson, *Poverty, the Underclass, and the Role of Race Consciousness: A New Age Critique of Black Wealth/White Wealth and American Apartheid*, 34 IND. L. REV. 1377, 1411–12 (2001) (book review); Powell, *Structural Racism*, *supra* note 33, at 794–800; Chantal Thomas, *Globalization and the Reproduction of Hierarchy*, 33 U.C. DAVIS L. REV. 1451, 1470 (2000).

43. See CHARLES TILLY, *DURABLE INEQUALITY* 6 (1998).

44. See Craig Mackenzie, *Ethical Auditing and Ethical Knowledge*, 17 J. BUS. ETHICS 1395, 1399 (1998).

45. Howard Winant, *Race and Race Theory*, 26 ANN. REV. SOC. 169, 181 (2000).

46. See *infra* note 146 and accompanying text.

47. James S. Liebman & Charles F. Sabel, *The Federal No Child Left Behind Act and the Post-Desegregation Civil Rights Agenda*, 81 N.C. L. REV. 1703, 1712–13 (2003).

48. Johnson, *Disparity Rules*, *supra* note 42, at 378.

49. See, e.g., CONN. GEN. STAT. § 2-24b (2011) (“[A] racial and ethnic impact statement shall be prepared with respect to certain bills and amendments that could, if passed, increase or decrease the

conducted pursuant to the U.S. Department of Transportation (DOT) regulations and U.S. Department of Housing and Urban Development (HUD) regulations designed to implement the “affirmatively furthering” mandate of the Fair Housing Act (FHA).<sup>50</sup> Together, these mechanisms provide important information about the strengths and limitations of evaluative measures like the one I propose and, thus, offer a useful basis for discussions about how well the race audit proposal might shape up as a tool.

Part II outlines how the voluntary audit mechanism would be implemented in practice by first returning to the opening narrative and exploring how an individual city might conduct the proposed audit. It then considers how two or more local governments in a metropolitan area might work together to conduct an audit. The realities of local borders, resources, and services are such that the audit, to be effective, would need to provide information about structural inequality in the broader regional context, as well as that of the individual city.<sup>51</sup> Indeed, scholars increasingly maintain that “[r]ace and wealth differences” in urban areas cannot fully be understood without an inquiry into the “territorial segregation”<sup>52</sup> and separation wrought by “the proliferation of municipalities in metropolitan areas.”<sup>53</sup> This Part ends by considering the role that states and the federal government might play in race audit implementation. While it is not inconceivable that state or federal entities might attempt to conduct their own version of the proposed audit, this Part suggests that their energies might be better spent supporting the efforts of localities seeking to implement it. In particular, they might offer monetary incentives to induce local implementation of the race audit, and experimentation with measures to address structural racial inequality, in much the same way that the Obama administration offered states “Race to the Top” funds in an effort to spur innovation in educational programs.<sup>54</sup>

---

pretrial or sentenced population of the correctional facilities in this state.”); IOWA CODE ANN. § 2.56(1) (West 2010) (requiring “correctional impact statements” that involve studying matters of race for measures that would alter sentencing, parole, or probation); see also Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 530–33 (2010) (using, inter alia, racial impact statement initiatives). See generally Catherine London, *Racial Impact Statements: A Proactive Approach to Addressing Racial Disparities in Prison Populations*, 29 LAW & INEQ. 211 (2011) (discussing, inter alia, racial impact statement initiatives in Iowa, Connecticut, and other jurisdictions); Marc Mauer, *Racial Impact Statements: Changing Policies to Address Disparities*, 23 CRIMINAL JUST., Winter 2009, at 16 (2009) (discussing Iowa and Connecticut legislation and use of racial impact statements in criminal justice context generally).

50. See *infra* notes 162–63 and accompanying text.

51. See Ford, *supra* note 34, at 1919.

52. Powell, *Regional Dilemmas*, *supra* note 28, at 220–21.

53. *Id.* at 221.

54. U.S. DEP’T OF EDUC., RACE TO THE TOP EXECUTIVE SUMMARY 2 (Nov. 2009).

Part III addresses the question most likely to be raised in response to the proposal described in Parts I and II: can the race audit, as outlined, pass constitutional muster? As I indicated at the outset, cases such as *Parents Involved* and *Ricci* impose significant barriers to serious local engagement with questions of racial disparity and inequality. For reasons outlined in this Part, however, these cases likely would not prohibit the collection of information that the race audit would facilitate. Potential difficulties arise only when remedial efforts suggested—though not at all required—by the audit become a possibility. This Part will explore why this is so, highlighting along the way the great potential that the race audit proposal has for encouraging localities that seek to act upon the information that they obtain through the race audit to develop better approaches both to race-neutral and race-conscious remedies. The race audit carries the advantage of creating a kind of blueprint for targeted measures specifically attuned to the unique systems and structures attending racial inequality.

Part IV anticipates possible critiques of the race audit proposal. In particular, it offers a response to those who, recalling the open resistance of many localities in the wake of *Brown*'s mandate that public schools be desegregated, might assert that encouraging localities to experiment in the area of race is akin to giving a fox the keys to a hen house. Obviously, this country has a long and unfortunate history of local government involvement in racial discrimination and exclusion. The race audit does not overlook this past, but rather seeks to draw upon it in some way, inviting localities interested in understanding the concrete effects of such exclusion to do so through a structured program with built-in accountability mechanisms. Because the race audit proposal emphasizes voluntariness, instead of seeking to mandate participation, there is good reason to believe that it might produce positive results. Relatedly, this Part also addresses the contention that localities have no real incentive to engage in an audit process that could be costly and might expose them to potential liability. In so doing, it emphasizes the contrary example of localities such as Seattle and Louisville—which have undertaken to address inequality through strategies not mandated by law—as well as new research by Robert Weissbourd and others indicating that local efforts to address the kind of inequality that would be uncovered by the race audit can revitalize lagging local economies.<sup>55</sup>

Finally, this Article concludes with a brief discussion of the broad potential of the race audit and the hope for increased innovation in the area of race that a shift away from an exclusive focus on courts to one that encompasses localities might bring. Localities regarded as “bad cities” under existing doctrine can do good not only by helping to root

---

55. See *infra* notes 253–55 and accompanying text.

out the structural causes of racial equality, but also by helping to engage communities in democratic conversations about the substantive content of equality and the meaning of belonging. Civil rights scholarship and advocacy fail to engage notions of local constitutionalism or to recognize the potential of localities to be important “equality innovators.” The race audit proposal, however—pointing in the direction of the larger scholarly project described earlier—urges us to do just that. It hints at the possibilities that greater engagement with localities in the race context might have both for articulating a thicker account of equality than current doctrine provides and for reconciling principles, such as equality and liberty, long thought to be at odds with one another.

### I. RACE AUDITS AND THE MEASUREMENT OF RACIAL INEQUALITY

Cities and other localities are the places where much inequality—hypersegregation, poverty, unemployment, crime, and the like—happens in the United States. Answering the question whether cities might take a broader role in combating racial inequality requires creative thinking about the problems faced by such entities and the range of solutions available to resolve them effectively. So, return for a moment to the opening narrative. Our city officials are just beginning to confront the reality of race in their jurisdiction. Deeply troubled by what they find, they want both to understand and to do something about it. For a host of reasons, they do not want to be passive in the face of inequality.

Tellingly, the conditions these officials face are not unique. Indeed, they are all too common. Nearly two decades ago, Douglas Massey and Nancy Denton reported in *American Apartheid*, their ground-breaking book examining the causes of racial segregation, that “one-third of all African Americans in the United States live under conditions of intense racial segregation.”<sup>56</sup> Today, early data from the 2010 Census reveal that, while rates of segregation have improved for some groups, the problems of hypersegregation negatively affecting Blacks and Latinos, in particular, persist.<sup>57</sup> Segregation has consequences not only for where someone lives, but also for where she goes to school, whether she is rich or poor,<sup>58</sup> whether she has a job or is unemployed,<sup>59</sup> the social opportunities she enjoys,<sup>60</sup> and the level of toxins or violence to which she is exposed.<sup>61</sup> It even has implications, given how racial stigma

---

56. See MASSEY & DENTON, *supra* note 3, at 77.

57. William H. Frey, *Census Data: Blacks and Hispanics Take Different Segregation Paths*, THE BROOKINGS INSTITUTION (Dec. 16, 2010), [http://www.brookings.edu/opinions/2010/1216\\_census\\_frey.aspx?p=1](http://www.brookings.edu/opinions/2010/1216_census_frey.aspx?p=1).

58. See HENRY LOUIS TAYLOR, JR. & SAM COLE, *RACISM AND EFFORTS TO RADICALLY RESTRUCTURE THE INNER-CITY BUILT ENVIRONMENT I* (2001) (noting high rates of poverty in inner-city areas).

59. See *id.* (indicating that many black and Latino areas within segregated cities have “double-digit unemployment rates”).

60. See POWELL ET AL., *COMMUNITIES OF OPPORTUNITY*, *supra* note 37, at 3.

61. LUKE W. COLE & SHEILA R. FOSTER, *FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE*

operates, for how someone and the space she lives in are perceived.<sup>62</sup> Ultimately, segregation and its effects bear on one's ability to participate fully in society.<sup>63</sup>

Recent Supreme Court cases make it clear that the traditional approach to racism, which emphasizes intentionality and causation,<sup>64</sup> has been inadequate to deal with these and other similar segregation effects. It fails entirely to account for the extent to which "[t]he spatial isolation of black Americans [and other minorities] was achieved by a conjunction of racist attitudes, private behaviors, and institutional practices that disenfranchised [B]lacks from urban housing markets and led to the creation of the ghetto."<sup>65</sup> This Part proposes a mechanism to respond to this reality. It takes as inspiration insights that social scientists and legal scholars have gained into the relationship between institutional structures and racial stratification.

Part I.A begins with a discussion of legal scholarship, and CSR and business management scholarship relevant to the "structural turn" taken in this Article.<sup>66</sup> It devotes specific attention to research on the social audit, an evaluative measure designed to assess the impact of corporations on society, first popularized in the 1970s. Part I.B discusses the race audit concept that I propose in some detail, outlining the issues that it would interrogate, as well as how and by whom it could be implemented. Part I.C briefly discusses other audit mechanisms that have been utilized in combating racial inequality, including those deployed in connection with the FHA's "affirmatively furthering" requirement and DOT regulations implementing Title VI. It explains why the race audit would have certain advantages over these alternatives.

#### A. EXPLORING THEORETICAL UNDERPINNINGS

Scholarship on structuralism highlights the limits of existing frames for understanding racism and provides a theoretical foundation for the audit model introduced in Part I.B. In general, structuralism emphasizes the cumulative effect of institutional structures and systems on outcomes for institutions, groups, and individuals.<sup>67</sup> Legal scholars, particularly those embracing the virtues of legal experimentalism, have deployed its

---

RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 54–58 (2001) (discussing, inter alia, exposure to toxins).

62. Lenhardt, *supra* note 8, at 843–44; see also Boddie, *Racial Territoriality*, *supra* note 34, at 405.

63. Lenhardt, *supra* note 8, at 844–47.

64. Powell, *Structural Racism*, *supra* note 33, at 794.

65. MASSEY & DENTON, *supra* note 3, at 83. For more on spatiality and discrimination, see Boddie, *Racial Territoriality*, *supra* note 34, at 437–38, and Ford, *supra* note 35, at 1856–57.

66. See Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 2 (2006).

67. See Michael B. Katz et al., *The New African American Identity*, 92 J. AM. HIST. 75, 75–76 (2005).

basic tenets to understand and offer innovative solutions for problems in areas as diverse as education,<sup>68</sup> employment,<sup>69</sup> juvenile justice,<sup>70</sup> and welfare.<sup>71</sup> Most importantly for our purposes, structuralist insights have been critical to interventions made by Critical Race theorists and, more recently, scholars from other areas interested in questions about race and equality.

Structuralism's key contribution in the race area concerns, as suggested earlier, the sources or causes of inequality.<sup>72</sup> Right away, structuralist insights call into question the often-asserted "naturalness" of racial disparities or the inevitability of racially segregative choices. Further, they make clear why the doctrinal focus on individual wrongdoers or motives falls short. Such an orientation dramatically "understate[s] the cumulative impact of discrimination."<sup>73</sup>

As one scholar explained, the causes of disadvantage, from a structuralist's vantage point, cannot be traced to one source.<sup>74</sup> Rather, they are regarded as "cumulative within and across domains," the "product of reciprocal and mutual interactions within and between institutions."<sup>75</sup> Structuralism, in effect, "shifts our attention from the single, intra-institutional setting to inter-institutional arrangements and interactions."<sup>76</sup> It makes plain, for example, that fully understanding residential behaviors necessarily requires undertaking an inquiry into institutional systems and structures pertaining, inter alia, to housing and zoning determinations never even contemplated in the Court's cases. Importantly for our purposes here, structuralism provides an avenue for beginning to understand how government entities could, intentionally or unintentionally, become involved in perpetuating racial inequality or supporting private discrimination.<sup>77</sup>

Legal scholars such as Susan Sturm, Tristin Greene, and Samuel Bagenstos have productively utilized a structural approach in considering issues of race and equality in the workplace.<sup>78</sup> Sturm's work emphasizing

---

68. Liebman & Sabel, *supra* note 47, at 1737.

69. Bagenstos, *supra* note 66, at 45–47; Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 462–63 (2001) [hereinafter Sturm, *Second Generation*].

70. Johnson, *Disparity Rules*, *supra* note 42 at 425.

71. Kathleen G. Noonan et al., *Legal Accountability in the Service-Based Welfare State: Lessons from Child Welfare Reform*, 34 LAW & SOC. INQUIRY 523, 524–25 (2009).

72. Critical Race theorists like John Calmore can be credited with bringing this understanding into the legal academy. See Powell, *Structural Racism*, *supra* note 33, at 793.

73. *Id.* at 796.

74. *Id.*; see also NAT'L RESEARCH COUNCIL, *supra* note 35, at 246.

75. Powell, *Structural Racism*, *supra* note 33, at 796.

76. *Id.*

77. See *City of Richmond v. Croson*, 488 U.S. 469, 497 (1989) (O'Connor, J., plurality opinion) (acknowledging potential for government's passive participation in "racial exclusion," but not elaborating on the circumstances under which it might be actionable or remedied).

78. See Bagenstos, *supra* note 66, at 2; Tristin K. Greene, *A Structural Approach as*



interactive processes and institutional norm-creation as a way to address “second generation discrimination”—the “social practices and patterns of interaction among groups within the workplace that, over time, exclude nondominant groups”<sup>79</sup>—has been particularly influential. Likewise, scholars such as John Calmore and John A. Powell have greatly advanced thinking about segregation more generally—ways of identifying its causes and impact, as well as resolving it—by employing a structural lens.<sup>80</sup> The opportunity-mapping research Powell has developed, which seeks to “visually track the history and presence of discriminatory and exclusionary policies that spatially segregate people,” seems especially promising and, like the other work just described, lays an important foundation for the proposed audit model.<sup>81</sup> It both outlines the barriers to meaningful opportunities in education, employment, and housing for disadvantaged communities, and seeks to identify strategies to develop systems that can enhance opportunity for communities throughout the areas on which it focuses.<sup>82</sup>

Social accounting and CSR scholarship in the field of business management also provide important support for the model.<sup>83</sup> In the first part of the twentieth century, scholars developed an evaluation instrument called the social audit.<sup>84</sup> Conceived as a device “for measuring the social performance of business,”<sup>85</sup> the social audit gained popularity during the activism of the 1970s.<sup>86</sup> Over the years, the audit, which functions, at least in theory, as a way to hold companies “responsible for their societal and environmental impact,”<sup>87</sup> has taken various forms.<sup>88</sup> In

---

*Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849, 850 (2007); Sturm, *Second Generation*, *supra* note 69, at 464. Cynthia Estlund’s scholarship on work diversity and the importance of the workplace as a site for interracial interactions also implicates structural issues. *See, e.g.*, Cynthia L. Estlund, *The Workplace in a Racially Diverse Society: Preliminary Thoughts on the Role of Labor and Employment Law*, 1 U. PA. J. LAB. & EMP. L. 49, 62 (1998).

79. Sturm, *Second Generation*, *supra* note 69, at 460.

80. *See, e.g.*, John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067, 1091 (1998); Powell, *Structural Racism*, *supra* note 33, at 796.

81. POWELL ET AL., COMMUNITIES OF OPPORTUNITY, *supra* note 37, at 2.

82. *Id.*

83. *See* RAYMOND A. BAUER & DAN H. FENN, JR., *THE CORPORATE SOCIAL AUDIT* 15 (1972).

84. Some debate exists as to whether it was first introduced in the 1930s, 1940s, or 1950s. *See* Archie B. Carroll & George W. Beiler, *Landmarks in the Evolution of the Social Audit*, 18 ACAD. MGMT. J. 589, 590–94 (1975) (describing Howard Bowen’s 1953 model as receiving credit for being the first, but citing Stanford business professor Theodore Kreps for bringing the social audit into usage); Adrian Henriques, *Civil Society and Social Auditing*, 10 BUS. ETHICS: EUR. REV. 40, 41 (suggesting the social audit was first conceived in the 1930s in the U.K.).

85. Carroll & Beiler, *supra* note 84, at 591.

86. *Id.* at 594; Homer H. Johnson, *Corporate Social Audits—This Time Around*, BUS. HORIZONS, May/June 2001, at 29 [hereinafter Johnson, *Corporate Social Audits*].

87. Johnson, *Corporate Social Audits*, *supra* note 86, at 29.

88. *See* Carroll & Beiler, *supra* note 84, at 595 (dividing social audit mechanisms into three groups: the “social indicators approach,” the “constituent impact approach,” and the “corporate rating approach”).

its most limited iteration, it has been a management-initiated device focused on factors closely related to the corporation's bottom line. For example, Howard Bowen's 1953 social audit proposal listed the following eight areas for evaluating a company's performance: (1) prices; (2) wages; (3) research and development; (4) advertising; (5) public relations; (6) human relations; (7) community relations; and (8) employment stabilization.<sup>89</sup> More expansive versions of the audit consider other factors. A self-audit conducted by a company might retain criteria such as public relations, but also seek to assess a company's fulfillment of its values and mission, impact on the environment, or contributions to social change.<sup>90</sup> Audits conducted by outside nonprofit or watchdog groups might also consider the company's environmental impact, but might then also look at its performance along vectors such as charitable giving; quality of life for women, minorities, and gays and lesbians; community outreach; or workplace safety.<sup>91</sup>

Corporate interest in social audits and accounting has waxed and waned.<sup>92</sup> After a surge of interest in the 1960s and 1970s, social audit use declined in the 1980s, only to increase again in the mid- and late-1990s.<sup>93</sup> The current CSR movement, which promotes "the efforts corporations make above and beyond regulation to balance the needs of stakeholders [for socially responsive policies] with the need to make a profit," is an extension of this work.<sup>94</sup> It encompasses the policies of socially enterprising companies like Ben and Jerry's or The Body Shop.<sup>95</sup> Such policies are perceived in the CSR movement as vehicles for enhancing social engagement, as well as corporate profits.<sup>96</sup>

---

89. *Id.* at 594.

90. *See, e.g.*, Johnson, *Corporate Social Audits*, *supra* note 86, at 32.

91. *Id.* at 31–32. Social audits conducted by accountants for the purpose of certifying compliance with industry standards typically consider different, but not unrelated, standards. *See id.* at 33 (listing child labor, freedom of association and tolerance for collective behavior, health and safety, and discipline, among other things).

92. *Id.* at 29.

93. *Id.* Some suggest that the decline related to government regulation of areas such as environmental impact, as well as the norm of corporate voluntariness that attended the social audit's creation. *Id.* Notably, even corporations that do not conduct a full social audit today frequently discuss audit factors, such as community investment or contributions, in their year-end reports. *Id.*

94. Deborah Doane, *The Myth of CSR: The Problem with Assuming That Companies Can Do Well While Also Doing Good Is the Markets Don't Really Work that Way*, STAN. SOC. INNOVATION REV., Fall 2005, at 23, 23.

95. *Id.*

96. *See* Janet E. Kerr, *The Creative Capitalism Spectrum: Evaluating Corporate Social Responsibility Through a Legal Lens*, 81 TEMP. L. REV. 831, 834 (2008). *But see* Doane, *supra* note 94, at 27 (questioning, inter alia, viability of current CSR model); *The Good Company: The Movement for Corporate Social Responsibility Has Won the Battle of Ideas*, ECONOMIST, Jan. 22, 2005, at 4 (critiquing CSR). Notably, the United Nations recently made efforts to define transnational corporate responsibility in the area of human rights. On June 16, 2011, the U.N. Human Rights Council formally adopted guiding principles, drafted by John Ruggie, the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business

Despite the variations in their use, social audit mechanisms plainly involve factors that could be adapted to the municipal context and the structural inquiry in which I seek to engage. Similarly, research in social accounting, though obviously also focused on corporations rather than local governments, offers insight into ways to expand upon the theory underlying audits. Some of that scholarship has endeavored to devise a “systematic information system” with criteria that specify more clearly the relevant micro- and macrolevel firm relationships to be evaluated.<sup>97</sup> Other work conceives of social accounting as a process with the capacity to do more than provide information about the ethics of a company. This scholarship, drawing on John Dewey’s work and Aristotelian philosophy, highlights the possibility social auditing has for building ethical knowledge and for launching public conversations about the conditions necessary for “the good life.”<sup>98</sup> This literature is especially intriguing. To the extent it understands auditing processes as vehicles for democratic engagement and touts the virtues of experimentation, it speaks directly to my project.<sup>99</sup> As explained later, I see the race audit as a way not only to evaluate inequality, but also to promote innovation and conversation about the substantive content of equality in the twenty-first century.

#### B. FORMULATING A PROPOSAL FOR ASSESSING STRUCTURAL INEQUALITY

Imagine that officials from our narrative have become convinced of the benefits of a structural approach to thinking about segregation in their city, but do not yet know how they would even begin to start the work of determining how municipal policies might have contributed to racial inequality. In some of the conversations with community members and experts in the field, the possibility of conducting a race audit, a voluntary evaluative process that considers the effects of systems and structures on race over time, came up. This Part begins a discussion about the norms and criteria that might be utilized in conducting a race audit and how such a device would be implemented. I offer what follows as a way of getting at questions about law, democratic participation, and substantive equality that are implicated by structural racism.

---

Enterprises, that seek, inter alia, to articulate the obligations and social responsibilities of businesses under existing human rights law. See JOHN RUGGIE, U.N. HUMAN RIGHTS COUNCIL, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: IMPLEMENTING THE UNITED NATIONS “PROTECT, RESPECT, AND REMEDY” FRAMEWORK (2011).

97. See, e.g., Kavasseri V. Ramanathan, *Toward a Theory of Corporate Social Accounting*, 51 ACCOUNTING REVIEW 516, 518–19 (1976).

98. See Mackenzie, *supra* note 44, at 1395–96.

99. See *id.* at 1397–99.

### I. *Developing a Program of Assessment*

Experts agree that, without attention to the effects and dynamics of structural racism, the problems of our inner cities will never be resolved.<sup>100</sup> Unfortunately, though, most social science research still emphasizes the measurement of “discrimination from one point in time and in one domain,” something plainly “insufficient to identify the overall impact of discrimination on individuals.”<sup>101</sup> To date, there have been relatively few successful efforts to model the cumulative disadvantage that structural racism generates or to capture the extent to which “[d]iscrimination not only accumulates over time and across domains within a single lifetime, but is instrumental in perpetuating racial inequality across generations.”<sup>102</sup> The research initiatives that do address structural racism, however, offer a strong foundation for the audit mechanism proposed here.

Professor Ira Katznelson’s influential research provides a useful roadmap for determining the exact ways in which governmental policies and programs might work to create and perpetuate inequality. Katznelson’s celebrated 2005 book, *When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America*, builds on other research to provide an historical account of the New Deal and its role in simultaneously building wealth for white Americans while economically disadvantaging African Americans.<sup>103</sup> In tackling this subject, Katznelson takes aim at storied initiatives widely credited with reversing the declining fortunes of millions of struggling Americans. But his account is persuasive, built on painstaking historical research and detail. It makes plain the myriad ways in which government initiatives during this era were structured to deliver benefits to Whites to the exclusion of racial minorities. For example, Katznelson’s discussion of the National Labor Relations Act and Fair Labor Standards Act passed as part of the New Deal illuminates, in a way other similar accounts do not, the extent to which the seemingly facially neutral labor initiatives of this era actually worked to inscribe existing racial norms and divisions

---

100. See, e.g., JOHN GOERING, *FRAGILE RIGHTS WITHIN CITIES: GOVERNMENT, HOUSING, AND FAIRNESS* (2007) (discussing the effect of structural racism on public affairs); MASSEY & DENTON, *supra* note 3 (sociology); POWELL, *Structural Racism*, *supra* note 33 (law); Taylor & Cole, *supra* note 58, at 4–5 (urban planning).

101. Douglas S. Massey & Rebecca M. Blank, *Assessing Racial Discrimination: Methods and Measures*, in JOHN GOERING, *FRAGILE RIGHTS WITHIN CITIES: GOVERNMENT, HOUSING, AND FAIRNESS* 77 (2007); see also Blank, *supra* note 35, at 63 (emphasizing need to focus on organizational processes in studying race).

102. Massey & Blank, *supra* note 101, at 76. On the intergenerational effects of racial inequality, see THOMAS M. SHAPIRO, *THE HIDDEN COSTS OF BEING AFRICAN AMERICAN: HOW WEALTH PERPETUATES INEQUALITY* (2004). See also EMMA COLEMAN JORDAN & ANGELA P. HARRIS, *ECONOMIC JUSTICE: RACE, GENDER, AND EQUALITY IN ECONOMICS* (2005).

103. IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA* 35–52 (2005).

into federal policy.<sup>104</sup> The exclusion of farm workers and domestics—occupations in which southern Blacks, in particular, were overrepresented at the time—from the protections extended by these statutes ensured that African American workers had neither the economic power nor union support necessary to migrate out of their subordinated social and economic position in the national economy.<sup>105</sup> Likewise, the fact that federal agencies affirmatively refused to interrupt the racial hierarchy in effect in the South in the wake of World War II meant that many returning African American soldiers could not, as a practical matter, take advantage of the educational and housing benefits afforded by the G.I. Bill, benefits that generated substantial wealth for Whites.<sup>106</sup> This exclusion arguably has wealth effects for Blacks even today.<sup>107</sup>

Work by Professor Charles Tilly similarly offers insights useful in determining not just how to think about the cumulative segregative effects of particular government policies, but, more expansively, how to understand and conceptualize the overall structural inequality that the race audit process would uncover.<sup>108</sup> For Tilly, the durability of inequality—its perpetuation across time and generations—has little, if anything, to do with individuals or their motives.<sup>109</sup> Instead, he attributes it to social categories such as race or gender and the social and economic stratification they help to effectuate.<sup>110</sup> Once society—through law, social practices, or perhaps force—assigns individuals or groups to categories that, like race, may carry stigmatic or dehumanizing meanings,<sup>111</sup> inequality is produced through amazingly durable systems and procedures that institutionalize “the allocat[ion] [of] resources [and opportunities] unequally across these categories.”<sup>112</sup> High levels of resource “exploitation” by empowered groups, and “opportunity hoarding”—the storing of resources by “non-elites” in ways that perpetuate the stigmatized groups’ exclusion and demonization<sup>113</sup>—

---

104. *Id.* at 53–61.

105. *Id.* at 112–29. Notably, Katznelson’s work raises questions about current economic initiatives and their potential to increase, rather than diminish, racial inequality. For an engaging discussion of these issues, see Olatunde C.A. Johnson, *Stimulus and Civil Rights*, 111 COLUM. L. REV. 154 (2010) [hereinafter Johnson, *Stimulus and Civil Rights*].

106. KATZNELSON, *supra* note 103, at 128.

107. See SHAPIRO, *supra* note 102.

108. TILLY, *supra* note 43.

109. *Id.* at 35 (lamenting the limitations of the focus on individuals in research concerning inequality). As Richard Ford and others have noted, even “race-neutral policy could be expected to entrench segregation and socio-economic stratification in a society with a history of racism.” Ford, *supra* note 34, at 1852.

110. TILLY, *supra* note 43, at 84–103.

111. See Lenhardt, *supra* note 8, at 814–23 (discussing, inter alia, racial stigma and the dehumanizing meanings associated with blackness in American society).

112. MASSEY, *supra* note 31, at 5–6.

113. Here, Tilly gives the example of mixed-race families in the Jim Crow South who were able to escape the disadvantages of segregation by passing for white, thereby benefitting from the privileges

ensure that the inequality persists.<sup>114</sup> And, according to Tilly, this dynamic is further reinforced through the “emulation” of models,<sup>115</sup> and regular “adaptation” of the mechanisms, that maintain social divisions and the core values of the unequal systemic arrangements.<sup>116</sup> Ultimately, “structures” take on a “logic and momentum of their own that reproduces and naturalizes the means that they help to shape.”<sup>117</sup>

The institutionalized inequality just described receives daily reinforcement from social interactions that occur between individuals every day.<sup>118</sup> Indeed, the categories on which the systemic stratification relies are ones which, at some level, originated in the cognitive processes of the members of empowered groups.<sup>119</sup> Imagine, for example, white slaveholders justifying the enslavement of black Africans on grounds of their racial difference and presumed inequality. Then, over time, these categories formed cognitive boundaries or schemas that affected how members of stigmatized or devalued categories and the spaces they inhabit were perceived by others.<sup>120</sup> As Massey explained in work that builds upon Tilly’s insights, individuals deploy schema that predetermine, often at an emotional level, how they will respond to or judge particular people or things.<sup>121</sup> These responses become so automatic and ingrained that they operate without full awareness on the part of the individual who has them and may influence, for example, how a job candidate is evaluated or whether a neighborhood in which individuals of a disfavored category predominate gets assessed as dangerous.<sup>122</sup> Importantly, cognitive processes such as these can be interrupted.<sup>123</sup> But,

---

that attend that classification, and escaping the burdens associated with being classified as black. TILLY, *supra* note 43, at 92–93.

114. *Id.*

115. *Id.* at 95–97.

116. *Id.* at 97–98.

117. powell, *Structural Racism*, *supra* note 33, at 812.

118. See Lenhardt, *supra* note 8, at 830–36 (discussing, inter alia, racial stigma and social processes reinforcing negative meanings ascribed to minorities); see also Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination in Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) (discussing categorical responses in employment); Lincoln Quillan & Deval Pager, *Black Neighborhoods, Higher Crime? The Role of Racial Stereotypes in Evaluations of Neighborhood Crime*, 107 AM. J. SOC. 717 (2001) (discussing race and neighborhood preferences). The implicit bias test has become a popular device for making this point. For more on implicit bias, see generally Christine Jolls & Cass Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969 (2006); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CALIF. L. REV. 1063 (2003).

119. MASSEY, *supra* note 31, at 8.

120. *Id.* at 9; see also Lenhardt, *supra* note 8, at 831–32 (discussing, inter alia, operation of cognitive schema).

121. MASSEY, *supra* note 31, at 10.

122. See Lenhardt, *supra* note 8, at 825–30 (discussing automatic nature of responses to racially stigmatized groups).

123. See *id.* at 878–79.

when left unchecked, they serve as powerful fortification of categorical or structural inequality.<sup>124</sup>

With the help of models such as Tilly's, and the research of Katznelson and scholars such as Massey and Denton—whose work on segregation continues to set the standard for research on urban centers—the basic contours of the program of assessment under the race audit begin to take shape. Typically, investigations of the sort proposed would be trained on evidence documenting discriminatory motive on the part of government officials or private actors. While such discrimination would not be irrelevant under the proposed audit, it would not be the focus of the audit process. Instead, the excavation of racialized categories and the processes utilized both to institutionalize and exploit them in ways that advantaged in-group members would be of primary importance. In trying to understand such processes, the audit would pay close attention to the ways in which the stratification achieved was adapted over time and emulated by organizations and officials within the system, as well as individuals residing in the jurisdiction. Such a focus would thus permit greater attention to the unseen, but nevertheless operationalized, background rules and systems that support segregation across multiple life domains. The audit might detect their presence in historically significant categorization mechanisms, such as slavery or Jim Crow laws, but would also be free to interrogate the role they play, for example, in spatial configurations within the jurisdictions or even private residential choices.

Once the general sources of categorical stratification have been unearthed within the particular locality, the race audit would require efforts to trace with some level of specificity their exploitative effects. Here is where histories such as the one compiled by Katznelson come in. Recall that he explained not only how and why black farmworkers and domestics came to be excluded from the protections of the Fair Labor Standards Act or why black veterans could not take full advantage of the G.I. Bill, but also what such exclusion meant socially and economically for workers and veterans at that time, as well as the consequences it has had for subsequent generations of Africans.<sup>125</sup> Ultimately, this is the type of the information that the race audit would also produce. It would explore in great detail the effects of, say, exclusionary zoning ordinances, racial violence, or residential practices and policies that have helped to generate racial inequality and stigma within the city or locality.

---

124. See MASSEY, *supra* note 31, at 14.

125. See *supra* notes 103–07 and accompanying text.

## 2. *Setting Criteria and Objectives for the Race Audit*

For the race audit to be effective, the norms or criteria that will guide the race audit process must be given careful thought. As with social audits in the corporate context, the ultimate objective of the race audit is not just to identify racialized categories or systems, but to determine how well the local government has performed its obligations. We can understand this in terms limited to matters of economics or, more broadly, to reach matters such as equality and fairness.<sup>126</sup>

In considering social auditing in the 1970s, one business management scholar invoked the “social contract”<sup>127</sup> and argued that clear macro- and microlevel corporate performance measures were necessary not simply to ensure proper evaluation of corporate functioning, but “to arrive at an operational definition of the role of a corporation in its broader social context.”<sup>128</sup> We can conceive of the race audit in the same way. That device could function as a vehicle for reconceptualizing, independent of any constraints imposed by existing race jurisprudence, the role of localities in addressing cumulative racial disadvantage. Accordingly, the macrolevel criteria we identify should give some indication of what we think local governments should be doing in the area of race.<sup>129</sup>

An initial set of macrolevel criteria might institute an inquiry along the following lines:

- Have the local government’s past and present decisions, systems, and structures categorized and exploited individuals or groups on the basis of race?
- Have the jurisdiction’s past and present decisions, systems, and structures allowed all groups to flourish equally without respect to race?
- To what extent have the local government’s spatial arrangements and policies impeded the ability of racial minorities fully to realize opportunities in areas such as education, employment, housing, and health?
- What are the intergenerational wealth, social capital, and participation effects of the local government’s past and present structures and systems?
- To what extent has local decisionmaking created or reinforced negative meanings about race and difference in the jurisdiction that stigmatize racial minorities as inferior and deny them full acceptance and belonging in the community?

---

126. See Ramanathan, *supra* note 97, at 518.

127. *Id.* at 519.

128. *Id.*

129. *Id.* at 518–19, 525.



Microlevel criteria would, in turn, encompass issues necessary to determine how specific agencies have performed along these vectors and how they would participate in the audit.<sup>130</sup> The audit would ask whether agency procedures, policies, or decisionmaking:

- Worked, intentionally or unintentionally, to exclude racial minorities economically, socially, spatially, or politically.
- Allowed racial minorities to participate equally in matters affecting their well-being or opportunities in life domains such as education, employment, housing, health, and wealth creation.
- Created or perpetuated negative meanings about race, or disproportionately affected minorities in their ability to move freely within the jurisdiction or participate in community affairs at a social or political level.
- Facilitated initiatives by other non-municipal government agencies or private entities that disproportionately affected or otherwise disadvantaged racial minorities within the jurisdiction.
- Should be changed to ensure successful implementation of the race audit and community-wide distribution of its results.

Finally, the overall objectives for the race audit would reinforce ideas or assumptions embedded in the criteria just identified.<sup>131</sup> For example, a set of objectives might look as follows:

- Clarify the obligations of the local government with respect to the fair and equitable treatment of racial minorities and others across various life domains and spatial contexts.
- Engage local stakeholders and constituents in evaluative processes and discussions necessary to understand the operation and effects of structural racism and disadvantage within the jurisdiction.
- Provide a formal account of the structural dimensions of racial inequality and disadvantage within the local government over time that can be distributed to local stakeholders and constituents in multiple forms.
- Identify changes in the local government's structures and procedures that could counteract the effects of structural racism and enhance the human flourishing of minorities and other community members.

The precise objectives and criteria utilized during the race audit will no doubt vary by jurisdiction. Quite simply, though, any terms set should, as the above factors suggest, reflect the dimensions of cumulative racial disadvantage—for example, spatiality, intergenerationality, temporality, and multidimensionality—thought critical to understanding structural racism.<sup>132</sup>

---

130. See *id.* (discussing similar microlevel criteria in the social accounting context).

131. *Id.* at 519–21.

132. See Massey & Blank, *supra* note 101; powell, *Structural Racism*, *supra* note 33.

### 3. *Building a “Community of Inquiry”*<sup>133</sup>

So far, I have addressed basic outlines of the race audit process and the criteria and objectives that should guide it. But who should actually conduct the audit? As Part I.A notes, in the corporate context it is not uncommon to see corporations conduct their own social audits.<sup>134</sup> My sense, however, is that such an approach would not be advisable for local governments considering voluntary race audits. Apart from the complexity inherent in attempting to measure the cumulative disadvantage and the obvious potential for bias,<sup>135</sup> putting the responsibility for evaluating structural racism in the hands of local governments alone would eliminate one of the key advantages of the race audit: the potential to develop a “community of inquiry.”<sup>136</sup>

In an ideal world, a locality would commission a race audit and invite community leaders and a wide range of stakeholders to take part in its development and implementation. Academics—economists, historians, law professors, philosophers, and sociologists—would be essential participants in the audit process, given the problems inherent in developing measures for cumulative disadvantage and the need for understanding issues of equity over time.<sup>137</sup> But civil rights organizations and other nongovernmental organizations, philanthropic entities, private-sector entities, religious organizations, and the officials and employees of local agencies could also be productively included.<sup>138</sup> At some level, the audit committee would function like the civil equivalent of a citizens’ grand jury.<sup>139</sup>

In the first instance, the stakeholders on the audit committee would, through a process of experimentation and negotiation, work to establish a set of audit criteria and objectives not unlike the one proposed earlier that responds to the unique social context of the jurisdiction.<sup>140</sup> Actual implementation of the audit, would, however, focus on the collection of historical documents, surveys, maps, demographic information, interviews, empirical data, and administrative regulations, among other things.<sup>141</sup>

---

133. See Mackenzie, *supra* note 44, at 1399.

134. See *supra* notes 83–91 and accompanying text.

135. On this issue in the social accountability context, see William S. Laufer, *Accountability and Greenwashing*, 43 J. BUS. ETHICS 253, 255–58 (Mar. 2003).

136. Mackenzie, *supra* note 44, at 1399; see also Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 HARV. J.L. & GENDER 247, 294 (2006) [hereinafter Sturm, *Architecture*] (discussing the importance of “productive collaborations” in thinking about workplace diversity in higher education).

137. See, e.g., Ramanathan, *supra* note 97, at 526.

138. See *id.*

139. See Kevin K. Washburn, *Restoring the Grand Jury*, 76 FORDHAM L. REV. 2333, 2378 (2008). I am grateful to Professor Pam Karlan for encouraging me to explore this analogy.

140. See Mackenzie, *supra* note 44, at 1399–400; Ramanathan, *supra* note 97, at 518–20; Sturm, *Architecture*, *supra* note 136, at 291.

141. See Mackenzie, *supra* note 44, at 1397.

But, consistent with the vision articulated by business management scholars concerned with the social audit, my strong sense is that an inquiry of this sort could ultimately be about much more than the gathering of discrete pieces of evidence. In the end, I envision the race audit serving as a vehicle for increased knowledge about the locality and the operation of race within its borders.<sup>142</sup> Audit committee members would effectively be tasked with developing a theory of race in the area and the particular causes of inequality in the jurisdiction.<sup>143</sup>

Reasonable questions about the audit committee's independence and accountability would no doubt emerge over the course of the auditing process. A number of these concerns would, I think, be addressed by the wide range of stakeholders that would comprise the audit committee, something that would minimize opportunities for participant capture. Similarly, public hearings on matters pertaining to race and the distribution of any report relevant to the investigation to the locality's various constituents, could also be an important guarantee of accountability.<sup>144</sup> The stakeholder groups just named, as well as other municipalities, and state, regional, and national entities,<sup>145</sup> would obviously be key participants in conversations about any issues that emerge.

### C. LOCATING THE PROPOSAL IN OTHER AUDIT MECHANISMS

The utilization of audit mechanisms to uncover racially exclusionary practices has become common.<sup>146</sup> Indeed, the difficulties inherent in detecting the covert social and institutional arrangements that permit "exploitation and opportunity hoarding to occur along categorical lines" have made auditing devices of some kind a virtual necessity.<sup>147</sup> Housing audits—which gather data about the incidence of residential discrimination through a "paired testing methodology where black and white auditors" approach real estate agents and record any differences in treatment or access to rental opportunities—likely constitute the best known of devices in this area.<sup>148</sup> But they are far from the only ones.<sup>149</sup>

---

142. See Sturm, *Second Generation*, *supra* note 98, at 491.

143. Mackenzie, *supra* note 44, at 1397–98.

144. See Ramanathan, *supra* note 97, at 520–21.

145. See *id.* at 526.

146. Massey & Blank, *supra* note 101, at 68–70. The use of such devices has not been limited to the race context, however. Environmental Impact Statements mandated under section 102 of the National Environmental Policy Act of 1969 are perhaps the best known and most widely used of mechanisms of this sort. See JACOB I. BREGMAN, ENVIRONMENTAL IMPACT STATEMENTS 8–9 (2d ED. 1999). Such statements require federal officials, *inter alia*, to consider and detail the potential adverse effects of proposed federal initiatives "significantly affecting the quality of the human environment." *Id.* at 8 (quoting section 102 of the National Environmental Policy Act).

147. MASSEY, *supra* note 31, at 242.

148. Massey & Blank, *supra* note 101, at 69. Some research has also been completed in the area of home ownership. See Margery Austin Turner & Stephen L. Ross, *How Racial Discrimination Affects*

The proposed race audit fits into a wave of innovative regulatory devices focused on the mechanisms through which structural inequality endures in the United States. At the state and local level, government entities have begun to experiment with a range of measures.<sup>150</sup> A number of jurisdictions have begun to require the completion of impact statements designed, among other things, to identify racial disparities in a particular domain. States such as Connecticut and Iowa, for example, recently adopted legislation requiring impact statements to detail disparities in criminal sentencing.<sup>151</sup> Similarly, some localities have also adopted other devices to measure the possible effects of government action. In 1989, New York City, as part of its charter process, adopted fair share provisions for the siting of public facilities that address matters of race to the extent that they endeavor to ensure that neighborhoods are not overburdened by “undesirable facilities.”<sup>152</sup> Other places, as suggested earlier, have begun to adopt “opportunity impact statements” that try to take account of the impacts of state and federal programs on opportunities for communities of color.<sup>153</sup>

At the federal level, several regulatory examples exist. The often criticized No Child Left Behind Act<sup>154</sup> (“NCLB”) stands out as an important one.<sup>155</sup> That Act requires, inter alia, the collection of school

---

*the Search for Housing, in THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA* 86 (Xavier de Souza Briggs ed., 2005).

149. Audit studies focused on race have also addressed issues as varied as employment, consumer sales, credit access, and taxi rides. See, e.g., MASSEY, *supra* note 31, at 109–10. The so-called “Croson” or “disparity studies,” which state and local governments began to undertake in order to generate statistical evidence sufficient to support contracting-based affirmative action programs in the wake of the Court’s decision in *City of Richmond v. Croson*, 488 U.S. 469 (1989), provide yet another example, although they might not be regarded as classic audit mechanisms. For a discussion of audit studies in consumer sales, see IAN AYRES, *PERVASIVE PREJUDICE? UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION* 17–44 (2001) (discussing discrimination in car sales).

150. Interestingly, international examples exist as well. For example, development efforts targeting social exclusion of individuals and groups from social, economic, and political participation sound in structuralist terms. See JO BEALL & LAURE-HÉLÈNE PIRON, *DEPARTMENT FOR INTERNATIONAL DEVELOPMENT SOCIAL EXCLUSION REVIEW* 11–14 (2005).

151. See *supra* note 49 and accompanying text.

152. See William Valetta, *Siting Public Facilities on a Fair Share Basis in New York City*, 25 *URB. LAW. I*, 2 (1993). Notably, in the 1990s, San Francisco adopted an auditing program to ensure compliance with the United Nations Convention on the Elimination of All Forms of Discrimination Against Women. See generally Stacy Laira Lozner, *Diffusion of Local Regulatory Innovations: The San Francisco CEDAW Ordinance and the New York City Human Rights Initiative*, 104 *COLUM. L. REV.* 768 (2004); Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 *U. PA. L. REV.* 245 (2001). Obviously, that measure concerned gender, not race, but many of its essential features correlate well with those of the proposed race audit.

153. See Johnson, *Stimulus and Civil Rights*, *supra* note 105, at 201–02 (discussing opportunity impact statements).

154. Pub. L. No. 107-110, 115 Stat. 1425 (2002).

155. The Act draws criticism for its reliance on test scores and use of federal mandates. Johnson, *Disparity Rules*, *supra* note 42, at 417.

achievement data by race and ethnicity as a way of monitoring performance for students of color.<sup>156</sup> It also requires public schools to develop strategies for reducing any disparities revealed by application of the statute.<sup>157</sup> Congress's attempt to encourage the elimination of racial disparities in juvenile justice provides another useful model. In 1992, Congress passed legislation amending the Juvenile Justice and Delinquency Prevention Act<sup>158</sup> to require state recipients of federal juvenile justice funds to "implement strategies to reduce disparities in the confinement rates of minority juveniles where those disparities are found to exist."<sup>159</sup> The relevant disproportionate minority contact standard, like provisions in the NCLB, addresses the information problem that usually attends the causes of persistent racial inequalities by mandating that states collect and make available to others any evidence of race-based disparity in the area of juvenile justice.<sup>160</sup> Finally, the stimulus act recently passed by Congress includes similar auditing provisions and requirements.<sup>161</sup>

Significantly, though, the best federal analogues for the race audit and what it seeks to accomplish are initiatives now being implemented by HUD and DOT. The HUD program reflects a departmental effort to comply with the FHA Section 3608 requirement that the Secretary of HUD "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies" of that statute.<sup>162</sup> The FHA does not give content to the "affirmatively furthering" mandate,<sup>163</sup> but it has been interpreted broadly to include not only combating intentional discrimination in housing, but also advancing integrative efforts capable of increasing opportunities and minimizing segregation in minority communities.<sup>164</sup> Accordingly, HUD "regulations

---

156. *See id.*; James S. Liebman & Charles F. Sabel, *The Federal No Child Left Behind Act and the Post-Desegregation Civil Rights Agenda*, 81 N.C. L. REV. 1703, 1722–23 (2003).

157. Johnson, *Disparity Rules*, *supra* note 42, at 417; Liebman & Sabel, *supra* note 156, at 1723; *see also* Kimberly West-Faulcon, *The River Runs Dry: When Title VI Trumps State Anti-Affirmative Action Laws*, 157 U. PA. L. REV. 1075 (2009) (addressing remedy under NCLB).

158. Pub. L. No. 102-586, 106 Stat. 4982 (1992) (codified as amended at 42 U.S.C. §§ 5601(a), 5602 (2006)).

159. Johnson, *Disparity Rules*, *supra* note 42, at 378.

160. *Id.* at 379.

161. *See* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115; Johnson, *Stimulus and Civil Rights*, *supra* note 105, at 178–81 (discussing the Act's Race to the Top Program and requirement that schools receiving such stimulus funds detail the steps they are taking to improve the achievement of disadvantaged group).

162. 42 U.S.C. § 3608(e)(5) (2006). This FHA requirement has been described as "the best statutory embodiment of an affirmative federal duty to consider racial impacts and promote equity outcomes in federal spending." *See* Johnson, *Stimulus and Civil Rights*, *supra* note 105, at 196.

163. U.S. DEP'T OF HOUS. & URBAN DEV., OFFICE OF FAIR HOUS. AND EQUAL OPPORTUNITY, FAIR HOUSING PLANNING GUIDE, VOL. I 1–2 (1996) [hereinafter FAIR HOUSING PLANNING GUIDE].

164. *See* Michelle Ghaznavi Collins, Note, *Opening Doors to Fair Housing: Enforcing the Affirmatively Further Provision of the Fair Housing Act Through 42 U.S.C. § 1983*, 110 COLUM. L. REV.

and associated subregulatory guidance try to operationalize the objective of using federal resources to end segregation and create open housing by devolving affirmative responsibilities to HUD grantees.”<sup>165</sup> State and local grantees of consolidated civil rights programs must carry out a fair housing plan that includes the completion of an analysis of impediments (“AI”) to fair housing choice that outlines barriers to fair housing in both the public and private sectors through a “comprehensive review of . . . [applicable] laws, regulations, and administrative policies, procedures, and practices” and their impact on “the accessibility of housing,” an “assessment of conditions . . . affecting fair housing choice,” and an “assessment of the availability of affordable, accessible housing.”<sup>166</sup> Creating and structuring the AI involves engaging in a process of considering data items such as public policies and procedures, zoning policies, and demographic information, and of establishing responsibilities, metrics, and objectives for the analysis that are very similar to what is contemplated by the race audit proposal.<sup>167</sup> It involves a range of jurisdictional stakeholders in an effort to understand the public and private systems that deny fair housing opportunities.

The DOT program similarly engages funding recipients in a process of inquiry into the possible sources of inequity that approximates aspects of the race audit. Applicable regulations endeavor to set the conditions for assuring compliance with the nondiscrimination mandate of Title VI of the Civil Rights Act of 1964 and a DOT order on environmental justice, as well as with the objective of providing transit services and access to minority communities.<sup>168</sup> In addition to requiring entities that receive Federal Transit Authority monies to provide assurance of Title VI compliance,<sup>169</sup> the regulations contemplate a detailed inquiry into “significant system-wide service and fare changes and proposed improvements . . . to determine whether those changes have a

---

2135, 2143 (2010) (discussing interpretation of requirement to “affirmatively further fair housing” in *Otero v. New York City Housing Authority*, 484 F.2d 1122 (2d Cir. 1973)). HUD itself has read it to require grantees to “identify impediments to fair housing choice,” “[t]ake appropriate steps to overcome . . . impediments identified through the analysis,” and “maintain records” on relevant issues. FAIR HOUSING PLANNING GUIDE, *supra* note 163, at 1–2.

165. Henry Korman, *Underwriting for Fair Housing? Achieving Civil Rights Goals in Affordable Housing Programs*, 14 J. AFFORDABLE HOUS. 292, 298 (2005). Notably, the “affirmatively further” requirement reflects “legislative recognition of the role federal government spending played in structuring segregation through federal grant programs, and the perceived inadequacies of Title VI.” Johnson, *Stimulus and Civil Rights*, *supra* note 105, at 193.

166. FAIR HOUSING PLANNING GUIDE, *supra* note 163, at 2–7; *see also* Korman, *supra* note 165, at 299.

167. *See* FAIR HOUSING PLANNING GUIDE, *supra* note 163, at 2–10.

168. DOT Order 5610.2, 62 Fed. Reg. 18,377, 18,378 (Apr. 15, 1997) sets out departmental procedures necessary for compliance with a Clinton-era Executive Order entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, Exec. Order No. 12,898, 3 C.F.R. 859 (1995), reprinted as amended in 42 U.S.C. § 4321 (2006).

169. U.S. DEPT. OF TRANSP., FED. TRANSIT ADMIN., TITLE VI AND TITLE VI-DEPENDENT GUIDELINES FOR FEDERAL TRANSIT ADMINISTRATION RECIPIENTS (2007).

discriminatory impact.”<sup>170</sup> In aid of this and other similar goals, the regulations encourage funding recipients to involve minority communities in outreach efforts and generally to encourage public participation in “the identification of social, economic, and environmental impacts of proposed transportation decisions.”<sup>171</sup> They also mandate the collection of demographic data, maps and charts, rider-relevant information, customer surveys, and other information bearing on equity within the transportation system.<sup>172</sup> State or local failure to comply with such equity-enhancing conditions can result in the cessation of funding. A plan to expand mass transit railways in Oakland, California was recently interrupted when federal officials determined that there had been inadequate attention to the potential racial effects of the planned expansion.<sup>173</sup>

Like HUD’s AI and DOT’s equity inquiry, the race audit seeks to uncover not just evidence of intentional discrimination, but also information about the systems and procedures that produce inequality. The race audit differs from these regulatory devices, however, in that it seeks to interrogate the sources of inequity in a broad range of domains and to provide a much richer, narrative account of the operation of race in the jurisdiction than one customarily receives through statistical reporting or even the fairly detailed reporting required under the programs just discussed.<sup>174</sup> That said, the HUD and DOT examples provide useful insight into the viability of the race audit as a tool for localities. While certainly not without some problems, these programs document that many governmental entities have the capacity and experience necessary to implement complex inquiries into the sources of systemic racial inequality.<sup>175</sup>

## II. IMPLEMENTING THE RACE AUDIT PROPOSAL

Once convened, how would the constellation of community, government, academic, public, and private organizations, and individuals participating in the race audit move beyond formulating criteria and objectives to applying them? This Part addresses that question. It focuses first on the city context before moving to consider how the race audit

---

170. *Id.* at V-5.

171. *Id.* at IV-4.

172. *Id.* at V-1, V-3, V-8 to V-9.

173. See Johnson, *Stimulus and Civil Rights*, *supra* note 105, at 193 n.188. In 2010, the Federal Transit Administration denied millions of dollars in stimulus funds to the Bay Area Regional Transit authority in the face of an administrative Title VI action initiated by local community groups alleging that the agency had not conducted required reviews on an extension project’s environmental impact and service to minority communities. *Id.* at 193.

174. In this sense, the audit proposal internalizes the insight that the full impact of structural inequality cannot be discerned through a focus on a single area. Massey & Blank, *supra* note 101, at 77.

175. See *infra* Part IV.B.

might work in the wider regional context. Finally, it explores what, if any, role states and the federal government should play in race audit implementation.

#### A. THE CITY CONTEXT

In many ways, the city context presents the “easy” case for race audit implementation. Officials in our narrative show obvious concern about the evidence of segregation in their community. But the task before them and the audit team they assemble, while complex, is relatively discrete. They must determine the sources of racial stratification within municipal borders.

Efforts to understand fully the categories that have helped to produce inequality within our city focus, for sake of illustration, on two realities. A history of racial violence within the municipal limits is the first of these. The research of historians and civil rights experts on the audit committee uncovers detailed evidence of racial violence against Native Americans, Blacks, and Asians, particularly individuals of Chinese descent, whom, on one occasion in the late 1800s, a violent white mob forcibly ejected from the jurisdiction by the hundreds.<sup>176</sup> In addition, painstaking archival research finds, among other things, neighborhood deed records detailing racially restrictive covenants used to ensure minority exclusion from white areas. A typical provision provided:

No person of Asiatic, African or Negro blood, lineage, or extraction shall be permitted to occupy a portion of said property, or any building thereon except a domestic servant or servants who may actually and in good faith be employed by white occupants of such premises.<sup>177</sup>

Although long since deemed unconstitutional, such language can still be found in home deeds for some city communities.<sup>178</sup>

Such evidence provides useful information about disfavored racial categories, as well as exploitative mechanisms—some intentional—deployed in their formation. But, without more, it sheds little light on the segregation identified. Audit committees must know more about any stratification achieved by the racial violence and covenants uncovered and whether that stratification was adapted to other areas. Let us say, then, that further investigation of demographic information reveals a second reality that, *inter alia*, the neighborhood exclusion and the violence worked together to limit Asian Americans to the city’s International district, the only area not previously covered by racially

---

176. Chang & Smith, *supra* note 4, at 748.

177. Seattle Civil Rights and Labor History Project, *Racial Restrictive Covenants*, U. WASH., <http://depts.washington.edu/civilr/covenants.htm> (last visited July 4, 2011).

178. *See id.*; *see also* Shelley v. Kraemer, 334 U.S. 1, 10–11 (1948). Restrictive covenants in private housing deeds became extremely popular after the Supreme Court held, in *Buchanan v. Warley*, that racially restrictive zoning ordinances violated the Constitution. 245 U.S. 60, 82 (1917).



restrictive covenants.<sup>179</sup> Even today, minorities are less likely to live in the still predominantly white northern district.<sup>180</sup> African Americans, who migrated to the city in large numbers in the 1940s and '50s, tend, for example, to be clustered in the center city, where, today, poverty rates are high and housing values low.<sup>181</sup> Latinos, who were not in the city in large numbers until recently, also experience segregation in the area, though arguably less than some other groups.<sup>182</sup>

To know, in real terms, the scope of structural inequality, the audit team must determine whether similar racial and economic stratification exists in other domains and, if so, by what means it was achieved. The extent to which city systems and procedures seem to have taken on a life and logic of their own, reproducing stratification widely, will confirm the significance of the inequality that exists. Audit committee members thus investigate and, eventually, identify further racial stratification in areas such as education, employment, policing, transportation, and environmental justice. Full implementation of the race audit requires attention to each of these areas, so that specific information about the microlevel procedures by which categorical inequality was achieved can be collected. For our purposes here, however, we consider just one of the affected areas: environmental justice.

Consistent with national studies, our hypothetical race audit confirms that “race was the most significant variable in determining the location of commercial hazardous waste facilities” within the city.<sup>183</sup> Minorities disproportionately bear the burden of having toxic waste sites in their neighborhoods and, as a result, are more likely than others to be located near other nuisances, such as highways, and to experience negative health effects or see decreases in home values.<sup>184</sup> To understand why this is so, the audit team trains its attention on various municipal agencies and offices. In their book, *Environmental Justice from the Ground Up*, Luke Cole and Sheila Foster note that the siting process for toxic waste sites heavily depends on “structured inequalities created in part by racially discriminatory processes” and policies, such as the restrictive covenants discussed in the previous Part.<sup>185</sup> On this account, a race audit team might study facially race-neutral zoning decisions and

---

179. Chang & Smith, *supra* note 4, at 748.

180. *Id.* at 749; *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 807 (2007) (Breyer, J., dissenting).

181. Chang & Smith, *supra* note 4, at 750.

182. *Id.* at 751.

183. COLE & FOSTER, *supra* note 61, at 55 (citing the United Church of Christ's Commission for Racial Justice groundbreaking report on toxic waste and race in the United States); *see also* Rachel D. Gotsil, *Environmental Justice and the Integration Ideal*, 49 N.Y.L. SCH. L. REV. 1109, 1119 (2004) (discussing national studies on environmental racism).

184. COLE & FOSTER, *supra* note 61, at 73.

185. *Id.* at 70.

determine that they contributed to the disproportionate placement of landfills uncovered by the initial stage of our race audit. Scholars have found that early zoning boards regularly classified white communities as “residential,” but zoned minority communities for “industrial” use, “permit[ting] the intrusion of disruptive, incompatible uses” that “generally undermin[e] the character, quality, and stability of the black residential areas.”<sup>186</sup> Likewise, the very criteria employed by agency officials responsible for matters pertaining to facility siting might be deemed to have contributed to existing structural inequalities. Purportedly race-neutral considerations like “cheap land values, appropriate zoning, low population densities, proximity to transportation routes, and the absence of proximity to institutions such as hospitals and schools” all point to historically segregated minority communities.<sup>187</sup>

Adverse effects such as these quickly begin to expand exponentially, revealing the extent to which the effects of stratification and cumulative disadvantage are not just additive, but “multiplicative.”<sup>188</sup> As a result, race audit procedures would emphasize the need to look at private entities, as well as public, and to look across governmental agencies, as well as within them. The link between private actions and government decisionmaking in areas like zoning is manifest in the housing context.<sup>189</sup> But it registers elsewhere as well. It turns out, for example, that administrative determinations often provide underlying support for industry choices to place toxic waste facilities in minority communities. Factors—such as “low-cost land, sparse populations, and desirable geological attributes”—important in zoning and siting decisions at the agency level also prove to be determinative in private industry decisionmaking.<sup>190</sup> Indeed, they have sometimes justified the explicit targeting of minority communities by toxic waste companies.<sup>191</sup> Further, because of economic interests in attracting businesses to their jurisdiction, agency officials and city leaders may provide tacit endorsement of such targeting by encouraging the approval of proposed facilities.<sup>192</sup>

Entanglements such as these also arise where other agencies or governmental units are concerned. Collusion between municipal leaders in permitting decisions or the underenforcement of state and federal environmental protection laws in minority communities would thus be

---

186. *Id.* at 73 (describing the work of Yale Rabin on residential zoning).

187. *Id.* at 72.

188. Massey & Blank, *supra* note 101, at 76.

189. *See infra* Part I.C.

190. COLE & FOSTER, *supra* note 61, at 71.

191. *Id.* at 71–72.

192. *See id.* at 43 (describing negotiations concerning waste facilities in Chester, Pennsylvania, and the resulting court case).

topics of interest.<sup>193</sup> Audit team members focusing on environmental justice issues would explore these connections, revealing that the “disparate burden of environmental hazards upon people of color is . . . [not exclusively] market” related.<sup>194</sup> Further, they would investigate what impact the spatial segregation and environmental disparities have had on how minorities and the racially isolated areas of the city they inhabit are regarded, and on the ability of minority groups to exercise social capital on par with Whites.<sup>195</sup> Data on these and other issues could be collected through surveys and individual interviews conducted by audit team members. For the reasons mentioned earlier, getting a handle on such questions would be of critical importance, even though, on the surface, they do not immediately implicate the deep, structural embeddedness of the government systems that the race audit highlights. As previously indicated, the cognitive bias of in-group members serves to reinforce systems-level racial stratification.<sup>196</sup>

## B. THE REGIONAL CONTEXT

The constant sorting or movement of goods, services, and people that characterizes American metropolitan areas requires an even more intricate analysis than that just described.<sup>197</sup> By considering the relationship between localities and their inhabitants, we see even more persuasively that segregation is both “embedded in and perpetuated by the social and political construction of racially identified space.”<sup>198</sup> It “ha[s] had profound consequences for the distribution of social goods” within and across boundaries.<sup>199</sup>

A different hypothetical helps make the point. Contemplate a metropolitan area in the Midwest. For decades now, the racial composition of public schools in the center city and the ninety or more suburban counties that surround it has been an issue. Protracted litigation over the schools, which were once segregated according to a provision in the state

---

193. *Id.* at 71.

194. Godsil, *supra* note 183, at 1110.

195. For more on segregation and its effects on social capital, see Xavier de Souza Briggs, *Social Capital and Segregation in the United States*, in *DESEGREGATING THE CITY: GHETTOS, ENCLAVES, & INEQUALITY* 79 (David P. Varady ed., 2005).

196. See *supra* notes 117–24 and accompanying text.

197. See Aaron J. Saiger, *Local Government Without Tiebout*, 41 *URB. LAW.* 93 (2009). Charles Tiebout offered a much-debated theory to make sense of this activity. Emphasizing the efficiency benefits of sorting, he argued “that . . . residents permitted to sort themselves among various localities . . . offering different bundles of local public goods and associated taxation, will select the package that they prefer most.” *Id.* at 94.

198. Ford, *supra* note 34, at 1849.

199. COLE & FOSTER, *supra* note 61, at 66. The *Parents Involved* case helps to make this point. In administering the challenged school-assignment plan, Louisville was joined by Jefferson County, whose school enrollment was greatly influenced by conditions in Louisville proper. *Cf.* *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 715–16 (2007) (plurality opinion).

constitution,<sup>200</sup> resulted in the adoption of a desegregation plan mandating city-to-county student transfers, the creation of magnet schools, and specific expenditures to improve the educational offerings in inner city schools.<sup>201</sup> Some progress was made, but evidence of resegregation and concerns about the continued recalcitrance of some counties have gotten city leadership and that of some of the surrounding counties thinking. Given that the history of area public schools has been so well rehearsed in court cases and in scholarship, they wonder whether there is an alternative way to begin to understand the stubbornness of segregation. Ultimately, they have decided to marshal forces by jointly conducting a race audit.

Like their counterparts in the single-city context, the race audit team begins by familiarizing itself with the racial history of the region itself. Exploitation effectuated through category-reinforcing racial covenants and violence comprise part of the story here as well.<sup>202</sup> But review of census data and other documents make clear that—unlike in the single-city context, where the effects of segregation could be understood largely by looking at districts within the city—better insight into the relationship between the city and surrounding suburban areas is required. The core city lost twenty percent of its population in the 1970s and 1990s, but the remaining parts of the metropolitan area saw a fifteen percent increase. Similarly, the percentage of African Americans residing in the city during this time increased from thirty-five percent to forty percent. The white population decreased substantially during the same period, suggesting that African Americans were probably taking up residence in neighborhoods previously inhabited by white individuals. Whites, in turn, seemed to be moving into suburban areas surrounding the city where no minorities reside.<sup>203</sup> Some Blacks have moved as well, but not very far into the county; they relocated to heavily minority and impoverished municipalities just across the border from the most segregated districts within the city, suggesting a spillover effect.<sup>204</sup>

Information indicating that poverty rates within the city skyrocketed during the same period, and that increases in rates of black incarceration, general unemployment, rates of rental assistance, and the number of low-income housing units and waste facilities also occurred, convinces audit

---

200. See *Liddell v. Missouri*, 731 F.2d 1294, 1297–98 (8th Cir. 1984).

201. See *id.* at 1299.

202. See *Shelley v. Kraemer*, 334 U.S. 1, 10–11 (1948) (invalidating racial covenant utilized to maintain racial segregation in St. Louis neighborhood); see also COLIN GORDON, *MAPPING DECLINE: ST. LOUIS AND THE FATE OF THE AMERICAN CITY 10* (2008) (discussing *Shelley* and use of racial covenants in St. Louis).

203. See Dennis R. Judd, *The Role of Governmental Policies in Promoting Residential Segregation in the St. Louis Metropolitan Area*, 66 J. NEGRO EDUC. 214, 217 (1997) (describing population changes in St. Louis city and county).

204. See *id.*

team members that such issues could be related to school segregation. Fully equipped audit teams would pursue each avenue of study, recognizing immediately the connection between spatial segregation and such stratification. For illustrative purposes, however, imagine that they decide to focus on residential issues first, predicting that housing would shed the most light on the school situation.

The belief that spatial segregation in the city and county relate solely to neutral market forces is widespread.<sup>205</sup> Audit information gathered by the team, however, reveals that the seeming naturalness of racial stratification in housing markets can be attributed, in large part, to private actors and the action or inaction of three levels of government: federal, state, and local.<sup>206</sup> State government failure to require that each jurisdiction take its “fair share” of low-income housing units, and federal government decisions not to promote rigorously programs such as Section 8, or to locate all public housing developments within the city’s inner core, historically have contributed significantly to the residential segregation in the region. Local entities, however, have administered the most consequential housing policies for our purposes.<sup>207</sup>

As noted earlier, the city government previously supported, or declined to combat, public and private exclusion rules that led to segregation within its municipal districts. By the 1980s and 1990s, though, it was working less to prohibit black residency than to accommodate it, as the numbers of African American inner city residents had swelled considerably.<sup>208</sup> Demand for affordable housing has soared.<sup>209</sup> The quality of housing stock has so declined that many neighborhoods have begun to destabilize, registering high rates of crime and decay, among other things.<sup>210</sup>

The story of most local county governments during this same period could not have been more different. The team obtains information suggesting that, instead of trying to provide affordable housing alternatives to Blacks, these local officials blocked desegregation efforts at every turn.<sup>211</sup> Whites departed for suburban governments that worked hard to exploit the weaknesses of the city and to adapt exclusionary techniques to ensure that the improved services and goods they afford their residents would not be shared with poor Blacks.<sup>212</sup> In effect, these

---

205. See Godsil, *supra* note 183, at 1110 (describing market-based arguments regarding the racial distribution of pollution and waste in the environmental justice context).

206. See Judd, *supra* note 203, at 226–37; see also GORDON, *supra* note 202, at 221.

207. See Judd, *supra* note 203, at 234.

208. See *id.* at 217.

209. See *id.* at 234.

210. See *id.*

211. See GORDON, *supra* note 202, at 129–52.

212. *Id.* at 23.

suburbs “erected a wall of [racial] separation.”<sup>213</sup> To paint a complete picture, audit team members would have to gather as much information as possible on the municipalities surrounding the inner city. On the basis of what they have already gathered, though, it seems clear that exclusionary efforts took a number of forms, each of which has worked to reinforce the spatial divide between city and county, and to ensure the resegregation of school buildings whose attendance zones relied, at least in part, on residential boundaries.

Suburbanites, for example, have been extremely vocal in their opposition to affordable housing initiatives over the years, making clear that their communities would not be hospitable to poor individuals and families looking to escape the inner city.<sup>214</sup> Even more, localities utilized their “zoning and other powers to systematically exclude public and subsidized housing and obstruct fair housing practices and policies designed to reduce residential segregation.”<sup>215</sup> A number of localities have issued rules prohibiting multifamily housing or imposing a requirement that all single-family lot sizes be at least two acres.<sup>216</sup> These policies plainly supported, if not encouraged, the discriminatory actions and choices of private realtors, banks, and individual home owners in ways that have deepened the racial stratification and inequality in the metropolitan area. The combined effect of public policies, white prejudice, and residential segregation has both excluded Blacks from all but the poorest of the municipalities in the county and, at the same time, ensured that they would remain within the borders of the city.<sup>217</sup> Even at this stage, information unearthed through the race audit process makes clear that African Americans and other minorities essentially have been locked indefinitely into poverty and segregation in the metropolitan area.<sup>218</sup>

### C. A ROLE FOR STATES AND THE FEDERAL GOVERNMENT?

Each of the preceding audit stories imagines direct local engagement with issues of structural racial inequality. In this way, even as it emphasizes potential opportunities for regional cooperation, the audit proposal draws heavily on two particular strains of localism. On the one hand, it reflects a pluralistic notion of localities as sites of experimentalism and innovation, “the laboratories of democracy.”<sup>219</sup> On

---

213. *Id.* at 10.

214. See Judd, *supra* note 203, at 216.

215. *Id.*

216. See *id.* at 235.

217. See David R. James, *The Racial Ghetto as a Race-Making Situation: The Effects of Residential Segregation on Racial Inequalities and Racial Identity*, 19 *LAW & SOC. INQUIRY*, 407, 409 (1994).

218. For a discussion of the concept of locked-in segregation, see Daira Roithmayr, *Locked in Segregation*, 12 *VA. J. SOC. POL'Y & L.* 197 (2004).

219. Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State*

the other hand, it taps into civic, republican-inspired notions about localities as a vehicle for “enhancing democratic engagement and civic participation” and “fostering community.”<sup>220</sup> It places cities and other localities at the center of efforts both to understand and potentially to interrupt systems of durable racial inequality. An immediate question, however, is whether states and the federal government might also have a role to play where the race audit is concerned.

At some level, of course, states and the federal government are, by definition, already very much bound up in the operation of local governments like the one in our opening narrative. Cities and other local entities do not exist as fully autonomous governmental units. Instead, under existing law, they derive much of their power and structure from state governments.<sup>221</sup> Indeed, they “exist as creatures of the state,” with questions of local structure, power, and immunity ultimately subject to plenary control.<sup>222</sup> Likewise, the federal government, while generally not the source of broad local powers, also shapes local functioning through spending, direct efforts to reinforce local capacity to support federal goals, and a system of devolution of responsibility that seeks to achieve federal goals by involving localities in carrying out governmental programs or functions. The AI process that localities conduct as part of HUD’s effort to implement the “affirmatively further fair housing” provision under the FHA falls into this latter category of activity. It constitutes one of many examples of cooperative localism.<sup>223</sup>

Given this background of intergovernmental connectedness, the real issue is not whether states and the federal government might play a role in this context, but whether they should assume a significant or primary role in race audit implementation. I answer that question in the negative. Apart from encouraging local innovation in the area of race, the ultimate objective of the race audit is to encourage the people who reside in local communities to become engaged in and take responsibility for addressing structural racism within their borders. In this respect, it reflects a commitment to local problem solving that, interestingly, has animated HUD’s FHA consolidated plan regulations:

[T]he people most knowledgeable about fair housing problems facing their communities are the people who live in those communities. In the past, the Department has too often tried to prescribe national remedies for local situations. And too often, this has not worked because the communities were not involved in the decisionmaking process, and what started out as instruments of principle became rules of process

---

*Sovereignty*, 93 VA. L. REV. 959, 1006–07 (2007).

220. *Id.* at 1007–08.

221. *Id.* at 981; FRUG, *supra* note 29.

222. Davidson, *supra* note 219, at 980; see also Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1062 (1980) (discussing lack of municipal control and power).

223. See, e.g., Davidson, *supra* note 219, at 1031 n.323.

that were to be minimized or even ignored. The result has been a failure by many communities to embrace their legal and moral obligation to ensure that persons are not denied housing opportunity in that community because of their race, ethnic origin, religion, disability, or the fact that they are a family with children. The goal of devolution of responsibility in the area of fair housing means that communities will have the authority and the responsibility to decide the nature and extent of impediments to fair housing and decide what they believe can and should be done to address those impediments.<sup>224</sup>

Importantly, the position that we should encourage local experimentalism around issues of race by advocating use of a particular tool or set of tools still allows space for state and federal support of and involvement in resulting processes.<sup>225</sup> Many cities and other local entities may lack the power to engage in some of the activities contemplated by the race audit. Accordingly, states can support local inquiries by ensuring that municipal governments have sufficient authority to implement the proposal advanced here. Similarly, states and federal agencies alike may determine that they can best support the race audit process by providing technical or financial support for one or more aspects of the work to be completed by the committee of inquiry. Federal or state agencies impressed by the potential of the race audit could, for example, offer competitive local grants to incentivize innovation and audit implementation. The Obama administration's Race to the Top Program provides a useful example of how such incentive programs might work. Described as a "competitive grant program," the Race to the Top Program made \$4.35 billion in stimulus funds available to states with a demonstrated "systemic" approach to education as a way of "creating the conditions for education innovation and reform" along a number of vectors.<sup>226</sup> The federal government, as well as states, could easily adopt a similar approach to encourage race audit implementation and efforts to better understand and address the effects of structural inequity.

Finally, states and the federal government might support the auditing process and the equity goals it serves by ensuring that limited immunity is extended to implementing localities for a carefully circumscribed set of eventualities. As the next Part details, the need for such liability would likely be quite limited. Nevertheless, some precedent for an approach such as this exists in the international context and could serve as a model for the domestic context as well. South African and

---

224. FAIR HOUSING PLANNING GUIDE, *supra* note 163, at i.

225. The race audit proposed here is not the only such tool that can be utilized. Opportunity mapping, which I discussed earlier, provides another example. *See supra* Part III.A.

226. U.S. DEP'T OF EDUC., *supra* note 54, at 2. The program generated interest from many states, but criticism from some in the education and civil rights communities. *See, e.g.*, Diane Ravitch, *Obama's Race to the Top Will Not Improve Education*, HUFFINGTON POST (Aug. 1, 2010), [http://www.huffingtonpost.com/diane-ravitch/obamas-race-to-the-top-wi\\_b\\_666598.html](http://www.huffingtonpost.com/diane-ravitch/obamas-race-to-the-top-wi_b_666598.html).



Rwandan Truth and Reconciliation Commissions stand as important examples.<sup>227</sup>

### III. NAVIGATING THE CURRENT DOCTRINAL LANDSCAPE

This Article has endeavored both to map out in some detail how the race audit might be deployed by cities and other localities and what the likely reception to the audit process might be from various governmental bodies and stakeholders with interests in the implementation process. At the outset, I indicated that—although important critiques of existing race jurisprudence have properly been made—I would, for the purposes of this Article, look to explore options for local innovation within the limits current doctrine imposes, rather than seeking to reform those boundaries in any way. This Part thus evaluates how well the race audit proposal advanced navigates the prevailing doctrinal landscape. In other words, it explores whether the race audit device could, as asserted, reasonably be expected to pass constitutional muster.

Under the Court's cases, the distribution of benefits or burdens on the basis of racial classification, for any reason, necessitates the application of strict scrutiny.<sup>228</sup> “[R]acial classifications are [regarded as] simply too pernicious” to justify an alternative conclusion.<sup>229</sup> The threshold question for our purposes, then, becomes whether the race audit can be said to utilize race in a way that offends current norms.

As previously described, the race audit functions primarily as a diagnostic or information gathering tool. It does not attempt to apportion rights or burdens in any way. Nor, for that matter, does it utilize racial classifications per se. Certainly, the audit seeks to take account of how race operates on the ground, facilitating data gathering and analysis relevant to structural racial inequality. In this sense, it is not unlike the Census, which actively collects information about race, or any number of data-gathering and audit mechanisms deployed by government entities not only at the local level, but also the state and federal levels.

This attentiveness to race seems unlikely to raise a problem under current doctrine. Indeed, to suggest otherwise would cast doubt on a web of presumptively permissible initiatives and administrative processes, including the FHA and DOT regulation-related equity audits discussed earlier. As Part I.C notes, auditing mechanisms of one sort or another have become an integral part of the landscape in this area.<sup>230</sup>

---

227. See, e.g., Olivia Lin, *Demythologizing Restorative Justice: South Africa's Truth and Reconciliation Commission and Rwanda's Gacaca Courts in Context*, 12 ILSA J. INT'L & COMP. L. 41 (2005) (discussing truth commissions).

228. See Helen Norton, *The Supreme Court's Post-Racial Turn Towards a Zero-Sum Understanding of Equality*, 52 WM. & MARY L. REV. 197, 240–41 (2010).

229. Fullilove v. Klutznick, 448 U.S. 448, 537 (1980) (Stevens J., dissenting).

230. MASSEY, *supra* note 31, at 68–70.

Notably, some justices and even some commentators have read existing cases to forbid the pursuit of even race-aware ends, such as the race audit's objective of understanding the operation of race and inequality in a particular jurisdiction.<sup>231</sup> Chief Justice Roberts, who likened integration-supporting public school officials in Seattle and Louisville to those who had mandated segregated public schools in *Brown*, took such a position in his plurality opinion in *Parents Involved*, asserting that eliminating racial isolation was an improper governmental interest.<sup>232</sup> But the Court itself has not yet extended its analysis so far.<sup>233</sup> Instead, most Justices appear disinclined to take such a dramatic step. After *Parents Involved*, there is a clear majority for the proposition that "seek[ing] to reach *Brown*'s objective of equal educational opportunity" constitutes a legitimate governmental purpose.<sup>234</sup>

For that matter, a majority arguably also exists for the notion that there are some uses or considerations of race that can safely occur without even invoking strict scrutiny.<sup>235</sup> In his much-discussed *Parents Involved* concurrence, Justice Kennedy concluded that school districts could make a range of policy decisions, including "strategic site selection of new schools; drawing attendance zones with . . . recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty; . . . and tracking enrollments, performance, and other statistics by race," without subjecting themselves to rigorous constitutional scrutiny.<sup>236</sup> For Justice Kennedy, such initiatives carry no risk of racial injury because, although they require some acknowledgement or cognizance of race, they do not require officials explicitly to classify or regard individuals on the basis of racial background. He explained that, in his estimation, such initiatives were different in kind from programs that expressly required the application of racial classification programs and, under current doctrine, arguably would be subject to the most exacting scrutiny.<sup>237</sup>

Thus, to the extent that implementation of the race audit simply entails gathering information about the problems of racial isolation and segregation whose resolution Justice Kennedy and the *Parents Involved* dissenters found compelling, it would seem even more constitutionally acceptable and perhaps even less likely to trigger strict scrutiny than the programs Justice Kennedy condones. Innovating governmental officials,

---

231. See Adams, *Discriminatory Purpose*, *supra* note 21, at 851. *But see* Boddie, *The Way Forward*, *supra* note 21 (manuscript at 2–3, 10).

232. *Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 732–33 (2007) (plurality opinion).

233. Boddie, *The Way Forward*, *supra* note 21 (manuscript at 2–3, 10).

234. *Parents Involved*, 551 U.S. at 732–33 (plurality opinion).

235. *Id.*

236. *Id.* at 787–88 (Kennedy, J., concurring).

237. *Id.* at 789–96.

in my view, could freely utilize it as an evaluative device without running afoul of the Court's precedent. The real question is not whether they could conduct the audit, but whether they could constitutionally act on information collected pursuant to the process it envisions. Race audits would likely point to a range of interventions that could interrupt the processes leading to racial stratification. Information about the mechanisms that produce exclusion can, as some scholars note, shed important light on the tools necessary to achieve meaningful inclusion.<sup>238</sup>

For reasons already discussed, any race-conscious remedies suggested by the audit proposal would be subject to strict scrutiny and, if recent cases are any indication, possible invalidation.<sup>239</sup> But race-neutral strategies arguably would not be. The close look at the macro- and micro-operations of race in a given jurisdiction that the audit would effectuate suggests that it would point to numerous race-neutral remedies that could be utilized to interrupt the structural processes that foster inequality. The targeted nature of the audit means that, rather than experimenting blindly with such alternatives, as the Court's cases—which require an exploration of race-neutral strategies before resort to using race—seem to encourage,<sup>240</sup> local governments can come up with specific fixes to address identified problems. For example, audit-generated information about the extent to which a city's reliance on landfill or waste facility siting factors such as the low cost of property or low population density has contributed to cumulative disadvantage might lead officials to resolve to utilize different factors. They could, among other things, try to determine the factors necessary to promote growth in areas of hypersegregation or consider whether a community has its "fair share" of such facilities. With the race audit, race-conscious measures need not be the first step in attempting to remedy structural inequality. Localities can experiment in calculated ways with other kinds of inequality-reducing measures.

Nevertheless, some localities might very well conclude that race-conscious remedies are necessary to address longstanding inequality within their borders. The benefit of the race audit is that the information it generates could be instrumental in helping localities develop more thoughtful race-conscious strategies to address racial inequality. For some judges, the knowledge that a strategy was devised in accord with information from a detailed, community-sponsored investigatory process might ease misgivings about whether it satisfies narrow tailoring requirements under the strict scrutiny doctrine. The race audit introduces a heightened level of precision to the development of race-conscious

---

238. Lani Guinier & Susan Sturm, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CALIF. L. REV. 953, 958 (1996).

239. See *supra* Part I.A.

240. See R.A. Lenhardt, *Localities as Equality Innovators*, 7 STAN. J. C.R. & C.L. 1, 12–13 (2011).

strategies that will only benefit governmental initiatives in this area. Even more, the data on systemic inequality and stratification generated through the auditing process might eventually “nudge” the Court or at least some of its members to reconsider certain aspects of current doctrine. Race audit information could, for example, give new content to claims that societal discrimination should be recognized as a constitutional injury. Concerns about the amorphous nature of such discrimination could be significantly mitigated by evidence on the specific systems and procedures that creative cumulative disadvantage in a jurisdiction.<sup>241</sup>

In sum, cities and other localities likely will be free to conduct the race audit without fear of potential liability. Likewise, my sense is that localities would be unlikely to face liability for the vast majority of what the race audit uncovers. To the extent that the audit uncovers evidence of something more than structural inequality—something that, for reasons already discussed, does not yet create a problem under existing doctrine—it seems likely that the statute of limitations will have run on most of the claims that could have been brought.<sup>242</sup> A municipality’s purposeful efforts to exclude African Americans, Latinos, or Asian Americans from desirable neighborhoods through the use of race-targeted ordinances decades ago will be useful information to auditors, but likely will not put the locality in serious jeopardy of suit.<sup>243</sup> Exposure to real liability likely will occur only with respect to previously undiscovered intentional discrimination that can be shown to have occurred relatively recently. Because localities now engaged in processes such as HUD’s AI process already face such liability, it seems unlikely that such exposure will be a deterrent to the vast majority of municipalities. To the extent that it does make some reluctant to engage in the audit process, it might, as I suggested earlier, make sense to explore possibilities for limited forms of immunity for current discrimination.<sup>244</sup>

---

241. See, e.g., *Gratz v. Bollinger*, 539 U.S. 244, 298–305 (2003) (Ginsburg, J., dissenting) (citing racial disparities in various areas while arguing that a university’s race-conscious admissions program should be upheld as constitutional).

242. Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 *GEO. WASH. L. REV.* 68, 70–71 (2005).

243. But see Charles Ogletree, Jr., *From Brown to Tulsa: Defining Our Own Future*, 47 *How. L.J.* 499, 558–60 (2004) (discussing efforts to secure reparations through litigation and other means).

244. The relatively narrow set of circumstances under which such immunity would be granted arguably provides an internal check against potential abuse. In any event, immunity arrangements should make clear that they would not operate in a way that would extinguish any preexisting claims for relief.

#### IV. LOCAL INCENTIVES AND POTENTIAL CONCERNS

For years now, we have looked primarily to federal courts for creative solutions to the problem of racial disadvantage in the United States. The extrajudicial race audit proposal turns the table on this arrangement by imagining a productive role for local governments in dismantling the American color line. In doing so, however, it raises a number of questions that bear on how viable this particular evaluative device might ultimately be. This Part addresses concerns about whether cities and other localities will have any interest in conducting the race audit proposed. It then considers possible critiques of the race audit proposal itself.

##### A. LOCAL INCENTIVES FOR INNOVATION

Conventional wisdom, informed by past history and the Court's own skepticism, is that jurisdictions like Seattle and New Haven stand alone in wanting affirmatively to acknowledge and address the effects of racial inequality within their borders. The thinking is that local officials are either comfortable with racial divisions in their communities or too afraid of exposure to legal liability for discrimination to take any action to resolve them. This view, however, overlooks a number of realities.

To begin with, it does not account adequately for the real and measurable impact that racial inequality has on the operations and economies of local government. The assumption is that, while persistent inequality may negatively affect racial minorities, it does not have significant enough an effect on local governments to warrant targeted action in this area. But this argument misses the fact that many local governments in the twenty-first century, "good" and "bad," perform their everyday functions against a backdrop of racial disadvantage. These localities know all too well what having to deliver services to large segments of the population mired in poverty and disadvantage means for their bottom line, or the ways in which the presence of persistent racial inequalities impedes opportunities for development, cross-government collaborations, or growth. They grapple daily with the realities of the American color line and, in many ways, act as our first defense against its concrete effects in domains such as education,<sup>245</sup> poverty,<sup>246</sup> employment,<sup>247</sup> housing,<sup>248</sup> and criminal justice.<sup>249</sup>

---

245. See Sandra E. Black & Amir Sufi, *Who Goes to College? Differential Enrollment by Race and Family Background* 8–11 (Nat'l Bureau of Econ. Research, Working Paper No. W9310, 2002), available at <http://www.nber.org/papers/w9310.pdf> (discussing that, on average, Whites are more likely than Blacks to go to college); see also Mary Leonard, *Race, Gender Gaps Found in Colleges*, BOSTON GLOBE, Sept. 23, 2002, at A3 (noting disparities between Whites and minorities in enrollment, degrees attained, and employment in higher education).

246. MELVIN OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 12 (2004) (indicating that Blacks are more likely than Whites to live in

In addition, the insistence that local governments will decline to explore opportunities to address persistent racial inequality discounts the strength of existing incentives for positive action by municipalities. One of these concerns is compliance with prevailing race norms. With the election of President Barack Obama, the possibility that we have become a “post-racial” society has generated much debate.<sup>250</sup> There is good reason to contest strenuously the notion that we have reached the point in American history where race no longer matters. Claims of postraciality, given the overwhelming evidence of racial stratification in the United States, seem premature, at best.<sup>251</sup> At the same time, engagement with such claims reveals that they rest on an understanding of social norms that few on either side of the postraciality debate would contest. And that is: we now live in a society where the open racial prejudice and hostility evidenced by some public officials or even private individuals in the 1950s and ’60s no longer counts as acceptable. Obviously, racial discrimination, both overt and covert, still exists.<sup>252</sup> But we no longer find ourselves at a point where most towns or cities would openly relish designation as the place where segregation reigns or inequality flourishes. Instead, we see local governments promoting themselves as “integrated” or “diverse.” They derive a benefit from at least projecting alignment with existing norms.

Another incentive relates to the economic interests of local jurisdictions. A presumption that reducing the incidence of racial disadvantage would constitute a serious drain on municipal resources—either because of the cost of resulting government programs or potential litigation concerning them, or both—underlies the inclination to underestimate the number of local governments that might find the

---

poverty).

247. See U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, THE EMPLOYMENT SITUATION: SEPTEMBER 2007, at 1 (listing the official unemployment rate for September 2007 as 4.2% for white workers and 8.1% for African Americans).

248. See generally Dorothy A. Brown, *Shades of the American Dream*, 87 WASH. U. L. REV. 329 (2009) (discussing disparities in home ownership).

249. Within certain age cohorts, black men are arguably equally as likely to end up in jail or prison as they are to attend college. See Michael B. Katz et al., *The New African American Inequality*, 92 J. AM. HIST. 76, 82 (2005) (“In 2000, nearly 12 percent of black men (between 26 and 30) resided in [a penal] institution.”); see also Glenn C. Loury, *Why Are So Many Americans in Prison?*, BOSTON REV., July/Aug. 2007, available at [http://www.bostonreview.net/BR32.4/article\\_loury.php](http://www.bostonreview.net/BR32.4/article_loury.php); H. Richard Milner & Tyrone C. Howard, *Black Teachers, Black Students, Black Communities, and Brown: Perspectives and Insights from Experts*, 73 J. NEGRO EDUC. 285, 288 (2004).

250. See generally Symposium, *Acknowledging Race in a “Post-Racial” Era*, 32 CARDOZO L. REV. 755 (2011).

251. See Barnes et al., *supra* note 22.

252. Moreover, we can find clear examples of towns actively discriminating against racial minorities. See, e.g., Kevin R. Johnson, *Taking the “Garbage” Out in Tulia, Texas: The Taboo of Black-White Romance and Racial Profiling in the “War on Drugs,”* 2007 WIS. L. REV. 283 (discussing racially discriminatory police-run drug stings in Tulia).

notion of grappling meaningfully with persistent racial inequality attractive.<sup>253</sup> While the idea that doing so would require an expenditure of funds cannot be gainsaid, recent research makes clear that there is also a cost associated with pervasive racial inequality.<sup>254</sup> This research, even more significantly, makes clear that strategies for reducing social problems such as poverty and inequality can have economic “benefits for [cities and] . . . regional econom[ies] as a whole.”<sup>255</sup>

Finally, the contention that cities and other localities will not be willing to experiment with new programs designed to curtail the negative effects of long-term racial disparities ignores the fact that many local governments have already begun to engage in such experimentation. For example, the exact number of public school districts with race-conscious school assignment plans remains unknown.<sup>256</sup> But *Parents Involved* made clear that Seattle and Louisville were not the only localities to have adopted them.<sup>257</sup> Indeed, those cities are part of a small but arguably growing set of states and localities that seek innovative ways to deal with inequalities in education, housing, and other areas.<sup>258</sup> The number of localities participation in HUD and DOT program-related equity audits attest to this.

#### B. POTENTIAL ISSUES IN RACE AUDIT IMPLEMENTATION

Apart from questions about local incentives for conducting the race audit are serious issues pertaining to the actual implementation of the audit. I have, for example, emphasized the importance of local engagement with issues of race as a way of promoting innovation, but also, ultimately, improving democratic participation and strengthening communities. But those skeptical of this position might, citing Madisonian concerns, point out as a threshold matter that on the flip side of this story of local promise sits a rather troubling history of discrimination and exclusion by homogeneous local majorities.<sup>259</sup> One need not look far to find proof of this. Think of Bull Connor, Birmingham’s infamous former public safety commissioner, who opened fire hoses on civil rights protesters in the 1960s in an effort to beat back

---

253. See ROBERT WEISSBOURD, STRENGTHENING COMMUNITIES FOR REGIONAL PROSPERITY 4 (2007), available at [http://www.rw-ventures.com/publications/downloads/Strengthening\\_Communities.pdf](http://www.rw-ventures.com/publications/downloads/Strengthening_Communities.pdf).

254. *Id.* at 5 (“[One study on this issue] shows that cities with higher poverty rates face higher per capita costs not only for poverty-related programs, but also for non-poverty-related expenditures including general government functions.”).

255. *Id.*

256. See Kimberly Jenkins, *The Constitutional Future of Race-Neutral Efforts to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools*, 50 B.C. L. REV. 277, 277 (2009).

257. *Id.*

258. For examples of such local initiatives, see, for example, POWELL ET AL., COMMUNITIES OF OPPORTUNITY, *supra* note 37 (discussing inclusionary zoning efforts in Montgomery County, Maryland, and low income tax credit projects throughout the country).

259. Davidson, *supra* note 219, at 1024–25.

integration efforts and defend the tenets of Jim Crow segregation.<sup>260</sup> Or, more recently, there is the example of Tulia, Texas, where racially-motivated police arrests resulted in the unlawful incarceration of scores of African Americans.<sup>261</sup> Clearly, intentional discrimination is not yet a problem we have completely eliminated.

The fear that localities conducting race audits might work to exploit local biases in ways that further disadvantage racial minorities is surely not unfounded.<sup>262</sup> But we would do well to remember that the context in which we live today is different from the one civil rights protesters found themselves in forty or fifty years ago in the deep South. We now have civil rights laws and court decisions that set a floor for equal treatment that simply did not exist in the past. Further, there is little to suggest that localities implementing the race audit would be any more likely to engage in discrimination than they already are. The benefit of the race audit is that it offers to localities interested in moving beyond a past history of discrimination or exclusion, whether intentional or not, new freedom to experiment with equity-enhancing initiatives.

Further, the concern that the race audit proposal, because of its focus on voluntariness rather than the mandatory participation of localities, will ultimately be ineffectual might also be raised as a critique. Under the proposal, localities would conduct audits solely on their own initiative, in an effort to inspire innovation in addressing persistent racial inequalities or to produce a counternarrative about race in their jurisdiction. My strong sense is that, while the audit process could be structured as a mandatory tool, it would be a mistake to take this approach in the near term.<sup>263</sup> The voluntariness of the race audit means that we can expect not only diminished levels of opposition, but also higher levels of openness. Certainly, the story might be very different if, for example, we were seeking information about British Petroleum's actions in connection with the oil spill that recently devastated the Gulf Coast states. But the kinds of concerns one might have in that situation do not obtain here. The likelihood of full disclosure, particularly given the expertise of the proposed audit committee, in my view, is relatively

---

260. Michael J. Klarman, *Brown at 50*, 90 VA. L. REV. 1613, 1628 (2004) (discussing Bull Connor's actions against civil rights protesters).

261. See Johnson, *supra* note 252.

262. See Davidson, *supra* note 219, at 1024–26 (discussing potential “exclusionary” dimensions of local power); see also Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 435–47 (1990) (discussing, inter alia, race and income segregation problems that often occur at the local level).

263. Theoretically, a court would likely have the power to mandate implementation of the race audit. The audit, however, seems an unusual remedy for a race-related wrong, as it primarily functions as a diagnostic device. Further, it is hard to conceive of the precise harm for which the audit could provide relief. The structural inequality on which the race audit focuses has not been something that the Supreme Court has previously been willing to address. See sources cited *supra* note 24 (cases on societal discrimination).



high.<sup>264</sup> This is especially so in a world where the audit sets out clear procedures and ensures that a well-defined group of experts retains responsibility for its implementation. Under other models, uncertainty with respect to the identity and credentials of auditors, as well as the exact areas of disparity to be studied, exists.

Last, the race audit raises real concerns about cost and scope. In the current economic climate, it seems unlikely that localities would carry out the expansive process envisioned by the race audit proposal without some difficulty. Competitive funding programs modeled on the Obama administration's Race to the Top Program, as indicated earlier, could be utilized to minimize the economic burden of implementation on localities, however. In the absence of such programs or similar state or federal government funding, localities interested in conducting the race audit might also productively seek outside financial support from philanthropic organizations or perhaps even universities.<sup>265</sup> Such support would diminish substantially the costs associated with the race audit.

With respect to scope, the HUD program cited as a kind of model for the race audit offers a cautionary tale. In a 2010 report, the Government Accountability Office (GAO) issued a report on the AI analysis conducted by grantees receiving funds under HUD programs seeking "affirmatively to further" fair housing, which indicates that, notwithstanding the clear rules and guidelines set out under HUD documents, many grantees do not comply fully with applicable rules. Given that "the vast majority of . . . AIs [studied] did not include timeframes for implementing their recommendations or the signatures of top elected officials, as HUD guidance recommends,"<sup>266</sup> real questions exist about the race audit's usefulness as a planning document. Drafters of that GAO report plainly had in mind the unfortunate example of Westchester County, New York, which recently entered into a multi-million dollar settlement after having been found liable for not engaging

---

264. Of greater concern might be the inclination to justify existing systems that social scientists have documented in advantaged as well as disadvantaged persons. See Gary Blasi & John T. Jost, *System Justification Theory Research: Implications for Law, Legal Advocacy, and Social Justice*, 94 CALIF. L. REV. 1119 (2006). Research suggests, however, that the elevation of "individual or group concerns [can] . . . reduce the net effect of this dynamic." *Id.* at 1151; see also John T. Jost et al., *A Decade of System Justification Theory: Accumulated Evidence of Conscious and Unconscious Bolstering of the Status Quo*, 25 INT'L. POL. PSYCH. 881 (2004). The set of criteria and objectives deemed necessary to the race audit process may thus serve an additional purpose.

265. Further, the fact that the race audit device would not be a condition precedent to the completion of any public project or program has potential to avoid unusually high cost expenditures and avoid community hostility toward the auditing process. In the environmental area, for example, where impact statements have become a regulatory fixture, the expense and delay that sometimes attend the issuance of environmental impact statements indicating the need for program revision or change have been a frequent area of critique.

266. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-905, HOUSING AND COMMUNITY GRANTS: HUD NEEDS TO ENHANCE ITS REQUIREMENTS AND OVERSIGHT OF JURISDICTIONS' FAIR HOUSING PLANS 9 (2010).

in measures to promote fair housing, despite years of reporting that it had done just that.<sup>267</sup> Noncompliance with AI-related and other controls suggests that there must be special attention under the proposal to developing and then holding localities accountable for any systems they adopt during the audit. This is especially so given that the range of issues to be addressed under the audit is far more expansive than that committed to localities under HUD's housing-related programs. The fact that the process would be open and public, however, should help to increase the audit's likelihood of success.

#### CONCLUSION: LOCALITIES, RACE, AND THE "GOOD LIFE"

Innovation norms that exist in other areas of the law do not exist in any meaningful way in the race context.<sup>268</sup> Indeed, the Supreme Court's race jurisprudence reveals an intention on the part of conservative majorities to limit experimentation and thinking about matters of race.<sup>269</sup> The race audit proposal advanced in this Article, however, makes clear that a shift away from an exclusive focus on courts to one that recognizes the potentially transformative power of localities in this area could create the conditions for the kind of innovation and experimentation that have been lacking.

Even within the narrow confines of current doctrine, the race audit proposal offers new ways to identify and understand the systems and procedures underlying persistent racial inequality. It also offers a counternarrative about race in our society. Racial stratification has always been regarded either as the naturally occurring backdrop against which we live our lives or, more problematically, as the inevitable consequence of minority cultural deviance or intellectual inadequacy.<sup>270</sup> The race audit offers an important counterpoint to these race narratives, emphasizing the role that geographical space and facially neutral policies play in creating cumulative racial disadvantage.<sup>271</sup> In shedding light on race matters, the audit may actually help establish the conditions necessary to interrupt the "racemaking situation" described earlier. It can help challenge our unspoken ideas and attitudes about race and inspire us to reconsider the systems that promote them.

---

267. See generally *id.*

268. See Lenhardt, *supra* note 240, at 27.

269. *Id.* at 11–14.

270. See generally CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994) (linking disparities to intellectual inadequacy); ABIGAIL THERNSTROM & STEPHAN THERNSTROM, *NO EXCUSES: CLOSING THE RACIAL GAP IN LEARNING* (2003) (linking racial disparities in educational achievement, *inter alia*, to cultural inadequacy).

271. See generally Ford, *supra* note 34; Boddie, *Racial Territoriality*, *supra* note 34.

The potential benefits of the race audit or, more broadly, a change agenda focused on localities rather than only courts, do not end there. The larger project of which the race audit is a part considers, among other things, the deep capacity that localities have to be “equality innovators” and to spur democratic conversations about the meaning of equality in the twenty-first century. Civil rights scholars and advocates have purposefully avoided deep engagement with localism, regarding localities as a potential site of abuse and discrimination, as they have been in the past. But cities and other localities may, in fact, be an important vehicle for progress in this context. For years we have been left with only the very thin account of equality articulated in the Supreme Court’s cases. Engagement with localities and the racial disparities that exist there may, however, provide us with a much thicker account of equality than we have previously enjoyed or contemplated. What I want to suggest is that cities and other localities could productively become involved in efforts to define equality and belonging for themselves and their members.<sup>272</sup> By this I do not mean to invoke debates about legal status or the rights one might have to access a particular community or the benefits it provides.<sup>273</sup> Rather, I envision robust debates about acceptance, the conditions necessary for the “good life,” and a renewed understanding of what community and participation mean.<sup>274</sup>

I share the view, articulated by Frug and others, that local “power can become a vehicle for facilitating the ability of different kinds of people—of strangers who share only the fact that they live in the same geographic area—to learn to live with, even collaborate with, each other.”<sup>275</sup> In interesting ways, a commitment to exploring the capacity of localities to be “good” may, as I intimated at the outset, also enable us to find new ways to bringing different principles— notions such as equality and liberty—together as well. Modern civil rights scholarship and advocacy often regard localities as obstacles to meaningful equality for racial minorities and others. But the race audit proposal and the larger project of which it is a part suggest that, in fact, we may well be able to

---

272. David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 572 (1999) (arguing, inter alia, that precedent exists for conceiving of local governments as vehicles for “transforming abstract constitutional principle[s]” such as equality into real, concrete terms).

273. See Richard C. Shragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 464 (2001) (“A ‘claim to belong’ is not readily cognizable. Yet, the language of belonging is meant to focus attention on the formation and definition of community in the first instance. In contrast to the rights response, which conceives of rights as trumps deployed on behalf of the individual from a place conceptually ‘outside’ the community, a claim of belonging challenges the implicit opposition between community and individual . . .”).

274. See *id.* For more on the benefits of community dialogues about race, see generally Katherine Cramer Walsh, *Communities, Race, and Talk: An Analysis of the Occurrence of Civic Intergroup Dialogue Programs*, 68 J. POL. 22 (2006).

275. FRUG, *supra* note 29, at 9.

preserve notions of liberty while still working to give greater content to principles such as equality. This possibility opens the door to an entirely different way of thinking about race, equality, and what can be accomplished in this context.

\*\*\*