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Localities as Equality Innovators

Robin A. Lenhardt

Fordham University School of Law, rlnhardt@law.fordham.edu

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ARTICLE

LOCALITIES AS EQUALITY INNOVATORS

R.A. Lenhardt†

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INTRODUCTION

Broadcast images of young African American civil rights protesters being battered by water from high-pressure fire hoses served as a turning point in the grassroots movement for racial equality and a catalyst for the enactment of the Civil Rights Act of 1964.¹ The decision of Bull Connor, Birmingham,

† Associate Professor of Law, Fordham Law School. In developing the ideas discussed in this article, I have benefitted from useful comments from and numerous conversations with colleagues, including Michelle Adams, Rick Banks, David Barron, Elise Boddie, Devon Cardado, Guy Charles, Nestor Davidson, Richard Ford, Sheila Foster, Katherine Franke, Jeanne Fromer, Jerry Frug, Suzanne Goldberg, Rachel Godsil, Jennifer Gordon, Kristin Johnson, Olati Johnson, Sonia Katyal, Catherine Powell, Aaron Saiger, Susan Sturm, and Benjamin Zipursky. My thanks to Ernestine Narcisse and the Fordham Law School Library staff for helpful research assistance, and to Christopher Hu and the other members of the *Stanford Journal of Civil Rights & Civil Liberties*, for their hard work on this article and the symposium of which it was a part.

1. See Michael J. Klarman, *Brown at 50*, 90 VA. L. REV. 1613, 1628 (2004) (discussing Bull Connor and his violence as catalyst for the Civil Rights Act of 1964); see also Tomiko Brown-Nagin, *Race as Identity Caricature: A Local Legal History Lesson in*

Alabama's former Public Safety Commissioner, to attack civil rights protesters in so brutal a manner came to signify the evils of Jim Crow segregation and its systematic subjugation of black Americans.² In a way few would have predicted at the time, Bull Connor's actions, and others taken by local and state officials throughout the South and in some areas of the North, also worked, in no small measure, to shape modern United States Supreme Court jurisprudence in the area of race.³ This is so in part because the Court found itself so often confronted with local defiance to racial segregation in countless cases in the decades following its landmark decision in *Brown v. Board of Education*.⁴ There has evolved in post-*Brown* cases a negative understanding of localities—what I call the “bad city” image—that now applies across a variety of contexts. The image certainly (and quite properly) gets evoked in cases involving racially segregative state action intended to disadvantage racial minorities.⁵ But it has not been confined to such cases. Under strict scrutiny, the Court now effectively treats as “bad cities” even those localities that seek affirmatively to promote equality and eliminate persistent racial disparities through their initiatives.⁶

Recent decisions such as *Parents Involved in Community Schools v. Seattle School District No. 1*⁷ and *Ricci v. DeStefano*⁸ help to illustrate the point. In those cases, conservative justices invalidated local programs or policy decisions designed to address racial disparities: Seattle- and Louisville-based school assignment programs geared toward reducing the effects of resegregation in the former case, and the City of New Haven's judgment that compliance with federal antidiscrimination law required the invalidation of test results that would have exacerbated racial imbalances in a fire department with a long history of racial exclusivity in the latter.⁹ Citing the dangers of race-conscious decision making, the *Parents Involved* and *Ricci* courts declined to afford local actors the deference that, ironically, had been forthcoming even in early cases challenging bedrock components of the Jim Crow system.¹⁰

Legal scholars have long decried the empty formalism inherent in the

the Salience of Intra-racial Conflict, 151 U. PA. L. REV. 1913 (2003) (discussing Connor's response).

2. Gilda R. Daniels, *Senator Edward Kennedy: A Lion for Voting Rights*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 415, 433 n.104 (2011) (discussing Connor as symbol of civil rights abuses).

3. See R.A. Lenhardt, *Race Audits*, 62 HASTINGS L.J. (forthcoming 2011) (manuscript at 4-5) (on file with author).

4. 347 U.S. 483 (1954).

5. Lenhardt, *supra* note 3, at 4-5.

6. *Id.*

7. 551 U.S. 701 (2007).

8. 129 S. Ct. 2658 (2009).

9. Lenhardt, *supra* note 3, at 4-5.

10. *Id.* at 4-6.

Rehnquist and Roberts Courts' determination to equate local policies designed to disadvantage racial minorities with those designed to promote equality for all.¹¹ In this Article, I explore what the Court's formalistic stance means for localities and possible innovations in addressing persistent racial disparities in areas such as education, housing, employment, health care, and criminal justice. Admittedly, one would be hard pressed to find the words "race" and "innovation" being used in conjunction with one another in any of the Court's cases. The Court's hostility to affirmative action and its insistence on treating ongoing structural racial inequalities as "societal discrimination" that cannot constitutionally be redressed through race-conscious means have dramatically limited opportunities for creativity in dealing with the problems of the modern color line.¹² Even more, they have severely circumscribed the role of localities in this context. Courts, not the local officials whose on-the-ground experience and expertise have been celebrated as the cornerstone of democracy in other areas of the law,¹³ now dictate how much or, more accurately, how little cities and other localities can accomplish in meaningfully addressing racial inequalities that divide their communities and, research increasingly shows, effect a drag on their long-term economic prospects.¹⁴

11. See, e.g., Guy-Uriel E. Charles, *Affirmative Action and Colorblindness from the Original Position*, 78 TUL. L. REV. 2009 (2004); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind"*, 44 STAN. L. REV. 1 (1991); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Ian F. Haney López, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985 (2007); Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CALIF. L. REV. 77 (2000).

12. Lenhardt, *supra* note 3, at 5-6; see also GIRARDEAU A. SPANN, *THE LAW OF AFFIRMATIVE ACTION: TWENTY-FIVE YEARS OF SUPREME COURT DECISIONS ON RACE AND REMEDIES* 2 (2000). The Court has consistently regarded "societal discrimination" as too amorphous a concept to recognize as a constitutional injury. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 497 (1989) (plurality opinion); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 296 (1978) (describing societal discrimination as a "social injury" too insignificant to warrant a race-based remedy). For more on societal discrimination, see Michael Selmi, *Remedying Societal Discrimination Through the Spending Clause*, 80 N.C. L. REV. 1575 (2002).

13. See, e.g., *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007) (waste management); *Vill. of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (zoning decisions); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (education).

14. For research indicating that addressing racial inequality can have a positive impact on a locality's bottom-line, see ROBERT WEISSBOURD, *STRENGTHENING COMMUNITIES FOR REGIONAL PROSPERITY* 4-5 (2006), available at http://www.rw-ventures.com/publications/downloads/Strengthening_Communities.pdf (indicating, inter alia, that 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").

The recalcitrance of localities, such as Birmingham, in the wake of *Brown* necessitated judicial oversight of this sort. But it is not at all clear that we still need courts to occupy so much of the field when it comes to determining the most effective ways to navigate the racial divide today. Obviously, racial discrimination still exists. In particular, official race-based discrimination remains a serious problem against which we must continue to guard. Incidents such as those that transpired in Tulia, Texas, where law enforcement officials were shown effectively to have engaged in race-based prosecution of nearly fifty African Americans charged in connection with a drug sting, make this clear.¹⁵ At the same time, we now have case law and federal, state, and local antidiscrimination statutes on the books that establish norms and baseline protections against racial discrimination in a range of areas that simply did not exist when Bull Connor and others used their public offices to deny African American citizens the equal treatment and opportunity guaranteed by the Fourteenth Amendment. With proper enforcement, these laws place meaningful limits on facially discriminatory government policies and programs.¹⁶

Further, the overall effectiveness of the Supreme Court's interventions in the race context has been limited. The judicial preoccupation with the eradication of intentional racial discrimination evident in modern cases—manifested in a norm of colorblindness so expansive that, after *Ricci*, some maintain that it prohibits the mere awareness of race¹⁷—may have helped to place limits on overtly discriminatory government programs. It has, however, done little, if anything, to address the source of persistent inequalities in core areas.¹⁸ Many of the justices whose vision of race and discrimination has prevailed in recent cases would no doubt insist that any lingering disparities could be attributed to perfectly “natural” individual choices¹⁹ or perhaps even the failings of the affected minorities themselves, rather than to existing

15. For a discussion of the Tulia, Texas case and the efforts made to bring justice to those victimized, see Kevin R. Johnson, *Taking the “Garbage” Out in Tulia, Texas: The Taboo on Black-White Romance and Racial Profiling in the “War on Drugs,”* 2007 WIS. L. REV. 283 (2007).

16. *But see* Goodwin Liu, *The Bush Administration and Civil Rights: Lessons Learned*, 4 DUKE J. CONST. L. & PUB. POL'Y 77, 78-86 (2009) (pointing out that civil rights enforcement has sometimes been inadequate, such as during the Bush administration).

17. *See, e.g.,* Michelle Adams, *Is Integration a Discriminatory Purpose?*, 96 IOWA L. REV. 837, 840-41 (2011) (arguing that, after *Ricci*, the mere consideration of race for any purpose might invoke strict scrutiny). *But see* 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) (on file with author) (arguing that *Ricci*'s reach is relatively limited and, in any event, does not prohibit all race-conscious goals or purposes).

18. *See* Lenhardt, *supra* note 3, at 3.

19. *See, e.g.,* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 736 (2007) (plurality opinion); *see also id.* at 750 (Thomas, J., concurring).

doctrine.²⁰ But a growing body of scholarship suggests otherwise. Legal scholars, historians, and social scientists increasingly point to the need to interrogate more fully the systems and structures that could explain such “durable inequality.”²¹ Structuralist accounts of race “shift[] our attention” from intentionality or “intra-institutional”-based analyses—favorites of the current Court—to interrogations of “inter-institutional arrangements and interactions” that better explain the cumulative and multi-generational nature of racial disadvantage.²² They make clear that an exclusive focus on intentionality, by definition, will always be inadequate to address persistent racial inequalities.²³

This Article thus argues that instead of regarding cities and localities that, like Seattle and Louisville, try to develop serious solutions to existing racial disparities as “bad cities” no different from those whose notorious policies spurred the civil rights movement of the 1950s and 1960s, we should be regarding them as potential “equality innovators.”²⁴ Their on-the-ground experience with the realities of race and its operation in the twenty-first century arguably places them in a better position than courts to develop innovative approaches to the structural racial inequities with which so many municipalities must grapple. Existing doctrine limits dramatically the ability of courts to confront in any meaningful way how localities and the people that inhabit them actually navigate race.

Part I develops the concept of local “equality innovators” by first detailing the parameters of the intellectual property term “user innovation” from which it takes its inspiration, and then considering theoretical support for extending opportunities for innovation from the individual user to the institutional context. Part II takes a closer look at existing judicial barriers to locality-generated innovation, briefly discussing recent cases and the emphasis on “race-neutral alternatives” in Supreme Court jurisprudence. Part III begins

20. Abigail and Stephen Thernstrom have been vocal advocates of the latter position in conservative circles. *See, e.g.*, ABIGAIL THERNSTROM & STEPHAN THERNSTROM, NO EXCUSES: CLOSING THE RACIAL GAP IN LEARNING 4-5 (2003) (advancing claim that the educational achievement gap reflect cultural deficiencies in African American and Latino students and families).

21. *See* CHARLES TILLY, DURABLE INEQUALITY (1998) (developing the term “durable inequality”). For further examples of such scholarship, see COLIN GORDON, MAPPING DECLINE: ST. LOUIS AND THE FATE OF THE AMERICAN CITY (2008); IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA (2005); DOUGLAS S. MASSEY, CATEGORICALLY UNEQUAL: THE AMERICAN STRATIFICATION SYSTEM, at xv (2007); john a. powell, *Structural Racism: Building upon the Insights of John Calmore*, 86 N.C. L. REV. 791, 796 (2008); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001).

22. powell, *supra* note 21, at 796.

23. *Id.*

24. Lenhardt, *supra* note 3, at 62.

by identifying examples of innovative regulatory devices that, consistent with the calls of many legal scholars, focus on structural barriers to racial equality, rather than on intentional racial discrimination alone. It then advances a broad proposal that could be deployed by localities, even within the narrow confines of existing doctrine, to respond more effectively to the structural sources of persistent racial inequality. It outlines some of the benefits that the race audit proposal, which I introduce more fully in an article in the *Hastings Law Journal*,²⁵ might have for encouraging innovation in the race context. The article concludes by briefly addressing potential concerns raised by the race audit proposal. It also situates this Article in a larger project on civil rights in the twenty-first century in which I am engaged.

I. LOCALITIES AND EQUALITY INNOVATION

In his 2011 State of the Union address, President Barack Obama talked about the need to enhance American innovation.²⁶ Areas such as business and education made the list of sites where innovative new strategies could be effectively deployed to improve the nation's competitiveness and help pull the country out of the worst recession in a generation.²⁷ Civil rights and racial equality, notably, did not.

For those who, as I do, find it hard to ignore matters of race when assessing the current economic crisis, the omission was striking. It was, however, hardly surprising, even setting aside the political considerations that no doubt played a significant role in shaping the speech. The truth is that, unlike in areas such as business, science, technology, and education, we have no real innovation norms in the race context. In fact, as I explain in greater detail in Part II, the Court has actively discouraged meaningful efforts to innovate or experiment in this context.²⁸ Localities and other government entities have been cast as obstacles to productive change, rather than the potential sources of it. Nevertheless, I contend that we should be looking for ways to innovate and to place localities more and more at the center of such efforts.

In the absence of strong innovation norms in the race context, it makes sense to consider other areas where theories pertaining to experimentation and innovation have been better developed. The intellectual property context provides an ideal starting point. There, of course, legal scholars have long

25. See Lenhardt, *supra* note 3.

26. Peter Grier, *Obama State of the Union 2011: U.S. Must 'Win the Future' Through Innovation*, CHRISTIAN SCI. MONITOR, Jan. 26, 2011, <http://www.csmonitor.com/USA/Politics/2011/0126/Obama-State-of-the-Union-2011-US-must-win-the-future-through-innovation>.

27. See *id.*

28. See *infra* p. 277.

debated the “socially desirable level of protection provided by intellectual property rights” necessary to encourage the development of intellectual goods.²⁹ Attention has most often been trained on the producers or manufacturers of such goods, who necessarily operated in a “closed way, . . . using patents, copyrights, and other protections to prevent imitators from free riding on their innovation investments.”³⁰ Increasingly, however, scholars have begun to study and develop ways to understand the phenomenon of user innovation.³¹

“User innovation” refers to the modification of mass-produced goods by consumers able to satisfy specific product needs or tastes without the assistance or acquiescence of manufacturers.³² At some level people have, as William Fisher notes in a recent article, long found it necessary—for reasons of functionality or pure aesthetics—to modify mass-produced items such as cars, shoes, or even fishing equipment to suit their particular needs.³³ The inclination that leads one to “supe up” a vintage car or alter a bicycle can hardly be called new.³⁴ But user-based innovation has become increasingly prevalent or, as Eric von Hippel contends in his book on this subject, “democratized.”³⁵ Technological advances in areas such as computer software and gaming, digital media, and biotechnology have made it much easier and productive for consumers to modify existing products for personal use and, in some instances, redistribution.³⁶ Think, for example, about recent controversies surrounding “digital mashups . . . combining audio, video, graphical, or textual material

29. Jonathan M. Barnett, *Is Intellectual Property Trivial?*, 157 U. PA. L. REV. 1691, 1692 (2009).

30. ERIC VON HIPPEL, *DEMOCRATIZING INNOVATION 2* (2005).

31. See, e.g., *id.*; William W. Fisher III, *The Implications for Law of User Innovation*, 94 MINN. L. REV. 1417, 1441-46 (2010) (discussing the challenges user innovation poses for law); Katherine J. Strandburg, *Evolving Innovation Paradigms and the Global Intellectual Property Regime*, 41 CONN. L. REV. 861 (2009) [hereinafter Strandburg, *Evolving Innovation*] (discussing the Agreement on Trade-Related Aspects of Intellectual Property and the extent to which innovations in use of certain technologies have outpaced conceptions of existing intellectual property models); Katherine J. Strandburg, *User Innovator Community Norms: At the Boundary Between Academic and Industry Research*, 77 FORDHAM L. REV. 2237 (2009) [hereinafter Strandburg, *User Innovator Community Norms*] (discussing methods of technology sharing and academic research that raise issues for patent law).

32. Fisher, *supra* note 31, at 1418-30.

33. *Id.*

34. See Strandburg, *Evolving Innovation, supra* note 31, at 873-74.

35. VON HIPPEL, *supra* note 30, at 1, 121-31.

36. See *id.* Oftentimes, the desire to redistribute such goods represents, as Professors Eduardo Peñalver and Sonia Katyal discuss in their recent book, a protest against operative rules about ownership or use. See EDUARDO MOISÉS PEÑALVER & SONIA K. KATYAL, *PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP* (2010).

from preexisting works into new digital works,”³⁷ which, for example, occur frequently in rap music,³⁸ or the prevalence of “gamer”-inspired alterations and sharing of mass-produced computer games.³⁹ These and other similar user innovations create tensions within existing intellectual property law, which may or may not incorporate norms about sharing or modification,⁴⁰ and require courts and scholars alike to reconsider existing rules about product use and innovation.⁴¹

User innovation becomes possible because of two important factors: localized, user-specific information and knowledge about a product, and the capacity of users to carry out innovations.⁴² Producers, not surprisingly, have mixed views of the innovations these factors make possible.⁴³ Some plainly view it as an encroachment on intellectual property rights protected by patent or copyright law. But even this reaction provides useful information for our purposes here. Underlying the debate is the recognition that user innovation produces value and concrete benefits.⁴⁴ Some of these benefits, like the idea that such innovation has positive redistribution effects and promotes self-determination and expression, arguably obtain primarily at the individual user level.⁴⁵ Others, such as the idea that inventions in this context enhance overall efficiency and, assuming an operational distribution and rights scheme, can make the product more widely available extend more broadly, as the fact that many producers ultimately seek either to encourage or facilitate user-level innovations for the own purposes suggests.⁴⁶

Obviously, courts are not manufacturers, and localities are not users in the traditional sense. It strikes me, though, that an argument can be made for formally recognizing the capacity that cities and other localities have to be “equality innovators,” and to engage in productive experimentation and innovation in the area of race that helps to address underlying public systems and structures that result in broad-scale inequality.⁴⁷ Like some producers of technological goods, courts are somewhat removed from the day-to-day reality

37. Fisher, *supra* note 31, at 1418.

38. PEÑALVER & KATYAL, *supra* note 36, at 208-26 (discussing *The Grey Album*, which incorporated digital content from the Beatles’s *The White Album* with rapper Jay-Z’s *The Black Album*); see also Fisher, *supra* note 31, at 1418-19 (same).

39. See Fisher, *supra* note 31, at 1421-22 (noting that player modification of computer games has become so commonplace that producers of some products now sometimes provide player tool kits to facilitate modifications and sharing).

40. See Strandburg, *Evolving Innovation*, *supra* note 31, at 861; Strandburg, *User Innovator Community Norms*, *supra* note 31, at 2237-38.

41. Fisher, *supra* note 31, at 1472-76.

42. Strandburg, *Evolving Innovation*, *supra* note 31, at 874.

43. Fisher, *supra* note 31, at 1435-41.

44. VON HIPPEL, *supra* note 30, at 2, 9, 123.

45. See *id.* at 122-23.

46. *Id.*

47. See Lenhardt, *supra* note 3, at 62.

of race on the ground. The Supreme Court's aspirational color-blindness mantra may appeal to some.⁴⁸ But no one can deny that—insofar as it represents the product that courts provide in this area—it offers few meaningful ways to deal with the racial division and separation that still pervades much of American society.⁴⁹ Justice O'Connor's majority opinion in *Grutter v. Bollinger*, which recognized achieving the educational benefits of broad diversity as a compelling interest, provides a rare example of the Court acknowledging what de facto racial segregation in housing or education might mean for particular groups on the ground, not to mention our democracy as a whole.⁵⁰

Localities, in contrast, are intimately involved with how race is lived or “used” everyday.⁵¹ Through the programs and institutions that they operate, cities and other local government entities have specific, localized information about the existence of persistent racial disparities, not to mention the impact such inequalities have on the set of opportunities particular groups enjoy, and the extent to which differentials in access to public goods such as education or housing limit the ability of racial minorities and others to participate actively in their communities.⁵² Increasingly, as suggested earlier, the dynamics of the modern color line also have concrete effects on a locality's ability to improve its economic prospects.⁵³ It would be hard to imagine an entity with better information or raw capacity to make the kind of changes, policy alterations, and cross-jurisdictional collaborations necessary to generate the kind of innovations in the race context that users in the intellectual property area now

48. On colorblindness, see López, *supra* note 11, at 988 (discussing, inter alia, conflicting visions of colorblindness as a future goal of society and “as a means to achieve this end”).

49. Indeed, some argue that this reality accounts, inter alia, for Justice Kennedy's separate opinion in *Parents Involved*, which went to great lengths to reject the plurality's contention that seeking to address racial isolation in our public schools should not be regarded as a compelling governmental interest for purposes of strict scrutiny. See Kimani Paul-Emile, *The Use of Race in Biomedical Science* 31-34 (unpublished manuscript) (on file with author) (discussing Kennedy's *Parents Involved* concurrence and asserting the existence of a strain of “racial pragmatism” in certain areas of existing equal protection doctrine).

50. 539 U.S. 306, 331 (2003). Notably, *Grutter* found the Court willing to defer to the expertise of education officials, rather than local government officials, and then only on a theory that had earlier been proposed by a member of the Supreme Court, former Justice Lewis Powell. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978) (articulating diversity theory for admissions).

51. See Lenhardt, *supra* note 3, at 43.

52. For a discussion of opportunity deficits stemming from racial inequality and new efforts to map opportunity differentials between racial minorities and others, see KIRWAN INST. FOR THE STUDY OF RACE AND ETHNICITY, *COMMUNITIES OF OPPORTUNITY: A FRAMEWORK FOR A MORE EQUITABLE AND SUSTAINABLE FUTURE FOR ALL* (2007), available at <http://www.racialequitytools.org/resourcefiles/powell1.pdf>.

53. See WEISSBOURD, *supra* note 14, at 4, 5.

facilitate.⁵⁴ The potential for productive, equality and democracy-enhancing benefits that localities have in this regard rivals the societal and cultural benefits that we seek to promote through intellectual property law.⁵⁵

The loose analogy drawn here admittedly falls short of perfect. Among other things, localities are as much producers of goods as they are users of court doctrine. Further, the incentives that localities and individual users have for innovation are quite different. Users of software and other technology, while perhaps willing to “reveal” or share their innovations with others,⁵⁶ often make modifications to goods to serve their own individual needs.⁵⁷ A locality might experiment with new strategies to deal with social problems to improve its bottom line, but it does so with a clear understanding of the implications such strategies will have for the residents for whom it has responsibility and to whom it has certain obligations. Still, I think the user-innovation analogy I have drawn here is helpful. When situated within legal scholarship on “democratic experimentalism,” which contemplates the decentralization of power to enable local actors and citizens to “utilize their local knowledge to fit solutions to their individual circumstances,” it speaks more directly to the kind of institutional innovation I hope to encourage in the race context.⁵⁸

Democratic experimentalism seeks to “reduc[e] the distance between . . . the Madisonian ideal of a limited government assured by a complex division of powers and . . . the governmental reality characteristic of the New Deal synthesis, in which an all-powerful Congress delegates much of its authority to expert agencies that are checked by the courts”⁵⁹ Scholars writing in this area have, for example, emphasized the possibilities that an experimentalist approach characterized by flexible procedures and “ongoing stakeholder participation and measured accountability” can have for meaningful reform of institutions such as schools, welfare organization, prisons, and even some private workplaces.⁶⁰ Notably, matters of racial inequity and disadvantage have

54. Admittedly, localities or regional entities, might, in circumstances lack the legal power necessary to institute certain reforms. But, as I argue elsewhere, it seems that they could productively solicit state legislatures to provide whatever authority necessary to move forward with new policies and seek additional support from federal entities. See Lenhardt, *supra* note 3, at 38. On the necessary relationship between localities and other governmental entities, see David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377, 378-79 (2001).

55. On the kinds of benefits intellectual property law seeks to promote, see, e.g., Jeanne C. Fromer, *Claiming Intellectual Property*, 76 U. CHI. L. REV. 719, 731 (2009).

56. VON HIPPEL, *supra* note 30, at 77-91.

57. *Id.* at 19-20.

58. Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 267 (1998).

59. *Id.* at 268.

60. Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1019 (2004).

generally not been widely discussed.⁶¹ This literature, nevertheless, points to how one might extend more fully the concept of democratic experimentalism to matters of race. Embracing the user-innovation analogy would be useful to the extent that the analogy highlights the uniquely oppositional positions arguably held by courts and localities with respect to some issues in the race context and the advantages that might accompany loosening the grip that courts now have on strategies for change—of course, without eliminating their institutional oversight and review roles.

Looking to local governments, rather than merely courts, to be “equality innovators” that provide solutions to problems such as hypersegregation and the negative effects it has for racial minorities in a range of areas would, as experimentalists urge, help reinvigorate Madisonian conceptions of local entities and their capacity to be incubators of solutions driven by local knowledge and insights that produce broad benefits at the community level.⁶² The deep skepticism with which the Court has regarded race-conscious initiatives like those at issue in *Parents Involved*, for example, cannot easily be reconciled with the view, articulated by the framers, 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.”⁶³ The proposal to regard localities as “equality innovators,” in contrast, resonates deeply with democratic values about local engagement and the position—increasingly advocated by scholars such as Gerald Frug—that cities and other localities can serve as important vehicles for community building and belonging.⁶⁴

II. JUDICIAL CONSTRAINTS ON INNOVATION IN THE RACE CONTEXT

Existing doctrine, as I noted at the outset, does not encourage “equality innovation” or the new policies and creative regional alliances that I envision localities committed to addressing structural racial inequality generating. As I have previously observed, it essentially places localities in a 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.”⁶⁵ Even where existing cases do not actually foreclose a particular strategy, the reality is that the Supreme Court’s negative stance toward local initiatives to combat the

61. Susan Sturm’s excellent work on second-generation race and gender discrimination in employment provides an important exception. See Sturm, *supra* note 21.

62. See Sabel & Simon, *supra* note 60, at 1100-01.

63. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 575 n.18 (1985) (Powell, J., dissenting).

64. See GERALD E. FRUG, CITY MAKING: BUILDING CITIES WITHOUT BUILDING WALLS 9 (1999).

65. Lenhardt, *supra* note 3, at 7.

cumulative effects of racial segregation and inequity arguably has the effect of stifling creativity for many in this area.⁶⁶ Localities not overly concerned about potential liability under the unforgiving standard of strict scrutiny applied in all cases involving race may—because of the very narrow set of options existing doctrine sets out for meaningful engagement with the effects of structural racism—simply lack the inspiration to develop truly innovative programs. Together, *Parents Involved* and *Ricci* express clear disdain for initiatives that try to wrestle with problems such as resegregation in public schools or residential areas which, at a surface level, appear to have more to do with individual choices and preferences, rather than identifiable government policies. “The way to stop discrimination on the basis of race,” Chief Justice Roberts declared in his *Parents Involved* plurality opinion, “is to stop discriminating on the basis of race.”⁶⁷

The only area of settled case law that remotely reflects the ethic of experimentation and innovation that I think we should be promoting in the race context relates to so-called race-neutral alternatives.⁶⁸ Because racial classifications of any sort raise serious concerns under existing doctrine,⁶⁹ the Court requires state actors to pursue race-neutral alternatives before utilizing racial classifications.⁷⁰ In writing the majority opinion upholding the University of Michigan Law School’s race-conscious admission program in *Grutter v. Bollinger*,⁷¹ Justice O’Connor explained what the mandate to consider alternatives entails:

Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups. . . . Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.⁷²

On the surface, the exhortation to engage in “good faith consideration of workable race-neutral alternatives” appears to be a call for experimentation.⁷³ But the reality is quite different. It has functioned, first and foremost, as a restraint on government decision making, rather than a license to innovate. In

66. See SPANN, *supra* note 12, at 192.

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

68. See *Boddie*, *supra* note 17, at 12-14 (discussing race-neutral alternatives and arguing that the Court’s *Ricci* decision did not change fundamentally what constitutes race-neutrality). *But see Adams*, *supra* note 17, at 858 (contending that *Ricci* arguably stands for the proposition that merely considering race can constitute race-conscious decision making).

69. See *Parents Involved*, 551 U.S. at 720 (plurality opinion).

70. See *Grutter v. Bollinger*, 539 U.S. 306, 339-40 (2003).

71. *Id.* at 306.

72. *Id.* at 339 (citation omitted).

73. *Id.*

Supreme Court affirmative action cases, programs have almost always been invalidated because conservative majorities have, from the bench, determined that government decision makers on the ground could have pursued additional alternatives before resorting to use of race-conscious measures.⁷⁴ *Grutter*, which approved the University of Michigan Law School's race-conscious admissions program even though the Law School had not first exhausted every possible race-neutral alternative,⁷⁵ represents a departure, at least in terms of outcome, from earlier cases that, as Chief Justice Roberts strongly signals in *Parents Involved*, the Court will likely not soon repeat.⁷⁶ At least in the near term, it seems that we can expect it to continue to ask government entities to engage in the shot-in-the-dark experimentation that the vague requirement that race-neutral alternatives be pursued encourages.

Justice Kennedy's much-discussed concurrence in *Parents Involved* arguably provides a better, though as of yet doctrinally indeterminate, avenue for greater creativity on the part of localities. Kennedy joined a majority of Justices in concluding, among other things, that the Seattle and Louisville school assignment programs at issue in *Parents Involved* were not narrowly tailored. He wrote a separate concurrence, however, to articulate a different conception of racial injury and the appropriate role of local governments in addressing inequality than that described in Chief Justice Roberts's plurality opinion.⁷⁷ First, Justice Kennedy expressed the position, shared by four dissenters, that "seek[ing] to reach *Brown's* objective of equal educational opportunity" constitutes a legitimate governmental purpose, a proposition Roberts squarely rejected.⁷⁸ More importantly for our purposes, he also specified a list of race-conscious decisions that, in his view, schools could make without invoking strict scrutiny—e.g., "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."⁷⁹ For Justice Kennedy, such initiatives carried no risk of racial injury because, although they require acknowledgement of race, they do not require officials explicitly to classify individuals on the basis of racial background.⁸⁰ He explained that, in his estimation, they are different in kind from programs

74. See Ian Ayers & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After Grutter and Gratz*, 85 TEX. L. REV. 517, 522 n.25 (2007) (listing cases where a failure to consider race-neutral alternatives was deemed problematic).

75. See *Grutter*, 539 U.S. at 340.

76. *Parents Involved*, 551 U.S. at 724-25.

77. Goodwin Liu, "History Will Be Heard": An Appraisal of the Seattle/Louisville Decision, 2 HARV. L. & POL'Y REV. 53, 66 (2008).

78. *Parents Involved*, 551 U.S. at 788 (Kennedy, J., concurring). See *id.* at 732-33, 747.

79. *Id.* at 789.

80. *Id.*

that expressly require the application of racial classifications, which, in his estimation, should be subject to the most exacting scrutiny.⁸¹

It remains to be seen whether the kind of initiatives Justice Kennedy envisions will be adopted on a large scale by local officials or, for that matter, how they will be received by his colleagues on the Court. It certainly seems likely that the *Parents Involved* dissenters would agree with Justice Kennedy on a limited basis, even as they push for less constrained local decision making in this area. Even so, for someone that, as I do, envisions a broader—though, importantly, not unfettered—berth for “equality innovators,” Justice Kennedy’s proposal represents only a limited solution to an exceedingly complex problem.

III. STRUCTURAL APPROACHES TO RACIAL INEQUALITY

The previous Parts admittedly paint a rather grim picture of current doctrine and the constraints that it places on localities interested in adopting strategies to address structural racial inequalities. Legal scholars have proposed attractive alternatives to the Court’s current approach to race.⁸² For prospective local “equality innovators, however, the question, is whether, in the current moment, when the adoption of such alternatives seems unlikely, room exists to adopt creative approaches to the structural problems that attend the color line in their jurisdictions.

This Part answers that question in the affirmative. In an effort to encourage equality innovation, it seeks to identify the opportunities for experimentation and change that exist, notwithstanding the real limitations posed by current doctrine. This Part begins by briefly discussing innovative regulatory devices focused on the mechanisms through which structural racial inequality endures in the United States. It then outlines a proposal for the creation and implementation of an evaluative measure called the race audit that could productively be deployed by local jurisdictions. First developed in an article in the *Hastings Law Journal*,⁸³ the race audit proposal seeks to be responsive to legal scholarship on structuralism and to the growing chorus of scholars who maintain that research emphasizing the measurement of “discrimination from one point in time and in one domain” is simply “insufficient to identify the overall impact of discrimination on individuals.”⁸⁴

81. *Id.*

82. See, e.g., Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465 (2010) (behavioral realism); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) (cognitive bias); Lawrence, *supra* note 11 (unconscious racism); R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803 (2004) (racial stigma).

83. See Lenhardt, *supra* note 3.

84. PANEL ON METHODS FOR ASSESSING DISCRIMINATION, NAT’L RESEARCH COUNCIL, MEASURING RACIAL DISCRIMINATION 246 (Rebecca M. Blank, Marilyn Dabady & Constance

A. Existing Regulatory Innovations

As previously noted, structuralist accounts of race and inequality focus on the cumulative effects of systems and structures that, over time, work to reinforce racial disadvantage.⁸⁵ Existing regulatory devices in the race context, however, still typically retain a focus on intentionality.⁸⁶ For example, widely deployed tools such as housing audits, which collect 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,⁸⁷ generally have uncovering intentional discrimination as their primary goal.

This said, noteworthy local, state, and federal regulatory initiatives reflecting structuralist insights exist. For example, at the state and local level, 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.⁸⁸ States such as Connecticut, Iowa, and Minnesota, for example, recently enacted legislation requiring impact statements to detail disparities in criminal sentencing.⁸⁹ Likewise, some localities have also adopted other similar devices to measure the possible effect of government action. These include educational impact statements or fair share provisions for siting public facilities, such as those that have been adopted by New York City.⁹⁰ A 2003 study of Mebane, North Carolina, and the cumulative effects of

F. Citro eds., 2004).

85. powell, *supra* note 21, at 796.

86. *Id.*

87. Douglas S. Massey & Rebecca M. Blank, *Assessing Racial Discrimination: Methods and Measures*, in FRAGILE RIGHTS WITHIN CITIES: GOVERNMENT, HOUSING, AND FAIRNESS 61, 69 (John Goering ed., 2007). Some research has also been completed in the area of home ownership. See Margery Austin Turner & Stephen L. Ross, *How Racial Discrimination Affects the Search for Housing*, in THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA 81, 83-85 (Xavier de Souza Briggs ed., 2005).

88. Such statements take inspiration from environmental impact statements, which have become prevalent in helping to assess the potential environmental impacts of proposed projects. See Amy L. Stein, *Climate Change Under NEPA: Avoiding Cursory Consideration of Greenhouse Gases*, 81 U. COLO. L. REV. 473 (2010) (discussing environmental impact statements).

89. See Catherine London, *Racial Impact Statements: A Proactive Approach to Addressing Racial Disparities in Prison Populations*, 29 LAW & INEQ. 211, 212-14 (2011).

90. See William Valletta, *Siting Public Facilities on a Fair Share Basis in New York City*, 25 URB. LAW. 1 (1993) (discussing city fair share provisions). Significantly, San Francisco passed an audit-like device focused on issues of gender in the 1990s in an effort to implement the United Nations Convention on the Elimination of All Forms of Discrimination Against Women. See Stacy Laira Lozner, Note, *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*

annexation, sewer placement, and highway relocation efforts also provides a very useful example.⁹¹

At the federal level, important models geared at structural inequality can also be found. The much-criticized federal No Child Left Behind Act (NCLB)—which requires public schools both to collect data on racial disparities and to develop strategies for reducing them—stands out as an important example.⁹² Other models can be found in juvenile justice provisions passed by Congress and even the recent stimulus act.⁹³

As I indicate elsewhere, however, programs now implemented by the Department of Housing and Urban Development (HUD) and the Department of Transportation (DOT) arguably provide the best examples of federal initiatives geared toward structural inequality.⁹⁴ HUD regulations—consistent with the “affirmatively furthering” requirement of the Fair Housing Act—currently require state and local grantees of consolidated civil rights programs to conduct, *inter alia*, an analysis of the impediments to fair housing choice and “comprehensive review of . . . [applicable] laws, regulations, and administrative policies, procedures, and practices” and their impact on “the accessibility of housing.”⁹⁵ DOT provisions seeking to ensure compliance with

United States, 150 U. PA. L. REV. 245, 245-46 (2001).

91. See CEDAR GROVE INST. FOR SUSTAINABLE CMTYS., ADDRESSING RACIAL DISPARITIES IN LOCAL GOVERNMENT ACTIONS: THE MEBANE CASE STUDY (2003), available at <http://www.cedargroveinst.org/files/mebanecase.pdf>.

92. Olatunde C.A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374, 417 (2007); 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, 1723 (2003); ; 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).

93. See Olatunde C.A. Johnson, *Stimulus and Civil Rights*, 111 COLUM. L. REV. 154, 193 (2011). The Juvenile Justice and Delinquency Prevention Act (JJDP) requires 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.” Johnson, *supra* note 92, at 378. 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. *Id.* at 379.

94. Lenhardt, *supra* note 3, at 27.

95. 1 U.S. DEP’T OF HOUS. AND URBAN DEV., HUD-1582B-FHEO, FAIR HOUSING PLANNING GUIDE, at 2-7 (1996), available at <http://www.hud.gov/offices/fheo/images/fhpg.pdf>; Henry Korman, *Underwriting for Fair Housing? Achieving Civil Rights Goals in Affordable Housing Programs*, 14 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 292, 299 (2005). Section 3608 of the Fair Housing Act (FHA) requires that the Secretary “administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies” of that statute. 42 U.S.C. § 3608(e)(5) (2006). The FHA does not give content to the “affirmatively furthering” mandate, but has been interpreted broadly to include not only combating intentional discrimination in housing, but advancing integrative efforts capable of increasing opportunities and minimizing segregation in minority communities. See Michelle Ghaznavi Collins, Note, *Opening Doors to Fair Housing: Enforcing the Affirmatively Further*

the nondiscrimination mandate of Title VI of the Civil Rights Act of 1964 engage funding recipients in a similar inquiry into the possible sources of inequity.⁹⁶ Applicable regulations contemplate, among other things, an in-depth inquiry into “significant system-wide service and fare changes and proposed improvements . . . to determine whether those changes have a discriminatory impact” on minority communities.⁹⁷ These programs stand out for the deep, multi-pronged inquiry into the sources of inequality that they facilitate. Also significant, for our purposes, is the extent to which they regard local jurisdictions as important partners in efforts to eliminate barriers to substantive racial equality and opportunity.

B. A Modest Proposal: The Race Audit Device

This Part outlines an evaluative mechanism called the race audit. The audit proposal reflects structuralist and experimentalist insights, but also draws on business management scholarship on corporate social responsibility and “social audits.” Notably, this scholarship has not only conceived of such devices as tools for, *inter alia*, evaluating the performance of corporate entities along vectors such as mission, environmental impact, or contributions to social change.⁹⁸ It has sometimes also understood them to be mechanisms for generating empirical knowledge relevant to conversations about the conditions necessary for “the good life.”⁹⁹

The purpose of the race audit proposal, which reflects a similar understanding, is to provide empirical information about the operation of race, at a structural level, in particular jurisdictions. Unlike existing regulatory devices, which typically focus on a single area, it envisions a multi-domain—e.g., education as well as housing or employment—inquiry into the extent to which local systems and structures, to include public entity entanglements with private entities, have contributed to ongoing racial disparities and spatial

Provision of the Fair Housing Act Through 42 U.S.C. § 1983, 110 COLUM. L. REV. 2135, 2143 (2010).

96. U.S. DEP’T OF TRANSP., FTA C 4702.1A, TITLE VI AND TITLE VI-DEPENDENT GUIDELINES FOR FEDERAL TRANSIT ADMINISTRATION RECIPIENTS, at II-1 (2007), available at http://www.fta.dot.gov/documents/Title_VI_Circular_4702.1A.pdf.

97. *Id.* at V-5. Millions of dollars in stimulus funds were recently denied to Bay Area Regional Transit after an administrative Title VI action brought by community activists demonstrated that the agency had not adequately considered an extension project’s environmental impact and service to minority communities. Johnson, *supra* note 93, at 193.

98. See Homer H. Johnson, *Corporate Social Audits—This Time Around*, 44 BUS. HORIZONS 29, 32 (2001); see also Archie B. Carroll & George W. Beiler, *Landmarks in the Evolution of the Social Audit*, 18 ACAD. MGMT. J. 589, 590-96 (1975).

99. See Craig Mackenzie, *Ethical Auditing and Ethical Knowledge*, 17 J. BUS. ETHICS 1395, 1397 (1998); see also Lenhardt, *supra* note 3, at 49. This focus aligns nicely with a focus on Democratic experimentalism. See Brandon L. Garrett & James S. Liebman, *Experimentalist Equal Protection*, 22 YALE L. & POL’Y REV. 261 (2004).

segregation. In generating information, the race audit—which could be utilized by single localities or by a group of localities seeking regional solutions to inequality within a broad regional area—will offer a narrative about the source of racial disadvantage in our communities very different from that now generated by tools focused on intentional discrimination.¹⁰⁰ It will also complement exciting work on opportunity mapping and other similar efforts to identify the exact dimensions of inequality,¹⁰¹ as well as point to new strategies that might be deployed at the local level to more effectively address durable racial inequality.

Under the proposal, local governments interested in understanding and possibly developing innovative solutions to persistent racial inequality within their borders would voluntarily commission a race audit. Audit implementation would not, however, be solely their responsibility. Instead, I envision the audits being conducted by “communities of inquiry,” in conjunction with local officials and community leaders.¹⁰² In essence, a locality would invite community leaders and a wide range of stakeholders to participate in developing and implementing the audit process, something that would help to ensure its integrity and the accountability of those involved. As I have previously explained, academics—e.g., law professors, but also historians, sociologists, urban planners, and philosophers—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.¹⁰³ Community groups, civil rights organizations and other non-governmental organizations, philanthropic entities, businesses, religious organizations, and the officials and employees of local agencies would also be essential participants.¹⁰⁴ At some level, the audit committee would function like the civil equivalent of a citizens’ grand jury.¹⁰⁵ In conducting its affairs, the “community of inquiry” would, of course, be attuned to any information regarding intentional discrimination. But, such information would not be the primary target of auditing efforts. Obtaining evidence pertaining to systems or procedures that create and perpetuate cumulative racial disadvantage sits highest atop the priorities to be served by the race audit.

100. Lenhardt, *supra* note 3, at 8.

101. See KIRWAN INST., *supra* note 52.

102. See Mackenzie, *supra* note 99, at 1399-1400; see also Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 HARV. J. L. & GENDER 247, 294 (2006) (discussing the importance of productive collaborations in thinking about workplace diversity in higher education).

103. See Kavasseri V. Ramanathan, *Toward a Theory of Corporate Social Accounting*, 51 ACCT. REV. 516, 526 (1976); see also Lenhardt, *supra* note 3, at 41-42.

104. See Lenhardt, *supra* note 3, at 41-42.

105. See Kevin K. Washburn, *Restoring the Grand Jury*, 76 FORDHAM L. REV. 2333 (2008) (discussing the importance of grand juries and ideas for reforming the current grand jury system).

In the first instance, the stakeholders on the audit committee would—as a way of “arriv[ing] at an operational definition of the role of a . . . [locality] in its broader social context”¹⁰⁶—establish, through a process of experimentation and negotiation, a set of audit criteria and objectives responsive to the unique social context of the jurisdiction.¹⁰⁷ While the criteria and objectives utilized would necessarily vary by jurisdiction, macro-level criteria would give some indication of what we think local governments should be doing in the area of race.¹⁰⁸ They might, for example, institute an inquiry along the following lines:

- To what extent do/have the local government’s spatial arrangements and policies impede/d the ability of racial minorities fully to realize opportunities in areas such as education, employment, housing, health, and intimacy?
- What are the intergenerational wealth, social capital, and participation effects of the local government’s past and present structures and systems?¹⁰⁹

Micro-level criteria would, in contrast, emphasize factors necessary to determine how specific agencies have performed along certain vectors. Consider this small sample:¹¹⁰

- Have agency procedures, policies, and/or decision making worked, intentionally or unintentionally, to exclude racial minorities economically, socially, spatially, or politically?
- Have agency procedures, policies, and/or decision making 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?¹¹¹

Finally, the audit objectives identified by the “community of inquiry” would draw on assumptions embedded in the criteria just identified.¹¹² Such objectives might include:

- To 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.
- To provide a formal account of the structural dimensions of

106. Ramanathan, *supra* note 103, at 518.

107. *See id.* at 518-19.

108. *Id.* at 518; *see also* Lenhardt, *supra* note 3, at 22.

109. Lenhardt, *supra* note 3, at 22. For a more comprehensive set of criteria, *see id.* at 22-23.

110. *See id.* at 22-23 (discussing similar micro-level criteria in social accounting context).

111. *Id.*

112. *Id.* at 23.

racial inequality and disadvantage within the local government over time that can be distributed to local stakeholders and constituents in multiple forms.¹¹³

Having determined the objectives and criteria for the evaluation process, the audit team would then collect and analyze historical documents, surveys, maps, demographic information, interviews, empirical data, and administrative regulations, among other things.¹¹⁴ 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. As I intimated previously, I envision the race audit serving as a vehicle for increased knowledge about the locality and the operation of race within its borders.¹¹⁵ Audit committee members would effectively be tasked with developing a theory of race in the area and the particular causes of “categorical inequality” in the jurisdiction.¹¹⁶ That theory would offer a way of tracing 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.¹¹⁷

Likewise, it would enable efforts to determine with some level of specificity the exploitative effects of categorical racial stratification.¹¹⁸ So, an individual city-level inquiry might result in a public report or presentation to core constituent groups within the relevant city or state that documents how racial violence or racial covenants restricting racial minorities to particular areas within a metropolis decades before might, because of various zoning decisions made on the basis of residence, account for the concentration of landfills or hazardous waste facilities within minority neighborhoods.¹¹⁹ A regional inquiry—which would highlight even more the extent to which racial segregation is “perpetuated by the social and political construction of racially identified political space”¹²⁰—might reveal the ways in which suburban communities utilized exclusionary zoning rules that locked minorities in declining inner-city neighborhoods and under-resourced schools, and facilitated the use of discriminatory practices by private entities such as realtors or businesses.¹²¹

113. *Id.*

114. See Mackenzie, *supra* note 99, at 1397-98.

115. See Sturm, *supra* note 102, at 290-92.

116. See Mackenzie, *supra* note 99, at 1397-98.

117. TILLY, *supra* note 21, at 92-98.

118. See Lenhardt, *supra* note 3, at 19-20 (discussing Tilly’s and Massey’s work on durable inequality).

119. See *id.* at 31.

120. Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1849 (1994).

121. See Lenhardt, *supra* note 3, at 36.

In sum, the audit process just described would have many advantages. While it envisions localities at the center of efforts to grapple with the effects of structural racial inequality, it leaves room for meaningful partnerships with other entities, including states and the federal government. As Subpart III.C. explains, both state and federal agencies could be an important source of funding for race audit initiatives. States will likely also be instrumental in ensuring that localities have the governmental powers necessary to conduct the audit.¹²²

C. Developing Better Solutions for Structural Racial Inequality

The previous Subpart provides only a very cursory picture of the race audit process. Elsewhere I describe what this process might involve in greater detail, noting, among other things, the role that states and the federal government might play in empowering localities to implement the race audit proposal.¹²³ Still, even this snapshot hopefully helps to make clear some of the benefits of the model I set out. It underscores the opportunities for meaningful change and innovation in the race context.

For decades now, the focus in the area of civil rights has largely been on national solutions to racial inequality, particularly those driven by federal courts, but without any long-lasting returns. The race audit breaks this unproductive reliance by pivoting away from the national to the local, and from a focus on the intentionality emphasized in current court doctrine to structural concerns.¹²⁴ Importantly, though, it achieves this shift without necessitating the adoption of a new theory of or approach to equal protection. The race audit, I submit, holds promise in part because it achieves meaningful innovation in thinking about the sources of persistent racial inequality while safely navigating within the boundaries of the current doctrinal landscape. Because it does not draw classifications on the basis of race in its implementation, the audit device does not run afoul of the strict scrutiny doctrine or the color-blindness norms that undergird it.¹²⁵ While there is some sense in which the proposed mechanism's purpose—understanding the sources of structural inequality—is deeply entangled with matters of race, this fact, as Justice Kennedy's concurrence in *Parents Involved* and recognition of remedying racial isolation as compelling interest makes clear, does not prove fatal under current doctrine.¹²⁶ Indeed, were it to be deemed so, any number of governmental programs requiring the collection of data on race and racial

122. See *id.* at 38 (discussing in greater detail the role that state and federal governmental agencies might play in supporting race audit efforts).

123. See *id.*

124. *Id.* at 29.

125. See *id.* at 39.

126. Boddie, *supra* note 17, at 2-3, 10.

minorities, including the HUD and DOT programs described above, would arguably be in jeopardy.¹²⁷

Even more, the race audit opens the door to rethinking existing strategies not just to map but actually to address racial inequality. Implementation of the race audit model I propose does not mandate that a locality take the additional step of developing solutions for any problem the audit process might uncover. The race audit may be conducted solely for the truth telling and knowledge it promotes. This said, an audit likely would point to interventions that could interrupt the processes leading to racial stratification in productive ways. As other scholars have noted, we can learn a great deal about what is necessary to achieve inclusion by learning about the mechanisms for exclusion.¹²⁸

In thinking about potential strategies, the temptation will be to focus solely on the question whether race audits would provide sufficient evidence of discrimination to justify the consideration of race by a local government. The question, while important, misses one of the advantages of the race audit mechanism. By looking closely at the macro and micro operations of race in a given jurisdiction, the race audit will help to identify the inequality-reinforcing systems and procedures of the locality. In so doing, it will also help to determine specific, race-neutral interventions that can be adopted by individual cities or multiple localities within a regional area to interrupt the structural processes that foster inequality.¹²⁹ Such strategies would arguably find support from Justice Kennedy and other justices, perhaps even some of those who emphasized the dangers of race-conscious decision making in *Parents Involved* and *Ricci*.¹³⁰

Targeted strategies mean that, rather than experimenting blindly with such alternatives, as the Court's cases encourage, local governments can come up with solutions to address identified problems. So, if a city's race audit determines that reliance on landfill siting factors such as the low cost of property or low population density has, in fact, contributed to cumulative disadvantage, officials can resolve to identify different factors.¹³¹ Perhaps they will consider whether a community has its "fair share" of such facilities or what kinds of decisions would promote growth in areas of segregation.¹³² Ultimately, they might conclude that race-conscious measures are necessary.

127. See Lenhardt, *supra* note 3, at 42-43.

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

129. See Lenhardt, *supra* note 3, at 42.

130. Lenhardt, *supra* note 3, at 40-41.

131. LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 70-73 (2001) (discussing factors contributing to overrepresentation of hazardous waste sites in minority communities).

132. See David Troutt, *Katrina's Window: Localism, Resegregation, and Equitable Regionalism*, 55 BUFF. L. REV. 1109 (2008) (discussing fair share housing programs).

But the point is that, with the race audit, such measures need not be the first stop in attempting to remedy structural inequality. Localities can experiment with other measures that have the potential not only to boost their bottom line,¹³³ but also change, consistent with what I argue in the previous Subpart, the understanding of what membership in their community means.

The race audit could also help to improve approaches to race-conscious remedies and voluntary programs. It would help localities develop more thoughtful remedial strategies. Where a jurist seems at least to be open to entertaining the constitutionality of some race-conscious decision making, the knowledge that a strategy was devised in accord with information from a detailed, community-sponsored investigatory process might quell misgivings about whether it uses race too much or too little to be regarded as thoughtful for narrow tailoring purposes.¹³⁴ The race audit introduces a heightened level of precision to the development of race-conscious strategies that will only benefit governmental initiatives in this area.¹³⁵

D. Strengthening Local Incentives for Innovation

Even those intrigued by the race audit concept might be skeptical about the willingness and ability of localities to implement it. Audit implementation will, at a minimum, be quite involved and may reveal information that could, in limited circumstances, expose the locality to potential liability.¹³⁶ It would be

133. WEISSBOURD, *supra* note 14, at 4-5.

134. Lenhardt, *supra* note 3, at 42.

135. *Id.* at 42. Significantly, implementation of the race audit might also have the added benefit of “nudging” courts to rethink aspects of current doctrine. In particular, the information about the systems and procedures that produce and sustain racial inequality might be relevant to conversations about “societal discrimination.” As previously noted, the Supreme Court has dismissed societal discrimination, which also focuses on racial inequity, as too amorphous a concept to satisfy doctrinal requirements pertaining to matters such as causation. *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). By helping to uncover the sources and concrete effects of structural inequality, however, the race audit might actually provide additional content to the notion of societal discrimination. Of course, it seems unlikely that the conservative majorities that have won the day in recent cases will be open to retreating on the Court’s earlier position with respect to this problem. But there are ways in which race audit data will make it more difficult to tow this line without engaging more directly the ways in which government policies and practices might bear on racial inequality.

136. The scope of any liability that a locality might face is arguably limited. For better or for worse, the vast majority of claims that might be brought against a jurisdiction for intentional discrimination will be time barred. *See* Suzzette Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68, 70-71 (2010). It will primarily only be evidence of current discrimination that will expose localities to liability under existing law. Because such exposure has not been a disincentive to local participation in initiatives such as the “AI” process sponsored by HUD, it seems unlikely to prevent a large number of jurisdictions from considering race audit implementation seriously. And, as I have previously suggested, where potential liability does

easy to assume that these issues, along with the cost of the audit process, will necessarily dissuade localities from electing to conduct the race audit. But doing so would be a mistake.

As I have previously argued, the assumption that localities will be unwilling to be proactive in addressing the structural racial inequality ignores two important realities.¹³⁷ First, contrary to what the typical incentives argument suggests, it simply is not the case that the negative externalities of persistent racial inequality flow only to minorities. They also affect local governments. In many ways, the performance of local functions occurs on a stage set by racial disadvantage. Localities appreciate this and understand that, if they are to be effective in carrying out their mission, they must find ways to deal with the extent to which persistent racial inequality affects everything from public education to community development efforts.¹³⁸ Second, as Part III attests, the truth is that many localities have already involved themselves in efforts to address racial inequity.¹³⁹ Jurisdictions like Seattle and even New Haven are deciding to throw themselves into the fray, to experiment actively with possible solutions, even if it means risking exposure to liability. And the reason this is so has to do with more than the individual calculus that a locality might make about the risk.

Localities—whether urban, suburban, or rural—have real incentives to try to experiment with solutions to the inequality that affects their citizens.¹⁴⁰ Some of these relate to their economic interests. While, as I have already acknowledged, race audit implementation will not be without cost, what one must keep in mind here is that the kind of racial disadvantage with which localities must contend also carries concrete costs.¹⁴¹ Research conducted by Robert Weissbourd and others has begun to document such costs.¹⁴² Even more, this research underscores the fact that developing successful strategies to eliminate the effects of racial inequality and disadvantage can actually serve to improve a locality's financial situation.¹⁴³

Other incentives relate to compliance with existing racial norms. Even where they have little fear of violating existing law, localities have strong reasons to signal to their residents and potential residents, as well as other localities, that they take issues of race and equality seriously.¹⁴⁴ At a normative

begin to dissuade jurisdictions from electing to conduct the race audit, states or the federal government could opt to provide limited immunity for any official discrimination revealed as a consequence of the audit process. See Lenhardt, *supra* note 3, at 38-39.

137. See Lenhardt, *supra* note 3, at 43-45.

138. See *id.*

139. See *supra* pp. 279-81.

140. Lenhardt, *supra* note 3, at 44-45.

141. *Id.* at 45.

142. See WEISSBOURD, *supra* note 14, at 5.

143. *Id.* at 4.

144. See Lenhardt, *supra* note 3, at 44.

level, a jurisdiction could reasonably conclude that, in the twenty-first century, when the first African American President sits in the Oval Office, it should make clear its awareness of and sensitivity to matters of race. Certainly, there will be those jurisdictions where problems of racial discrimination still arise.¹⁴⁵ Indeed, there may also be those that subtly promote racial exclusivity by subsidizing the development of gated communities and the like.¹⁴⁶ But I submit that we will be hard pressed to find many that openly celebrate their hostility to racial minorities in the way that a Birmingham or Jackson did a generation ago. Many jurisdictions will find it important at least to project compliance with existing race norms.¹⁴⁷ At a minimum, some jurisdictions will conclude that doing so might give them a competitive edge in attracting new residents, including those who might add to racial diversity within their borders.¹⁴⁸

Significantly, the race audit proposal advanced above not only takes account of incentives such as these, but could actually work to enhance them. At present, we are operating at an innovation deficit when it comes to solutions to inequality. As previously indicated, the emphasis placed on race-neutral alternatives has not produced the experimentation and change one might hope for in addressing persistent racial inequality.¹⁴⁹

The race audit responds to this situation by making clear that productive experimentation and change is still possible, despite the limitations of current doctrine. Jurisdictions, I argue, would likely be encouraged by evidence about a tool that could be deployed to identify and possibly address the sources of such inequity without running afoul of existing law. I would hope that there would be some that would adopt the proposal advanced here. But there might be others that would be inspired simply to develop their own new strategies, something that, in my view, would prove equally beneficial.

Beyond this, the race audit offers opportunities for strengthening the financial incentives that localities have for innovation in the race area. Earlier I emphasized the incentive that a city or other locality, armed with data about the costs of inequality, might have to adopt programs designed to eliminate persistent racial inequality. But one can imagine localities being responsive to other economic incentives, as well. In Subpart III.B., I noted the role that states or the federal government might play in supporting localities in the race audit

145. See, e.g., Johnson, *supra* note 15 (discussing racially discriminatory police-run drug stings in Tulia, Texas).

146. See Mona Lynch, *From the Punitive City to the Gated Community: Security and Segregation Across the Social and Penal Landscape*, 56 U. MIAMI L. REV. 89 (2001).

147. Lenhardt, *supra* note 3, at 45.

148. Interestingly, jurisdictions such as Shaker Heights, Ohio, and Maplewood and South Orange, New Jersey, have previously used incentive programs to attract residents and enhance racial diversity. See Eleanor Novek, *Sidebar: The Value of Integration*, SHELTERFORCE, Mar.-Apr. 2001, available at <http://www.nhi.org/online/issues/116/PRISM.html>.

149. See Lenhardt, *supra* note 3.

process. One could easily imagine government or philanthropic programs that provide direct support for race audit processes or, alternatively, that seek to incentivize race audit implementation or innovation more broadly. Think, for example, about the “Race to the Top” initiative that the Obama Administration recently launched to encourage innovation in public schools.¹⁵⁰ That popular program incentivized “systemic” approaches designed to “creat[e] the conditions for education innovation and reform” by encouraging states to compete for financial grants to be paid from approximately \$4.35 billion in stimulus funds.¹⁵¹ Localities could be encouraged to implement race audits or other similar measures in much the same way.¹⁵² A properly structured program could enhance local incentives for innovation without requiring any compromises on the quality of the initiatives proposed by localities.¹⁵³

CONCLUSION

For too long now, we have looked almost exclusively to courts for creative solutions to the myriad problems that attend the American color line. This Article has outlined the case for bringing cities and other localities to the center of efforts to think deeply about the structural dimensions of racial inequality. The race audit proposal described here provides one window on what a world in which this goal has been accomplished might look like.

For reasons already articulated, I think that the proposal advanced is a sound one with many potential benefits. Admittedly, though, this particular forum has not made it possible to explore potential concerns about the audit mechanism as fully as I have elsewhere.¹⁵⁴ In addition to matters of scope and cost, reasonable concerns about the possibility that localities will abuse the authority afforded them under the audit proposal in ways that deepen, not minimize, racial disparities must be addressed. For good reasons, many will find it difficult to excise the images of a 1960s Birmingham from their minds. While not unsympathetic to such concerns, I find, as previously intimated, comfort both in the existence of civil rights laws that were nonexistent when Bull Connor attacked defenseless civil rights protesters and in the recognition that the opportunities for abuse under the race audit are arguably no greater than those that obtain in the many other contexts in which we permit localities

150. See Lenhardt, *supra* note 3, at 10.

151. U.S. DEP’T OF EDUC., RACE TO THE TOP EXECUTIVE SUMMARY 2 (Nov. 2009), available at <http://www2.ed.gov/programs/racetothetop/executive-summary.pdf>.

152. See Brian Galle & Joseph Leahy, *Laboratories of Democracy? Policy Innovation in Decentralized Governments*, 58 EMORY L.J. 1333, 1361 (2009) (concluding that financial incentives could help to minimize relevant externalities and ensure socially efficient levels of government innovation).

153. See *id.* (noting, inter alia, that financial incentives might help to overcome barriers to innovation identified in the work of Susan Rose-Ackerman).

154. See, e.g., Lenhardt, *supra* note 3, at 46-48.

to make decisions regarding matters of race.¹⁵⁵ I acknowledge, however, that without the more fulsome account of the argument for the race audit, others might not.

Importantly, though, the primary point of the intervention made in this Article has not been to make the case for the race audit per se. Rather, it has been to support the general proposition that innovations in how we deal with persistent racial inequality can be achieved—something we barely allow ourselves to contemplate in the current doctrinal climate—and would have positive social and democracy-enhancing benefits. Further, I have tried to make the case that we need not, and arguably should not, rely exclusively on old civil rights frameworks in pursuing them. In this sense, this Article is part of a larger project to rethink the kind of commitments that underlie the strategies for addressing inequality in the twenty-first century that race scholars and civil rights advocates have embraced. I think it critical, for example, that race scholars and civil rights advocates reexamine implicit assumptions about the possibilities for reconciling principles such as equality and liberty. Fears about what local power might mean for civil rights have produced a very narrow focus on national, court-driven solutions for race. But it is not entirely clear to me that, particularly in the current context, local solutions should be so quickly overlooked.

Localities, because of their unique knowledge about how race is experienced at the community level and intimate involvement in processes at the heart of our democracy, have, as I have argued, the capacity to be important change agents in the area of race.¹⁵⁶ The race audit proposal advanced in this Article represents just one of arguably many ways that localities, if permitted and sufficiently inspired, can be instrumental in both identifying and remedying more effectively cumulative racial disadvantage. It helps to make clear that localities can be important “equality innovators” in their own right. In making this assertion, I mean to suggest not only that localities could be instrumental in helping us to resolve racial disparities, but also that they might be productively engaged in sharpening the stories we tell about how race operates in our society. They might also be enlisted to help encourage community-level conversations focused on providing greater content to core concepts like equality.¹⁵⁷ Such discussions could produce attractive substantive alternatives to the very thin, formalistic account of equality advanced in recent Supreme Court cases. As other scholars note, some precedent for including localities in constitutional interpretation of this variety exists.¹⁵⁸ Even more, after decades of relying on courts alone for answers about how best to address

155. *Id.* at 46.

156. *See id.* at 49.

157. *See id.*

158. *See* David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 572 (1999).

the color line, I submit that the prospect of generating democratic conversations about race and the meaning of belonging in our society at the local level should be very attractive indeed.