

2011

Stimulus and Civil Rights

Olatunde C.A. Johnson
Columbia Law School, olati.johnson@law.columbia.edu

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship



Part of the [Civil Rights and Discrimination Commons](#), [Law and Economics Commons](#), [Law and Race Commons](#), and the [Social Welfare Law Commons](#)

Recommended Citation

Olatunde C. Johnson, *Stimulus and Civil Rights*, 111 COLUM. L. REV. 154 (2011).
Available at: https://scholarship.law.columbia.edu/faculty_scholarship/104

This Essay is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact cls2184@columbia.edu.

ESSAY

STIMULUS AND CIVIL RIGHTS

Olatunde C.A. Johnson*

Federal spending has the capacity to perpetuate racial inequality, not simply through explicit exclusion, but through choices made in the legislative and institutional design of spending programs. Drawing on the lessons of New Deal and postwar social programs, this Essay offers an account of the specific features of federal spending that give it salience in structuring racial arrangements. Federal spending programs, this Essay argues, are relevant in structuring racial inequality due to their massive scale, their creation of new programmatic and spending infrastructures, and the choices made in these programs as to whether to impose explicit inclusionary norms on states and localities. Exploring these features has relevance for understanding the current stimulus. Key aspects of the stimulus entrench funding and programmatic structures that promote racial inequality, defer to states and localities rather than advance explicit civil rights rules and norms, and miss key opportunities to innovate to promote racial inclusion and equity.

Yet, this Essay argues that even with these limitations, the stimulus presents opportunities for civil society groups to learn from the lessons of New Deal and postwar programs by using the stimulus to promote racial inclusion and equality. Indeed, this Essay shows that the magnitude of the stimulus is generating a new set of laws and regulatory institutions designed to promote transparency and accountability in federal spending. These interventions, this Essay suggests, provide promise for interrupting the mechanisms through which federal spending perpetuates inequality, and for leveraging the stimulus to advance racial inclusion.

INTRODUCTION	155
I. SPENDING'S POWER: LESSONS FROM HISTORY	159
A. Scale	160
B. Embedding Racial Inequality	162
C. Structuring Citizenship	165
II. THE STIMULUS MOMENT: REPEATING HISTORY?	172
A. Overview of the Stimulus	172
1. Housing	174

* Associate Professor of Law, Columbia Law School. For helpful conversations and for suggestions on earlier versions of this paper, I am grateful to Michelle Adams, Richard Banks, Ariela Dubler, Richard Thompson Ford, Rachel Godsil, Abbe Gluck, Jill Hasday, Pamela Karlan, Robin Lenhardt, Gillian Metzger, Myron Orfield, Nathaniel Persily, Deborah Rhode, Susan Sturm, and participants in the junior faculty workshop at Columbia Law School, the Stanford Law School Faculty Workshop, and the Public Law Workshop at the University of Minnesota. I am indebted to Pouya Bavafa, Diarra Guthrie, Adia Gross, Stephen Hayes, Zoe Pershing-Foley, and Aslihan Bulut of the Columbia Law Library for wonderful research assistance.

a.	Community Development Block Grant Program	174
b.	Homelessness Prevention and Rapid Re-Housing Program	175
c.	Neighborhood Stabilization Program	175
d.	Public and Low-Income Housing and Rental Subsidies	175
2.	Transportation	177
3.	Education	177
a.	State Fiscal Stabilization Fund	177
b.	Race to the Top Fund	178
c.	Additional Education Provisions	179
B.	Stimulus and Equity	180
1.	Scale	180
2.	Structuring Citizenship	180
3.	Embedding Inequality?	184
C.	Implications	186
III.	STIMULUS AS CIVIL RIGHT	187
A.	Antidiscrimination Baseline	189
B.	Duties to Affirmatively Further	193
C.	Spending and Racial Inclusion	197
1.	“Transparent” Spending	197
2.	Civil Rights Accountability	200
a.	Broadening Equity Metrics	200
b.	Structuring Citizenship	202
c.	Increasing Visibility	203
CONCLUSION	205

INTRODUCTION

The 2009 federal stimulus package, formally known as the American Recovery and Reinvestment Act of 2009 (ARRA, or the Recovery Act),¹ has sparked debates akin to those that occurred during the New Deal.² Most pronounced have been discussions about federal spending’s capac-

1. Pub. L. No. 111-5, 123 Stat. 115 (2009).

2. During this period, public leaders and policymakers disagreed on the economic benefits of increased federal spending. See James T. Patterson, *Congressional Conservatism and The New Deal* 133, 234 (1967) (describing New Deal advocacy in favor of increased federal spending to stimulate economic recovery); *id.* at 140–41, 189, 298 (describing congressional and public resistance to relief spending and to federal intervention in private markets). New Deal social welfare programs also provoked debates on the proper role of the federal government in providing and administering social insurance. See Robert C. Lieberman, *Shifting the Color Line: Race and the American Welfare State* 28 (1998) [hereinafter Lieberman, *Color Line*] (describing southern skepticism of federal intervention through provision of social security); Ann Shola Orloff, *The Political Origins of America’s Belated Welfare State*, in *The Politics of Social Policy in the United States* 37, 70–71 (Margaret Weir et al. eds., 1988) (describing political resistance to federal centralization of social insurance programs).

ity to reignite an economy in recession,³ but commentators have invoked other parallels. Much as during the time of the New Deal, some commentators and state officials have argued that the massive stimulus spending effort—the biggest infusion of federal funds to states since the New Deal—rewrites federal-state relations.⁴ States' rights arguments may have proved short-lived: Only a few states appear to be refusing federal stimulus money, and state legislative sovereignty measures to resist the stimulus have largely faltered.⁵ Yet, the sheer amount of new federal money provided to states under the stimulus, and the conditions attached to some of these federal funds, raise questions about the federal government's expanding power to shape, through spending, a broad set of institutional arrangements at the state and local levels.⁶

3. Compare Cong. Budget Office, *Estimated Impact of the American Recovery and Reinvestment Act on Employment and Economic Output from October 2009 Through December 2009*, at 1–2 (2010), available at www.cbo.gov/ftpdocs/110xx/doc11044/02-23-ARRA.pdf (on file with the *Columbia Law Review*) (finding stimulus added between 1 million and 2.1 million jobs in fourth quarter of 2009 and GDP was between 1.5% and 3.5% higher than it would have been in absence of stimulus package), and Council of Econ. Advisors, Exec. Office of the President, *The Economic Impact of the American Recovery and Reinvestment Act of 2009, Second Quarterly Report 1–2* (2010), available at <http://www.whitehouse.gov/sites/default/files/microsites/100113-economic-impact-arr-second-quarterly-report.pdf> (on file with the *Columbia Law Review*) (claiming stimulus package was responsible for boosting Gross Domestic Product (GDP) and lowering unemployment), with Karen Campbell, Ctr. for Data Analysis, Heritage Found., *Did the Stimulus Create Jobs? White House Economic Report Is Unclear 1–3* (2010), available at <http://www.heritage.org/Research/Reports/2010/02/Did-the-Stimulus-Create-Jobs-White-House-Economic-Report-Is-Unclear> (on file with the *Columbia Law Review*) (arguing White House's benchmarks for GDP and unemployment were arbitrary and claiming economic benefits were illusory).

4. See, e.g., William Yardley, *Bids to Push States' Rights Falter in Face of Stimulus*, *N.Y. Times*, May 8, 2009, at A14 (“Frustrated by federal policies like the bank bailout . . . they drafted so-called sovereignty resolutions, aggressive interpretations of states' rights outlined in the Tenth Amendment.”).

5. See *id.* (“With the recession sparing few corners of the country, the \$787 billion federal stimulus package has weakened the resolve of states' rights activists in legislatures across the country.”). The Republican Governor of Louisiana opposed the concept of a federal stimulus plan, and has particularly resisted stimulus funds to extend federal-state programs providing health care for the poor, including the uninsured and families moving from welfare to work, as well as expansions in unemployment insurance. See WDSU New Orleans, *Jindal Says 'No' to Health Care Stimulus Funds* (Mar. 31, 2009, 10:47 PM), at <http://www.wdsu.com/money/19057646/detail.html> (on file with the *Columbia Law Review*) (explaining Jindal's opposition to stimulus funds for extended Medicaid for welfare recipients who begin working and for increased amounts of money for hospitals treating a “disproportionate share” of poor and underinsured). The Governor's refusal to accept “disproportionate share” funding may not impact state residents as the state does not currently use its entire federal allocation under the program, and no cuts are expected in the program. *Id.*

6. See, e.g., Greg Hitt & Jonathan Weisman, *Congress Strikes \$789 Billion Stimulus Deal*, *Wall St. J.*, Feb. 12, 2009, at A1 (describing “economic-recovery package” as “one of the largest economic rescue programs since Franklin Roosevelt launched the New Deal”); Steven Mufson, *For Insight on Stimulus Battle, Look to the '30s*, *Wash. Post*, Feb. 12, 2009,

To date, however, commentators have focused little attention on a related parallel between the current stimulus effort and the New Deal: the power of each to produce and reproduce racial inequality. Indeed, while a handful of legal scholars have written compellingly about the racial impacts of New Deal programs,⁷ the civil rights impacts of federal spending programs have not been a core focus of legal commentary.

This omission may stem from legal commentary's relative inattention to the federal government as a source of racial harm. The canonical idea of the federal role in civil rights is not of federal government discrimination, but of federal power invoked against recalcitrant states, localities, and private parties.⁸ When legal commentators turn to the connections between federal spending and civil rights, it is generally to examine Congress's use of the Constitution's spending power to remedy racial discrimination, and the attendant doctrinal question of the limits of this power.⁹

Moreover, the question of how law relates to matters of federal spending and racial inequality is less than clear. Complex, messy, and at times contested, the role that federal social welfare and housing programs have played in embedding racial discrimination might seem better suited to historical examination than civil rights law's traditional understanding of fault and complicity. The federal government involves multiple actors and shared responsibility with states and localities. Its multifarious actions are not easily amenable to a legal framework that depends largely on notions of causation and intent.¹⁰ Looking for federal discrim-

at D01 (quoting then-Chairman of Council of Economic Advisors Christina Romer's statement that "current stimulus is much bigger than anything Roosevelt tried").

7. See, e.g., William E. Forbath, *The New Deal Constitution in Exile*, 51 *Duke L.J.* 165, 203–17 (2001) [hereinafter Forbath, *New Deal*] (discussing changes to New Deal legislation forced by southern Democrats and how these changes impacted African Americans); Deborah C. Malamud, "Who They Are—or Were": Middle-Class Welfare in the Early New Deal, 151 *U. Pa. L. Rev.* 2019, 2058–59 (2003) ("It is also undeniable that blacks did in fact face considerable discrimination when they applied for benefits."). Historians and political scientists have produced a wealth of scholarship on the question of the racializing effects of the New Deal and other federal programs. E.g., Ira Katznelson, *When Affirmative Action Was White* (2005).

8. Cf. Voting Rights Act of 1965, 42 U.S.C. §§ 1973–1973bb-1 (2006) (prohibiting states from engaging in discriminatory voting practices); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (prohibiting discrimination by private employers); Fair Housing Act of 1968, 42 U.S.C. §§ 3601–3631 (prohibiting discrimination in sale, rental, or financing of residential real estate); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (prohibiting disability discrimination by both public and private entities).

9. See generally Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 *Duke L.J.* 345 (2008) (predicting indirect attempts by Roberts Court to limit Congress's spending power); Michael Selmi, *Remedying Societal Discrimination Through the Spending Power*, 80 *N.C. L. Rev.* 1575 (2002) (arguing Congress can constitutionally enact affirmative action programs to remedy societal discrimination pursuant to its spending power).

10. See, e.g., *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (holding that proving intentional discrimination under equal protection requires that "the

ination through an equal protection lens may lead legal scholars to overemphasize explicit and official forms of discrimination, while overlooking the assortment of federal actions and inactions at the level of policy design and implementation that create more complex forms of inequality.¹¹

This Essay argues that the stimulus, much like the New Deal, makes plain federal spending's power to exacerbate racial inequality. Legal scholars have recognized that setting conditions on federal spending can serve as a powerful tool for requiring states, localities, and private parties to comply with national antidiscrimination rules.¹² But conditional spending is just one mechanism through which federal spending shapes equity outcomes. New Deal and postwar social programs expanded protections and opportunities for African Americans and other groups, but they also inscribed racial divisions that contributed to the stark racial inequities in wealth, labor market participation, and housing that continue today.¹³ This Essay argues that specific mechanisms in the legislative and institutional design of twentieth-century social programs—more than explicit categories of racial exclusion—allowed these federal spending programs to restructure state, local, and private institutions and to create new funding streams that led to racial inequality. This Essay contends that, in much the same way, significant aspects of the legislative design of the stimulus threaten to preserve and even deepen racial inequality.

At the same time, this Essay argues, the stimulus provides a powerful occasion for using federal funds to promote racial equity. Federal law now provides tools unavailable to racial reformers of the New Deal era for guiding how federal money is spent. Indeed, as a result of the legislative gains of the 1960s, federal spending has become a potent vehicle for advancing antidiscrimination norms. By conditioning spending, federal statutes prohibit intentional racial exclusion by federally funded grantees, and even impose affirmative duties on federal agencies and grantees to

decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group"); Ralph Richard Banks & Richard Thompson Ford, (How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality, 58 *Emory L.J.* 1053, 1095 (2009) (noting "near impossibility of invalidating legislative acts that are formally race neutral").

11. See, e.g., Richard A. Primus, *Bolling Alone*, 104 *Colum. L. Rev.* 975, 979, 1023–24 (2004) (contending that few equal protection cases arise against federal government because Congress and Executive hold same antidiscrimination norms as federal courts).

12. See, e.g., Bagenstos, *supra* note 9, at 350 (noting "liberal welfare and civil-rights state [is] built on conditional spending legislation").

13. Neighborhoods of intense racial segregation and poverty concentration tend to have lower quality schools. They also tend to be isolated from valuable employment opportunities as well as other resources that facilitate mobility. See Michael K. Brown et al., *Whitewashing Race: The Myth of a Color-Blind Society* 74–77 (2003) [hereinafter *Brown*, *Whitewashing Race*] (arguing black exclusion from postwar federal program for veterans significantly contributed to contemporary wealth and labor market inequality); Douglas S. Massey & Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* 148–85 (1993) (discussing role of housing barriers in "the perpetuation of the underclass").

attend to, and to interrupt, the varied and complex ways in which federal funds sustain racial inequality.¹⁴ These statutes are useful not only in litigation but also in allowing civil rights and equity groups to mobilize around the broad idea that government spending should not entrench or subsidize racial inequality.

Beyond antidiscrimination law, however, the stimulus reveals new mechanisms for advancing equity. Federal statutes require transparency in federal spending programs. New regulatory institutions at the federal, state, and local levels track stimulus spending. Recent technology allows governments and nongovernmental organizations to document and disseminate spending information to the broader public. These tools render the oft hidden racial impacts of federal spending visible and allow equity groups to map racial harms in compelling ways. Thus, the stimulus has potential, this Essay suggests, for engendering a new regulatory and advocacy framework for advancing racial equity through federal spending.

This Essay proceeds in three Parts. Part I argues that the history of twentieth-century housing and social welfare programs reveals that these programs achieved their harm not simply through explicit racial exclusion, but through a set of decisions about institutional design and structure that expanded and cemented racial inequality. This Part discusses three frames for understanding the complex ways in which federal spending structures racial arrangements. Part II argues that the stimulus risks repeating history. This Part shows how important design aspects of the stimulus's housing and transportation programs risk cementing and even expanding racial inequality by buttressing unequal twentieth-century funding and programmatic structures and by failing to impose affirmative civil rights and inclusion norms.

Part III argues that, through attention to implementation, the stimulus can serve as an important point for both governmental and nongovernmental organizations to use federal spending to promote racial equality. The Essay suggests that this will not happen primarily through court-enforced civil rights law, but instead as civil rights and equity groups build on new rules and regulatory entities created to promote transparency and accountability in implementation of stimulus programs.

I. SPENDING'S POWER: LESSONS FROM HISTORY

Civil rights commentary has not centrally focused on the connection between race and federal spending; yet it is increasingly clear from recent social science literature that federal grant programs in housing, transportation, and social welfare generated significant racial harms.¹⁵ Indeed, an explicit goal of recent historical accounts is to explain contemporary

14. See *infra* Part III.A–B.

15. See, e.g., Katznelson, *supra* note 7, at 142–43 (noting immense “damage to racial equity” caused by black exclusion from Social Security, veterans’ benefits, and other social

and existing patterns of racial inequality by recovering a history of discrimination in federal programs often omitted from standard civil rights narratives.¹⁶ By these accounts, the federal government's social security, housing, and transportation programs contributed greatly to contemporary and persistent disparities in wealth, and to current patterns of segregation and concentration of poverty.¹⁷

The aim in this Part is not to buttress the well-documented case that federal grant programs are a central source of racial harm.¹⁸ Rather, it is to understand the federal-level decisions and design choices that helped produce these harms. These harms, this Essay contends, are not simply the result of official or explicitly discriminatory acts, nor are they invidious or intentional in the way the law typically understands discrimination.¹⁹ Rather, they involve a range of federal-level decisions and inactions in program design and implementation that operate to exacerbate racial inequality. In what follows, this Essay provides a framework for understanding these mechanisms. Its contention is that federal spending programs are salient in producing racial inequality due to their massive scale, their creation of new programmatic and spending infrastructures, and through their failure to impose explicit inclusionary norms. As explicit racial exclusion is likely to be less dominant today than in the New Deal or postwar era, it is only by attending to how these mechanisms operated in the past that we can begin to understand the stimulus's power to structure racial outcomes today.

A. *Scale*

The most obvious reason to explore federal spending's impact on questions of civil rights and equality is no doubt its scale. The Recovery Act, for instance, provides more than \$787 billion of federal funds, including new funding for a range of infrastructure and social welfare programs.²⁰ Federal spending transfers resources to individuals, communi-

welfare programs); Massey & Denton, *supra* note 13, at 149–53 (documenting socioeconomic harm of residential segregation).

16. See Brown, *Whitewashing Race*, *supra* note 13, at 68–103 (showing effect of federal government's social welfare programs on persistent racial inequality). See generally Katznelson, *supra* note 7 (detailing history of African American exclusion from twentieth-century social security, military, and labor programs). Another motivation is to shift the theoretical basis for contemporary remedial and civil rights programs, like affirmative action. Arguing that inequality is both state-generated and the product of recent exclusions strengthens the empirical and moral bases for remedial action. See *id.* at 162 (proposing renewed program of affirmative action to both transcend race and rectify racial injustice).

17. See *supra* note 15 (citing sources discussing these effects).

18. See generally Katznelson, *supra* note 7 (detailing racially discriminatory effects of federal spending programs in the 1930s and 1940s).

19. See *supra* note 10 and accompanying text (noting legal framework often requires showing of causation and intent).

20. See *infra* Part II.A (detailing specific programs funded by Act and amounts reserved for those programs).

ties, states, and localities, with evident distributional consequences. One consequence is increased national power to influence state and local policies and programs.²¹ Increased federal spending in the postwar period in areas such as health, education, and income security provided new sources of financing for programs that serve vulnerable populations, and new federal power and responsibility in areas traditionally the domain of states and localities.²²

Scale also ensures far-ranging equity consequences from national level decisions on who to include and exclude. The most notorious example stems from the New Deal. The exclusion of agricultural and domestic workers from the Social Security Act of 1935 meant that sixty-five percent of black workers would be excluded from the pension program.²³ These occupational exclusions would remain in place until 1954, depriving African Americans of an important source of income and wealth formation.²⁴

Massive outlays of federal funds reshape policy and programs at the local level. The substantial new federal investment in housing and transportation in the postwar period funded highway programs, public housing construction, and suburban housing expansion, all of which helped produce the concentrated poverty and spatial segregation that persist today.²⁵ The programs that helped to cement racial housing segregation in the postwar era were made possible by federal funds, jointly administered and financed at the state and local levels. State and local governments used new federal funding streams from federal lending programs, urban renewal, and public housing to expand residential segregation.²⁶ In the North, this funding infrastructure served to deepen racialized housing

21. Federal grants have risen from less than one percent of states' GDP in the 1940s to about three percent of GDP since the 1970s. Daniel Klaff & Adam Lawton, *Conditional Spending and Other Forms of Cost Sharing* 32 fig.3 (Harvard Law Sch. Fed. Budget Policy Seminar, Briefing Paper No. 18, 2008), available at [www.law.harvard.edu/faculty/hjackson/ConditionalSpending_18\(rev\).pdf](http://www.law.harvard.edu/faculty/hjackson/ConditionalSpending_18(rev).pdf) (on file with the *Columbia Law Review*). Even more telling is the steep postwar rise in federal support in a few areas: education, income security, and health. See *id.* at 32 fig.2.

22. See Paul E. Peterson, *The Price of Federalism* 13–14 (1995) (asserting that through spending programs the federal government maintains some power over states even in areas of state control).

23. See Katznelson, *supra* note 7, at 43 (“Across the nation, fully 65 percent of African Americans fell outside the reach of the new programs; between 70 and 80 percent in different parts of the South.”).

24. See Melvin L. Oliver & Thomas M. Shapiro, *Black Wealth/White Wealth: A New Perspective on Racial Inequality* 40–41 (2006) (documenting how inequities in Social Security contributed to contemporary racial disparities in wealth).

25. See Massey & Denton, *supra* note 13, at 149–53 (“[T]he persistence of racial barriers [to integration] implies the systematic exclusion of blacks from benefits and resources that are distributed through housing markets.”).

26. See *infra* notes 33–37 and accompanying text.

patterns and, strikingly, throughout the South, *created* residential segregation for the first time.²⁷

B. *Embedding Racial Inequality*

Federal spending programs create new programmatic and funding structures that help sustain existing patterns of racial inequality. The segregative effect of twentieth-century housing programs provides an important example. In the public housing context, federal spending cemented patterns of discrimination and segregation in housing that existed before the federal funding stream. In the North, the executive branch's refusal to create housing opportunities for blacks in low-poverty suburbs reflected a norm that poor African Americans would be spatially segregated from whites of all classes.²⁸ Rampant private discrimination by whites, particularly in the North in the early part of the century, in the wake of the Great Migration, shaped the residential housing patterns upon which the federal government built.²⁹ In the North, this infrastructure served to expand and deepen racial housing patterns.³⁰ As the federal government became involved through urban renewal and the construction of low-income housing, resistance by state and local governments and white communities to the presence of blacks in white neighborhoods influenced decisions on where public housing was located.³¹

27. See Massey & Denton, *supra* note 12, at 42–53 (detailing role of federal programs in creating urban ghettos in South for first time). Residential patterns of segregation had been less pronounced in the South than in the North. See *id.* at 25–26, 41–42, 48–49 (comparing segregation levels and growth in southern cities with those in North). The federal government persuaded some states to enact legislation to provide states and localities with the legal authority to develop public housing. See Nathaniel Keith, *Politics and the Housing Crisis Since 1930*, at 28–29 (1973) (“When the PWA Housing Division wound up its activities in late 1937, 29 states had passed enabling legislation and 46 local housing authorities had actually been established.”).

28. See Arnold Hirsch, *The Last and Most Difficult Barrier: Segregation and Federal Housing Policy in the Eisenhower Administration, 1953–1960*, at 13–15 (2005) [hereinafter Hirsch, *Difficult Barrier*], available at <http://www.prrac.org/pdf/hirsch.pdf> (on file with the *Columbia Law Review*) (describing Eisenhower Administration's failures to address racial effects of housing policy).

29. See Massey & Denton, *supra* note 13, at 36–37 (detailing various forms of resistance to integrated housing).

30. See *id.* at 45–49 (discussing statistics showing increased residential segregation between 1930 and 1970).

31. See Hirsch, *Difficult Barrier*, *supra* note 28, at 38–39 (discussing failure of federal government to require local officials to adopt “workable plan” that would have allowed non-whites to be relocated in “outlying vacant land”); see also *id.* at 48 (describing adherence by housing agencies to pre-*Brown* policies and refusals which left “[t]he color line at the housing agencies . . . intact”); *id.* at 59 (detailing dynamic in which urban renewal displaced inner-city residents and sent them to public housing, resulting in radically changed racial demographics of public housing between 1948 and 1959); Massey & Denton, *supra* note 13, at 55–57 (detailing mobilization by white communities, city councils, and mayors to block construction of public housing in white neighborhoods and concluding that resulting segregation “in economic as well as social terms—was the direct result of an unprecedented collaboration between local and national government”).

The essential concept—that poor blacks lived in inner cities and that whites lived in suburbs—would provide the frame for mid-century policies in public housing and urban renewal. It is not simply that they would go unchallenged by federal policy, but that they would become the operative frame that guided federal policy. In the wake of *Brown v. Board of Education*,³² local authorities in the South exploited this new federal funding structure in housing to create segregatory living patterns that had not before existed.³³ Federal urban renewal and public housing policies thus institutionalized segregation, lending it new permanence.³⁴

A similar account can be found in the housing loan programs subsidized by the federal government.³⁵ Federal agencies, following patterns established by the private sector, institutionalized redlining, consistently undervaluing black and integrated neighborhoods for the purpose of making mortgage loans.³⁶ The redlining practices influenced federal loan decisions and those of private banks, and contributed to the deterioration of predominantly black urban neighborhoods.³⁷ Federal loans provided to veterans were particularly powerful forces behind the tre-

32. 347 U.S. 483 (1954).

33. Massey & Denton, *supra* note 13, at 52–53 (arguing government policies were “responsible for a much larger and more significant disinvestment in black areas by private institutions”). Residential patterns of segregation had been less pronounced in the South than in the North. See *id.* at 25–26, 41–42, 48–49 (examining statistical evidence of changes in housing segregation). The federal government actually persuaded some states to enact legislation to provide states and localities with the legal authority to develop public housing. See Keith, *supra* note 27, at 28–29 (noting “President Roosevelt wrote the Governors urging the enactment of . . . state legislation” to establish local housing authorities).

34. See Massey & Denton, *supra* note 13, at 54–55 (“[B]y the late 1950s, many cities were locked into a spiral of decline that was directly encouraged . . . by federal housing policies.”).

35. See Keith, *supra* note 27, at 21–22 (pointing to early federal failures to address housing crisis).

36. “Redlining” describes the government and industry practice that began in the 1920s and 1930s of assigning risks to neighborhoods for the purpose of providing home mortgages. The Home Owners’ Loan Corporation (HOLC) formalized a rating system that assigned risks to neighborhoods based on assessments of their quality; neighborhoods with the lowest quality were coded red. See Kenneth T. Jackson, *Crabgrass Frontier: The Suburbanization of the United States 196–97* (1985) [hereinafter Jackson, *Crabgrass Frontier*] (providing evidence that HOLC “initiated the practices of ‘red lining’”); Massey & Denton, *supra* note 13, at 51–52 (discussing development of “redlining” practices). As a matter of practice, HOLC assigned the lowest rating to majority black neighborhoods, explicitly rating as a negative factor the density of blacks, without regard to other factors. See *id.* at 199–201 (detailing role of race as factor in HOLC appraisals in St. Louis metropolitan area). The effect of this was to redirect valuable loans away from black neighborhoods, or neighborhoods that looked like they might become predominantly black. *Id.* at 52.

37. See Massey & Denton, *supra* note 13, at 52 (“[P]rivate banks relied heavily on the HOLC system to make their own loan decisions, and the agency’s ‘Residential Security Maps’ were widely circulated throughout the lending industry. . . . Thus HOLC not only channeled federal funds away from black neighborhoods but was also responsible for a much larger and more significant disinvestment in black areas by private institutions.”).

mendous suburbanization of the postwar period and in promoting middle class homeownership and wealth acquisition.³⁸

In income security too, Social Security's ultimate exclusion of agricultural and domestic workers transferred existing patterns of labor market segregation to the public system. The exclusion had grave effects because of the relative poverty of African Americans and their overrepresentation in the lowest wage sector of the American labor force.³⁹ In effect, these design decisions reproduced the unequal private labor market structure, inscribing it into federal program design.

The point here is not simply that the federal government interacts passively to perpetuate longstanding inequality, but that federal programs structure opportunities as part of state policy. Federal grant programs not only permit these inequalities to exist but create the mechanisms that sustain them. In this way, federal programs become implicated in generating racial and other forms of inequality.

These federal spending choices soon become hidden. Rendered invisible, the resulting landscape begins to seem natural and inevitable. Federal decisions might have shaped the construction of suburbs, the placement of highways, and the location of public housing, but the resulting physical, spatial structure is encompassing, and thus quickly begins to seem preordained and fixed.⁴⁰ Racial meanings become cemented in these created spaces. In his study of residential segregation in Detroit, political scientist Thomas Sugrue notes that even as "blackness and whiteness assumed a spatial definition" in postwar cities, the federal policy decisions regarding public housing and urban renewal that produced this segregation remained invisible.⁴¹ Federally funded urban renewal programs displaced blacks, who were then concentrated in federally funded, racially segregated public housing.⁴² Racially discriminatory federal loan

38. See Keith, *supra* note 26, at 64 (noting substantial increase in 1946 in construction starts and production of housing building materials was driven in part by the Veterans' Emergency Housing Program); see also Katznelson, *supra* note 7, at 115–16 (observing that in immediate postwar period Veterans Administration mortgages paid for nearly five million new homes and were especially important in high growth areas like California, where they accounted for half of home mortgages by 1950); cf. *id.* at 116 ("Residential ownership became the key foundation of economic security for the burgeoning and overwhelmingly white middle class.").

39. See Katznelson, *supra* note 7, at 43 (noting majority of blacks at that time occupied lowest sectors of labor market).

40. See Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, in *In Pursuit of a Dream Deferred: Linking Housing & Education Policy* 244 (John A. Powell et al. eds., 2001) (arguing "[r]ace-neutral policies, set against a historical backdrop of state action in the service of racial segregation and thus against a contemporary backdrop of racially identified space . . . predictably reproduce and entrench racial segregation and the racial caste system that accompanies it").

41. Thomas J. Sugrue, *The Origins of the Urban Crisis: Race and Inequality in Postwar Detroit* 9 (1996).

42. See Arnold R. Hirsch, *Making the Second Ghetto: Race and Housing in Chicago, 1940–1960*, at 170, 273–74 (1983) [hereinafter Hirsch, *Making the Second Ghetto*]

practices deprived blacks of access to suburban housing markets enabled by the government-subsidized mortgage industry.⁴³ Yet these decisions remained, as a practical matter, invisible to the public. Whites could see “ghettoization” as “an inevitable, natural consequence of profound racial differences.”⁴⁴ Those residing in the “ghetto,” though acutely aware of the poverty and disinvestment that surrounds them, might thus fail to see their communities as constructed by discriminatory government policies and spending decisions.⁴⁵ Invisibility attends federal subsidies to create private markets in particular. As historian Dolores Hayden notes in her examinations of the discrimination embedded in federal housing and loan programs, the racially tiered housing market was enabled by federal policy, yet “mystified many working-class and middle-class Americans, who saw minimal subsidies for the poor but never understood that their own housing was far more heavily subsidized.”⁴⁶ Historian David Freund’s recent account of federal policy on fair housing underscores the manner in which the federal government itself promoted its mortgage programs as market-driven rather than as products of federal spending.⁴⁷

This account of housing reveals how embedding racial outcomes and obscuring federal spending’s role in shaping racial outcomes become mirror developments: As federal policy shapes segregation and patterns of inequality, the funding and policy decisions often remain concealed to beneficiaries and the broader public.

C. Structuring Citizenship

Federal spending programs can serve as key locations for advancing conceptions of citizenship and inclusion. With regard to racial equality, spending programs have manifested a dual nature. They have served to include African Americans and other groups by establishing certain base-line protections and entitlements that apply to citizens regardless of race.

(describing effect of urban renewal in Chicago); Massey & Denton, *supra* note 13, at 54–57 (describing how federally funded urban renewal programs razed black neighborhoods and shuttled blacks into high density housing projects with goal of “slum clearance”).

43. See Jackson, *Crabgrass Frontier*, *supra* note 36, at 199–201 (describing HOLC’s real estate appraisal practices).

44. Sugrue, *supra* note 41, at 9.

45. Susan Eaton’s recent account of landmark civil rights litigation to address school segregation and educational inequality in Connecticut articulates this well. Residents rarely imagine themselves as “segregated”; rather, the spatial divide “seemed natural and normal—a fact of life sustained by personal choice and housing costs, not by mandated structures and systems. Segregation was hardly an ‘issue’ anymore.” Susan Eaton, *The Children in Room E4: American Education on Trial* 36–37 (2007).

46. Dolores Hayden, *Building Suburbia: Green Fields and Urban Growth, 1820–2000*, at 152 (2003).

47. See David M.P. Freund, *Marketing the Free Market: State Intervention and the Politics of Prosperity in Metropolitan America*, in *The New Suburban History* 11–14 (Kevin M. Kruse & Thomas J. Sugrue eds., 2006). As Freund states, “[f]ederal intervention also helped create and popularize a unique postwar political narrative that obscured the origins of race and class inequality in the modern metropolis.” *Id.* at 12.

Yet, federal spending programs have also explicitly excluded African Americans, or deferred to discrimination at the state and local level, thus excluding blacks from the benefits of national citizenship.

New Deal and postwar spending programs provide powerful examples of how federal social welfare programs can advance and broaden the meaning of American citizenship. New Deal programs embodied new assumptions about the national government's role in ensuring core economic security for citizens. Scholars have explored the extent to which reformers at that time quite self-consciously sought to promote a new constitutional vision of social citizenship,⁴⁸ and how as a practical matter labor and economic security protections of the New Deal provided a framework for racial rights claims.⁴⁹ Whether or not this citizenship framework is explicitly constitutional in the formal sense,⁵⁰ the material commitments manifested in federal spending programs function to establish a set of baseline protections that can be constitutive of citizenship.

These commitments are most visible in programs explicitly structured as entitlements, such as Social Security pensions. Nonentitlement federal spending programs—such as federally funded public and subsidized housing or federal aid to education—can also function, albeit less robustly, to advance baseline protections for citizens. One can understand nationalizing moves in elementary and secondary education in this vein. Federal government support for education has steadily increased since World War II, the key expansion of federal aid being the establishment in 1965 of Title I of the Elementary and Secondary Education Act

48. See 1 Bruce Ackerman, *We the People: Foundations* 105 (1991) (discussing New Deal as triumph of national citizenship over state citizenship); 2 Bruce Ackerman, *We the People: Transformations* 279–344 (1998) (tracing historical development of New Deal policies and interpreting their impact on society); William E. Forbath, *Caste, Class & Equal Citizenship*, 98 *Mich. L. Rev.* 1, 66–70 (1999) [hereinafter Forbath, *Caste, Class*] (describing New Deal project in part as redefinition of citizenship in United States); Forbath, *New Deal*, *supra* note 7, at 176 (exploring tradition of “social citizenship” in constitutional discourse and its impact on New Deal proponents). Professor Forbath has argued that the exclusion of blacks from the New Deal compromised reformers’ broad vision of advancing social and economic rights, thus contributing to omissions of social citizenship from debates on the meaning of the Constitution today. See generally Forbath, *Caste, Class*, *supra* at 21.

49. See, e.g., Risa Goluboff, *The Lost Promise of Civil Rights* 142–43 (2007) (detailing how Thirteenth Amendment involuntary servitude cases brought by Department of Justice to combat exploitation of black workers in 1930s “aimed to bring African Americans within the New Deal rights framework”); Harvard S. Sitkoff, *A New Deal for Blacks: The Emergence of Civil Rights as a National Issue* 58–59 (1978) (stating that despite racial discrimination perpetuated by New Deal programs, New Deal “played its part [in changing racial relations] by substantively and symbolically assisting blacks to an unprecedented extent, by making explicit as never before the federal government’s recognition of and responsibility for the plight of Afro-Americans, and by creating a reform atmosphere that made possible a major campaign for civil rights”).

50. Cf. William N. Eskridge, Jr., *America’s Statutory “Constitution”*, 41 *U.C. Davis L. Rev.* 1, 6 (2007) (arguing that administrative and legislative norms can create constitutional norms not found in U.S. Constitution).

(ESEA) to provide federal aid to poor students and Head Start.⁵¹ Federal policy involvement—specifically the use of federal funds to prompt school reform at the state and local level—is most prominent in the 2001 No Child Left Behind Act (NCLB).⁵²

These measures reflect notions that providing a set of baseline educational protections are matters of national concern. To be sure, these protections are not fully realized. NCLB announced its purpose to “ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education,”⁵³ yet its financial support and program for reforms may, as a practical matter, fall short of that goal.⁵⁴ The federal government also is a key source for funding low-income housing, though housing is not federally guaranteed, nor are the budgetary allocations sufficient to meet the need.⁵⁵ Yet, the point here is that even these imperfect interventions gesture toward citizenship.

51. See The Elementary and Secondary Education Act of 1965 (ESEA), Pub. L. No. 89-10, 79 Stat. 27 (codified as amended in scattered sections of 20 U.S.C.). Precursors to Title I include the 1946 National School Lunch Act, ch. 281, 60 Stat. 230, and the 1950 Impact Aid Act, ch. 1124, 64 Stat. 1100. In 1961, the federal share of education funding increased to four percent of total K-12 revenues. After the establishment of Title I, federal spending rose to about nine percent of K-12 education. See Maris A. Vinovskis, *School Reforms & Equal Education Opportunities for All Children: The Changing Federal Role in Education 4* (Jan. 2010) (unpublished manuscript) (on file with the *Columbia Law Review*).

52. Pub. L. No. 107-110, 115 Stat. 1425 (codified in scattered sections of 20 U.S.C.). NCLB requires that states report achievement data of different racial, ethnic, and socioeconomic groups, and take steps to reduce achievement disparities between groups. See, e.g., 20 U.S.C. § 6301 (2006) (describing Act’s goal of “closing the achievement gap between high- and low-achieving children, especially the achievement gaps between minority and nonminority students, and between disadvantaged children and their more advantaged peers”).

53. 20 U.S.C. § 6301.

54. See Goodwin Liu, *Education, Equality and National Citizenship*, 116 *Yale L.J.* 330, 399–401 (2006) (discussing complexity in defining citizenship and highlighting failures in remedial educational policies). There is considerable debate over the efficacy of NCLB’s reforms in the education and legal community. Compare 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, 1729–30 (2003) (identifying positive objectives and impact of NCLB programs), with James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 *N.Y.U. L. Rev.* 932, 959–60 (2004) (outlining negative consequences associated with NCLB and countering supporters’ arguments for its implementation).

55. Moreover, the Executive and Congress can change the scope of the citizenship guarantee, as with regard to welfare, which changed from an entitlement program (Aid to Families with Dependent Children (AFDC)) to the current, more limited, Temporary Assistance to Needy Families (TANF) program. See *Personal Responsibility and Work Reconciliation Act of 1996 (PRWORA)*, Pub. L. No. 104-193, 110 Stat. 2105 (detailing provisions of TANF program in Title I). Eligible families can only receive TANF aid for five years and many must now participate in work activities. Cf. 42 U.S.C. § 607 (2006) (establishing mandatory work requirements). In addition, the Act gives states great flexibility to set eligibility criteria. See 42 U.S.C. § 602 (directing states to submit plan establishing objective criteria for delivery of benefits and determining eligibility).

The converse is also true. Federal spending programs also determine citizenship through federal-level policy decisions on who to include and who to exclude. The New Deal's original social security program explicitly rejected universality in favor of exclusion of racially salient groups. On its face, the program was nondiscriminatory, yet it was practically exclusionary in its design. Many of Franklin Delano Roosevelt's (FDR) New Deal reformers recommended that the social security program include all sectors of the labor market, including agricultural workers and domestic servants.⁵⁶ Yet, after intense congressional debate, these workers were not included.⁵⁷ The effect of these design decisions is to incorporate existing views about who is entitled to citizenship and to further circumscribe citizenship.

More than simply reflecting ideals of citizenship, federal-level spending programs reflect specific, pivotal choices about whether to explicitly advance national antidiscrimination requirements or, instead, to practice what might be called strategic deference: structuring programs to allow interstate variation in who gets included. Compelling examples are found in the earliest New Deal relief programs, which provided immediate financial help to agricultural laborers, the poor, and the unemployed, but which ceded power to states and localities in ways that accommodated the racialized structure and caste system of the South.⁵⁸ Thus, although the program was largely federally funded, some southern counties and

56. See Lieberman, *Color Line*, supra note 2, at 31 ("We cannot be satisfied that we have a reasonably complete program for economic security unless some degree of protection is given [to agricultural workers and domestic servants].") (quoting Comm. on Econ. Sec., *Need for Security* (1935), at <http://www.ssa.gov/history/reports/ces5.html> (on file with the *Columbia Law Review*)). The Committee on Economic Security was chaired by the Secretary of Labor and consisted of the Secretaries of Agriculture and the Treasury, the Attorney General, and the Federal Emergency Relief Administrator. See *id.* at 30.

57. To be sure, commentators have divided on the extent to which racial discrimination motivated Social Security's occupational exclusions. See Gareth Davies & Martha Derthick, *Race and Social Welfare Policy: The Social Security Act of 1935*, 112 *Pol. Sci. Q.* 217, 218–20 (1997) (describing debate surrounding Congress's decision to exclude agricultural and domestic workers); see also Lieberman, *Color Line*, supra note 2, at 30–31 (noting Committee on Economic Security was worried about administrability of program as it related to domestic and agricultural workers); *id.* at 40 (discussing argument by Treasury Secretary about administrative challenges of including agricultural and domestic workers despite his support for inclusion on philosophical grounds). More recently, historian Mary Poole has argued that southern congressional members were actually divided over the question of excluding farmworkers because of the grave impact it would have had on white southern laborers. Mary Poole, *The Segregated Origins of Social Security* 44 (2006).

58. See Katznelson, supra note 7, at 36–37 (noting some Georgia counties excluded all blacks from federal relief monies, while in Mississippi relief rates for blacks were under one percent). These programs included the Agricultural Adjustment Act (AAA), the National Recovery Act (NRA), and the Federal Emergency Relief Act (FERA). Poole, supra note 57, at 7.

states effectively excluded all blacks from relief money.⁵⁹ Other New Deal programs such as the new Aid to Families with Dependent Children program (ADC) similarly built state and local discretion into program design in ways that maintained racial hierarchy. Thus, while ADC was jointly funded by the federal government and by states, legislators allowed states to determine benefit levels and construct other requirements which in southern states operated to exclude blacks.⁶⁰

Similar patterns are evident in the construction of deference in the design of federal public housing programs and urban renewal programs, which would serve to promote, in the end, racial segregation. In the initial formulation of the federal public housing program, the federal government sought to use eminent domain to acquire private property. After an appellate court ruled this maneuver beyond the federal government's eminent domain power,⁶¹ Congress redesigned the program so that public housing was owned and operated by local public housing authorities (PHAs), with the capital costs paid by the federal government.⁶² The new legislative design granted deference to localities in tenant and site selection, requiring the development of projects through

59. See Katznelson, *supra* note 7, at 37–38 (noting “ten southern states had lower relief rates for rural blacks than whites” and “[i]n some Georgia counties . . . federal relief monies excluded all blacks”). Despite having broad powers, the FERA Administrative Director succumbed to pressure from southern landowner interests to tailor benefit levels so as not to interfere with their labor needs. See Michael K. Brown, *Race, Money and the American Welfare State* 42 (1999).

60. See Katznelson, *supra* note 7, at 45–46 (“In the South . . . state governments used their discretion, including provisions that an ADC home be ‘suitable,’ to reduce [African American beneficiaries’] numbers.”); Lieberman, *Color Line*, *supra* note 2, at 51–56 (discussing legislative debates surrounding Social Security Act and concluding southern support for Act was contingent in part on belief that state discretion in administration of Act preserved states’ “right to maintain an economic and social system of segregation and white supremacy”).

61. See *United States v. Certain Lands in Louisville*, 78 F.2d 684, 686 (6th Cir. 1935) (finding Congress’s power “does not carry with it the power here claimed, to condemn private property to the end that appropriations of tax funds may be made for purposes deemed by Congress to be for the public welfare”).

62. See Keith, *supra* note 27, at 28 (detailing development of new system of providing federal loans and grants to local housing authorities which was consistent with Constitution and served to “foster local responsibility”); Michael H. Schill & Susan M. Wachter, *The Spatial Bias of Federal Housing Law and Policy: Concentrated Poverty in Urban America*, 143 U. Pa. L. Rev. 1285, 1291 (1995) (describing redesign of public housing program). As Schill and Wachter explain:

Municipalities that wished to participate in the program would establish a PHA and enter into an Annual Contribution Contract (ACC) with the federal government. Under the ACC, the federal government funded the majority of the capital costs of public housing by paying the debt service on long-term bonds. The PHA, in turn, agreed to operate the housing over the life of the bonds, subject to federal statutes and regulations.

Id. (citations omitted).

cooperation agreements between local public housing authorities and local municipal governments.⁶³

While the joint federal-state nature of the program might have been required as a matter of constitutional doctrine in the arena of public housing,⁶⁴ state and local authority became a powerful instrument for segregation. Local government and local communities had tremendous power in determining the location of public housing and, indeed, whether it should be built at all.⁶⁵ The result was that public housing was occupied on a segregated basis and few low-income housing projects were built in middle class and white communities.⁶⁶ The effect of local cooperation agreements was also to tie the authority to develop public housing to the existing, increasingly segregated urban-suburban boundaries. Local city housing authorities lacked the ability to develop housing in suburbs, and suburbs could effectively either allow only white-occupied projects or, per the usual course, fail to develop public housing altogether.⁶⁷

In the urban renewal programs that the federal government helped to finance in the postwar period, deference and decentralization became a way for both local and federal governments to avoid complying with antisegregation norms that began to emerge at the time of the Supreme Court's decision in *Brown v. Board of Education*.⁶⁸ In the wake of the *Brown* decision, federal bureaucrats in the Eisenhower administration re-examined discrimination in federal housing and subsidized loan programs.⁶⁹ The Eisenhower Administration's housing bureaucracy—quite consistent with President Eisenhower's own dislike of the *Brown* deci-

63. See Hirsch, *Difficult Barrier*, supra note 28, at 58 ("Most important of all, the [Wagner-Steagall Act] exhibited a deference to localism that meant that tenant- and site-selection remained in local hands, as did the decision as to whether or not a town would choose to take advantage of the proffered assistance at all."); Alexander Polikoff, *Housing the Poor: The Case for Heroism* 12 (1978) ("Local governments, therefore, had the power to decide whether public housing was to be built at all in their communities and could retain control, project by proposed project, over the place and pace of development.").

64. See *Certain Lands in Louisville*, 78 F.2d at 688 (finding acquisition of private property for public housing program to be beyond eminent domain power of federal government).

65. Polikoff, supra note 63, at 12.

66. See Hirsch, *Making the Second Ghetto*, supra note 42, at 10 ("Beginning in the 1930s, and continuing thereafter, the operation of national agencies such as . . . the Federal Housing Administration (FHA) reflected prevailing segregationist attitudes."); Polikoff, supra note 63, at 12-13 ("More important, hardly any of the completed units were built in white neighborhoods.").

67. See Polikoff, supra note 63, at 12-13 ("Suburban areas were, of course, unavailable to central city housing authorities; the local cooperation agreement requirement assured that the suburbs could ignore central city housing needs with impunity." (citation omitted)).

68. 347 U.S. 483 (1954).

69. Hirsch, *Difficult Barrier*, supra note 28, at 25-26 ("Once rendered, the *Brown* decision sparked a flurry of self-examination among the housing agencies that consumed the spring and summer of 1954."); id. at 70 ("*Brown*, potentially, called [the federal

sion⁷⁰—resisted calls to reshape federal policies and programs to satisfy *Brown*'s requirements and, indeed, took actions that reinforced values of local deference. Despite *Brown*, federal officials assumed that segregated government housing would be the rule⁷¹ and ignored both internal and external critics who warned of the ghetto-expanding and hardening effects of federal programs.⁷² Executive branch officials in the Eisenhower Administration employed concepts of localism and decentralization to justify their decisions not to require integration and desegregation in local housing programs.⁷³ Key officials in the Eisenhower Administration argued that the national government had not caused residential segregation and, in the absence of federal legislation, had no power to end it.⁷⁴

Federal-level decisions about how to structure state and local discretion in the design of federal programs thus have tremendous implications for racial inequality. This is not to suggest that arguments for deference are always entangled with race, or in service of unfair racial ends. Questions about how to maintain state and local control in the face of increased federal funding and programmatic authority have salience even apart from the question of race.⁷⁵ Yet the historical record of twentieth-century programs reveals the practical and normative effect of decisions about whether to federalize programmatic requirements and to establish explicit antidiscrimination protections.

government's traditional deference to localism] into question, and at least threatened great change.”).

70. See *id.* at 70 (“The President’s criticism of the Warren Court and the *Brown* decision were well known as [was] his general distaste for the public discussion of racial discrimination.”).

71. See *id.* at 48–49 (“Despite the talk of open occupancy experiments and a handful of ‘integrated’ projects, [the Eisenhower Administration] continued to adhere to pre-*Brown* racial policies.”).

72. Hirsch describes the failure of the government to assign agents of the Race Relations Service to field offices of the federal Urban Renewal Administration, giving “[l]ocalities . . . a virtual free hand to employ the new federal assistance not only to rebuild aging neighborhoods, but to restructure their racial composition.” *Id.* at 71. He further notes that “[t]his became a particularly salient feature of the program in the wake of the Supreme Court’s action in *Brown*.” *Id.*; see also *id.* at 41–47 (describing firing of Frank Horne, Administrator of the Racial Relations Service, and accompanying outrage from civil rights and housing advocates); *id.* at 43 (noting criticism of federal housing policy by George Weaver, acting chair of the National Committee Against Discrimination, and other civil rights advocates); Hirsch, *Making the Second Ghetto*, *supra* note 42, at 226–27 (discussing African American critics of placing public housing in already segregated, poor communities).

73. See Hirsch, *Difficult Barrier*, *supra* note 28, at 70–71 (describing extreme federal deference to localism, particularly during Eisenhower Administration, and noting “[t]he result was that local elites successfully hitched new federal power and supports to the reinforcement (or establishment) of segregation”).

74. See *id.* at 48–49 (describing positions taken by Albert Cole, head of Housing and Home Finance Agency (HHFA) in 1950s, in defense of HHFA’s noninterference with residential segregation).

75. See Peterson, *supra* note 22, at 16–49 (discussing functional theory of federalism).

II. THE STIMULUS MOMENT: REPEATING HISTORY?

These twentieth-century lessons on the specific mechanisms by which federal spending creates racial exclusion are relevant to understanding the civil rights and equal opportunity impacts of the stimulus. The aim of this Part is to suggest key ways in which the Recovery Act bears on racial equality. My focus is on programs involving education, housing, and transportation, because of the role these federal programs have historically played in structuring racial inequality. Federal transportation and housing programs are powerful contributors to the residential segregation that sustains contemporary racial inequality.⁷⁶ Education is examined less because of past federal complicity than because of the increasing federal involvement in education and the importance of education in structuring opportunity.⁷⁷

To situate this analysis, the “stimulus” refers both to the specific congressional design of the Recovery Act of 2009, as well as to the implementation by both federal agencies and states of programs funded by the stimulus. It is possible to analyze the equal opportunity implications of the legislative design of the stimulus, but how the stimulus is implemented in the years to come will determine its ultimate impact. This Essay ultimately contends that key aspects of the stimulus entrench funding and programmatic structures that promote racial inequality, defer to states and localities rather than advance explicit civil rights rules and norms, and miss key opportunities to innovate in ways that promote inclusion and equity.

A. Overview of the Stimulus

The Recovery Act followed on the heels of smaller stimulus and economic relief efforts initiated in the last year of the presidency of George W. Bush, including the Economic Stimulus Act of 2008⁷⁸ and the

76. See Xavier de Souza Briggs, Introduction, *in* *The Geography of Opportunity* 1, 3–8 (Xavier de Souza Briggs ed., 2005) (detailing effects of urban sprawl and housing options on racial and economic segregation).

77. The federal government had a more extensive involvement in education than is often recognized. The post-Civil War Freedmen’s Bureau was responsible for the education of as many as 100,000 students each year, and the federal Department of Education was established independently in 1867. Liu, *supra* note 54, at 371–75. As Liu notes, soon after its establishment the Department was “demoted” to an office within the Department of Interior, see *id.* at 374, and it did not become a cabinet-level agency until 1980. See U.S. Dep’t of Educ., *The Federal Role in Education*, at <http://www2.ed.gov/about/overview/fed/role.html> (on file with the *Columbia Law Review*) (last visited Oct. 22, 2010). A major increase in the federal role, however, occurred with the passage of the Elementary and Secondary Education Act of 1965 (ESEA), Pub. L. No. 89-10, 79 Stat. 27 (codified as amended in scattered sections of 20 U.S.C.).

78. Pub. L. No. 110-185, 122 Stat. 613. The Economic Stimulus Act of 2008, enacted February 13, 2008, created a range of economic initiatives to boost the economy, including tax rebates, tax incentives for businesses, and provisions to allow government mortgage agencies Fannie Mae and Freddie Mac to purchase additional mortgages. The cost of the Act was about \$152 billion in 2008. Cong. Budget Office, *Cost Estimate: H.R. 5140*,

Emergency Economic Stabilization Act of 2008.⁷⁹ Even before assuming office, President Obama began work on a stimulus package, and the bill that would become the Recovery Act was introduced in the 111th Congress in January 2009. The House introduced a bill on January 25, 2009,⁸⁰ and passed it three days later on January 28.⁸¹ The Senate voted through its own stimulus package on February 10, 2009, which provided somewhat less in overall spending and more in tax relief.⁸² Conference committee-approved versions of the bills ultimately passed each chamber on February 13, 2009; and President Obama signed the bill into law on February 17, 2009.⁸³

In part, the stimulus depends on the controversial idea advanced in the 1930s by John Maynard Keynes that government spending can revive the growth of stalled market economies.⁸⁴ In so doing, the package also

Economic Stimulus Act of 2008 (2008), available at <http://www.cbo.gov/ftpdocs/89xx/doc8973/hr5140pgo.pdf> (on file with the *Columbia Law Review*).

79. Pub. L. No. 110-343, 122 Stat. 3765 (to be codified in scattered sections of 12 U.S.C.). The primary purpose of the Emergency Economic Stabilization Act of 2008 was to bail out foreign and domestic banks saddled with a range of troubled assets including mortgage-backed securities. A key provision, the Troubled Assets Relief Program (TARP) allowed the U.S. Department of the Treasury to purchase or insure up to \$700 billion of troubled assets in order to improve the liquidity of these assets. See 122 Stat. at 3767 (authorizing Secretary to establish TARP and “to purchase, and to make and fund commitments to purchase, troubled assets from any financial institution, on such terms and conditions as are determined by the Secretary”).

80. H.R. 1, 111th Cong. (2009). The lead sponsor was the Chair of the House Appropriations Committee, Representative David Obey (D-WI). *Id.*

81. See Jackie Calmes, House Approves \$819 Billion Plan for Economic Aid, *N.Y. Times*, Jan. 29, 2009, at A1. Initially, 206 amendments were offered, but the Rules Committee would eventually allow votes on just eleven amendments in order to expedite the process and assure that amendments were germane and relevant to economic growth. See Jonathan Allen, How 206 Stimulus Amendments Became 11, *CQ Politics* (Jan. 28, 2009, 6:22 AM), at <http://www.cqpolitics.com/wmspage.cfm?docID=news-000003019194> (on file with the *Columbia Law Review*).

82. The Senate bill, S. 1, was introduced in the Senate on January 6, 2009 by Majority Leader Harry Reid (D-NV). S. 1, 111th Cong. (2009). The bill passed the Senate by a vote of sixty to thirty-eight, with three Republicans voting yes. See 155 Cong. Rec. S2312 (daily ed. Feb. 13, 2009) (listing roll call vote).

83. Foon Rhee, With History and Flourish, Obama Signs the Stimulus Bill, *Bos. Globe Pol. Intelligence Blog* (Feb. 17, 2009, 5:56 PM), at http://www.boston.com/news/politics/politicalintelligence/2009/02/with_history_an.html (on file with the *Columbia Law Review*).

84. See Ike Brannon & Chris Edwards, Barack Obama’s Keynesian Mistake, *Nat’l Post* (Jan. 29, 2009, 7:00 PM), at <http://network.nationalpost.com/NP/blogs/fpcomment/archive/2009/01/29/barack-obama-s-keynesian-mistake.aspx> (on file with the *Columbia Law Review*) (arguing stimulus plan would fail due to its reliance on flawed Keynesian premise that government spending will spur economic recovery). The Keynesian notion is that, faced with major unemployment and sticky wages, increased government spending will increase aggregate demand for goods and services, and hence reduce unemployment. See John Maynard Keynes, *The General Theory of Employment, Interest and Money* 27–32, 245–49 (Prometheus Books 1997) (1936) (detailing relationship between consumption, investment and employment levels); see also Alan Brinkley, *The End of Reform: New Deal Liberalism in Recession and War* 66 (1995) (describing as foundational

aims to alleviate the immediate impact of the recession on individuals and government institutions; launch government investments to fuel longer-term economic growth by providing infrastructure investments in transportation and environmental protection; and to promote “technological advancements in science and health.”⁸⁵ Job creation is at the Act’s core: President Obama’s signing statement declared that the stimulus package would “create or save 3.5 million jobs over the next two years.”⁸⁶

Part A of the \$787 billion stimulus package makes appropriations in a broad set of federal programs.⁸⁷ Part B consists of tax measures for individuals, families, businesses, and educational institutions, as well as for promoting job creation and for energy and health reform.⁸⁸ Central to the stimulus are Part A’s investments in housing, transportation, and education. The following details some of the key programs and initiatives funded by the Recovery Act.

1. *Housing*. — The Recovery Act provides over \$13 billion for housing programs administered by the Department of Housing and Urban Development (HUD). These programs are designed to generate jobs, make homes energy efficient, and help families and communities affected by the economic crisis.⁸⁹ Many of the programs are directed at low-income and minority populations in particular.

a. *Community Development Block Grant Program*. — The Recovery Act provides \$1 billion for the Community Development Block Grant (CDBG) program, which helps state and local governments fund various housing and community development activities in low-income neighborhoods.⁹⁰ In the interest of economic stimulus, states and localities were

to the “Keynesian approach” the idea that public spending to spur consumption was the best strategy for alleviating recession).

85. ARRA, Pub. L. No. 111-5, § 3, 123 Stat. 115, 116 (2009).

86. See Remarks on Signing the American Recovery and Reinvestment Act of 2009 in Denver, Colorado, 2009 Daily Comp. Pres. Doc. 88 (Feb. 17, 2009) [hereinafter ARRA Signing Statement].

87. ARRA, div. A, 123 Stat. at 116–305.

88. *Id.*, div. B, 123 Stat. at 306–521.

89. *Id.*, div. A, tit. XII, 123 Stat. at 203–26. The Act provides \$288 billion in tax cuts. The remaining \$499 billion is for funding federal programs, as well as for federal contracts, grants, and loans. See Recovery Accountability and Transparency Bd., *The Recovery Act*, at http://www.recovery.gov/About/Pages/The_Act.aspx (on file with the *Columbia Law Review*) (last visited Oct. 22, 2010) (providing high level breakdown of funding allocation).

90. ARRA, div. A, tit. XII, 123 Stat. at 217–20. “All activities, other than administrative costs, must meet one of the CDBG’s three national objectives: provide benefits to low- and moderate income persons; eliminate slums and blighting conditions; or address urgent needs and/or imminent threats within the community.” U.S. Dep’t of Hous. & Urban Dev., *Program-Level Plan: Community Development Block Grant (CDBG) Entitlement Grants*, at [http://portal.hud.gov/portal/page/portal/RECOVERY/PLANS/Community%20Development%20Block%20Grant%20\(CDBG\)%20Entitlement%20Grants.pdf](http://portal.hud.gov/portal/page/portal/RECOVERY/PLANS/Community%20Development%20Block%20Grant%20(CDBG)%20Entitlement%20Grants.pdf) (on file with the *Columbia Law Review*) (last visited Oct. 22, 2010). Ten million dollars of the appropriation is directed to the Office of Public and Indian Housing’s Indian CDBG program. *Id.*

required to give priority to projects able to award contracts within 120 days of the distribution of the funds.⁹¹

b. *Homelessness Prevention and Rapid Re-Housing Program.* — The Recovery Act provides \$1.5 billion for the Homelessness Prevention and Rapid Re-Housing Program (HPRP), aimed at homelessness prevention assistance for at-risk households and rapid re-housing assistance for the homeless.⁹² The funds provide a variety of assistance, including “short-term or medium-term rental assistance [and] housing relocation and stabilization services.”⁹³ HUD awarded \$1.2 billion of the funds in July 2009,⁹⁴ and in September 2009 HUD awarded the remaining \$300 million to almost 100 communities.⁹⁵

c. *Neighborhood Stabilization Program.* — The Act provides \$2 billion to help states, cities, nonprofits, and consortia of nonprofits in the redevelopment of abandoned or foreclosed homes and residential properties.⁹⁶ According to HUD guidelines issued in May 2009, grants are to be made based on a number of selection criteria, including: greatest number and percentage of home foreclosures; ability to expend at least 50% of the funds within two years and 100% of the funds within three years; demonstration of capacity to execute projects; potential for leveraging; and concentration of investment to achieve neighborhood stabilization.⁹⁷

d. *Public and Low-Income Housing and Rental Subsidies.* — The Recovery Act appropriates \$2 billion for rental subsidies to eligible tenant

91. ARRA, div. A, tit. XII, 123 Stat. at 217.

92. *Id.* at 221–22.

93. *Id.* at 221.

94. Henry C. Jackson, Housing and Urban Development Releases \$1.2 Billion in Stimulus Funds to Combat Homelessness, Associated Press, July 9, 2009, available at Factiva, Doc. No. APRS000020090709e579001jm.

95. Press Release, Andrea Mead, U.S. Dep’t of Hous. & Urban Dev., Donovan Announces \$300 Million in Recovery Act Funding to Prevent Homelessness (Sept. 23, 2009), at http://portal.hud.gov/portal/page/portal/HUD/press/press_releases_media_advisories/2009/HUDNo.09-181 (on file with the *Columbia Law Review*).

96. ARRA, div. A, tit. XII, 123 Stat. at 217. The funds are available for five uses: “establishment of financing mechanisms for purchase of foreclosed homes; purchase and rehabilitation of abandoned or foreclosed homes; land banking of foreclosed homes; demolition of blighted structures; and redevelopment of vacant or demolished property.” U.S. Dep’t of Hous. & Urban Dev., Program-Level Plan: Neighborhood Stabilization Program (NSP), at [http://portal.hud.gov/portal/page/portal/RECOVERY/PLANS/Neighborhood%20Stabilization%20Program%20\(NSP\).pdf](http://portal.hud.gov/portal/page/portal/RECOVERY/PLANS/Neighborhood%20Stabilization%20Program%20(NSP).pdf) (on file with the *Columbia Law Review*) (last visited Oct. 22, 2010) (detailing funding, objectives, activities, characteristics, schedule, and metrics for CDBG program).

97. U.S. Dep’t of Hous. & Urban Dev., Notice of Fund Availability (NOFA) for the Neighborhood Stabilization Program 2 Under the American Recovery and Reinvestment Act, 2009, at 20–30, 68 (2009), available at http://portal.hud.gov/portal/page/portal/RECOVERY/programs/NEIGHBORHOOD_RESOURCES/Funding%20Notice%20for%20the%20Neighborhood%20Stabilization%20Program%202.pdf (on file with the *Columbia Law Review*).

families.⁹⁸ The Recovery Act also provides \$4 billion to be used by local public housing authorities to develop and modernize public housing units, demolish and replace ailing structures, and maintain existing buildings.⁹⁹

In March 2009, HUD awarded almost \$3 billion by formula to over 3,000 public housing authorities.¹⁰⁰ HUD changed its funding guidelines to allow more grant money to be spent in impoverished communities.¹⁰¹ HUD had initially stated that \$100 million for major redevelopments must be spent in census tracts where no more than 20% of residents lived in poverty, but the agency soon increased the cap to 40%.¹⁰²

The Recovery Act also appropriates \$2.25 billion for a grant program to provide funds for capital investments in stalled Low-Income Housing Tax Credit projects, the largest federal program for creating low-income rental housing.¹⁰³ State housing finance agencies are required to commit 75% of their funds within one year of the enactment of ARRA and must show that project owners have spent 75% of funds made available within two years and 100% within three years.¹⁰⁴

98. ARRA, div. A, tit. XII, 123 Stat. at 222. HUD will use \$2 billion to fund Section 8 contract renewals on a full twelve month cycle. *Id.*

99. *Id.*, div. A., tit. XII, 123 Stat. at 214–15. ARRA requires that \$3 billion of these funds be distributed “by the same formula used for amounts made available in fiscal year 2008, except that the Secretary [of HUD] may determine not to allocate funding to public housing agencies currently designated as troubled or to public housing agencies that elect not to accept such funding.” *Id.* In addition, public housing agencies must “give priority consideration to the rehabilitation of vacant rental units” and to those “capital projects that are already underway or included in the 5-year capital fund plans required by the Act.” *Id.*

100. See Press Release, Andrea Mead, U.S. Dep’t of Hous. & Urban Dev., HUD Makes Nearly \$1 Billion Available in Recovery Act Funds to Improve Public Housing (May 11, 2009), at http://portal.hud.gov/portal/page/portal/HUD/press/press_releases_media_advisories/2009/HUDNo.09-057 (on file with the *Columbia Law Review*). In June 2009, HUD announced that it was “lower[ing] the threshold that public housing agencies must meet” to get a portion of the \$1 billion in competitive funds. Initially, grants were available only to “high performers”—housing authorities whose properties were in good physical condition and well-managed. But after complaints by legislators that housing authorities in many of the nation’s largest cities would be ineligible for the funding due to poor past performance, HUD decided that only half the funds in the first round of competitive grants would be given to high performers. Kevin Freking, HUD Revises Rules for Stimulus Money, *Seattle Times*, June 3, 2009, at http://seattletimes.nwsource.com/html/politics/2009235970_apusstimuluspublichousing.html (on file with *The Columbia Law Review*).

101. Freking, *supra* note 100.

102. See *id.*

103. HUD awards the Tax Credit Assistance Program funds by formula grant “to state housing credit agencies to complete construction of qualified housing projects that will ultimately provide affordable housing to an estimated 35,000 households.” ARRA, div. A, tit. XII, 123 Stat. at 220; U.S. Dep’t of Hous. & Urban Dev., Program-Level Plan: Tax Credit Assistance Program (TCAP) [hereinafter TCAP Plan], at [http://portal.hud.gov/portal/page/portal/RECOVERY/PLANS/Tax%20Credit%20Assistance%20Program%20\(TCAP\).pdf](http://portal.hud.gov/portal/page/portal/RECOVERY/PLANS/Tax%20Credit%20Assistance%20Program%20(TCAP).pdf) (on file with the *Columbia Law Review*) (last visited Oct. 22, 2010).

104. ARRA, div. A, tit. XII, 123 Stat. at 220; TCAP Plan, *supra* note 103.

2. *Transportation.* — The Recovery Act provides almost \$50 billion for transportation-related investments.¹⁰⁵ Most of the transportation funding in ARRA is to be administered by the Department of Transportation (DOT) and distributed through existing programs.¹⁰⁶ While all transportation funding is contingent upon states maintaining existing spending levels, Federal Highway Administration funding is subject to the additional conditions that half of the funds be obligated within 120 days of apportionment, and that priority for funding be given to projects “located in economically distressed areas” that can be completed within three years.¹⁰⁷

More than half (\$27.5 billion) of the funds are allocated to the Highway Infrastructure Investment Fund to support highway and bridge construction, repair, and maintenance, as well as rail and port projects.¹⁰⁸ Further, the Act allocates \$8 billion to improve and develop intercity high-speed rail service,¹⁰⁹ and \$6.9 billion to enhance public transit programs.¹¹⁰

3. *Education.* — The Recovery Act’s major investments in education take place through the State Fiscal Stabilization Fund (SFSF) which, as discussed further below, attempts to help states meet current budget shortfalls while promoting executive branch-driven policy reform.

a. *State Fiscal Stabilization Fund.* — The SFSF is a one-time appropriation of \$53.6 billion to help state education programs cope with the recession and advance education reform.¹¹¹ Of the amount appropriated, the U.S. Department of Education (DOE) will award states approximately \$48.6 billion by formula grant¹¹² in exchange for states’ commitment to

105. *Id.*, div. A, tit. XII, 123 Stat. at 203–14.

106. *Id.*

107. *Id.* at 206–07, 212–14. To constitute an economically distressed area, an area generally must (1) have “a per capita income of 80 percent or less of the national average”; or (2) have “an unemployment rate that is, for the most recent 24-month period for which information is available, at least 1 percent more than the national average unemployment rate.” 42 U.S.C. § 3161(a) (2006). For areas that fail to satisfy either of these criteria, the Secretary of Commerce can decide that an area has experienced or will experience “a special need arising from actual or threatened severe unemployment or economic adjustment problems resulting from severe short-term or long-term changes in economic conditions.” *Id.* Another \$1.5 billion will be competitively awarded to states, local governments, and transit agencies for capital investments in highways and bridges, public transportation, and rail. ARRA, div. A, tit. XII, 123 Stat. at 203–12.

108. See ARRA, div. A, tit. XII, 123 Stat. at 206. The program will fund projects eligible under the Surface Transportation Program. 23 U.S.C. § 133 (2006).

109. ARRA, div. A, tit. XII, 123 Stat. at 208.

110. *Id.* at 209; see also American Recovery and Reinvestment Act of 2009 Public Transportation Apportionments, Allocations and Grant Program Information, 74 Fed. Reg. 9656 (Mar. 5, 2009) (providing guidance for formula grants to be distributed through “Federal Transit Administration . . . assistance programs”). The Recovery Act gave Amtrak \$1.3 billion for capital improvements. ARRA, div. A, tit. XII, 123 Stat. at 209.

111. ARRA §§ 14001–14013, 123 Stat. at 279–86.

112. A formula grant program is a noncompetitive grant to states administered according to a formula. See U.S. Dep’t of Educ., Formula Grant Definition, at

advance specific educational reforms.¹¹³ Up to \$5 billion remains available for the Secretary of Education through the competitively awarded Race to the Top and Innovation Fund programs.¹¹⁴

Two-thirds of the \$48.6 billion in funds are distributed in a first phase, in which states receiving awards must pledge to advance education reform in four areas: increasing teacher effectiveness and addressing inequities in the distribution of highly qualified teachers; establishing and using a system to track student progress; making progress toward establishing college- and career-ready standards and high quality assessments; and supporting interventions for improving and restructuring failing schools.¹¹⁵ DOE will distribute the remaining one-third of the \$48.6 billion when states provide data on their progress in the above reform areas and make that data publicly available.¹¹⁶

b. *Race to the Top Fund.* — The Recovery Act makes \$4.35 billion available for the Race to the Top Fund, a competitive grant program designed to encourage and reward states that are creating the conditions for education innovation and reform.¹¹⁷ A state must describe the status of the state's progress in each of the four reform areas addressed above with respect to SFSF funds.¹¹⁸ In addition, a state's application must also

<http://www2.ed.gov/fund/grant/about/formgrant.html> (on file with the *Columbia Law Review*) (last visited Oct. 22, 2010). By contrast, an agency awards discretionary grants to states on a competitive basis. See U.S. Dep't of Educ., Discretionary Grant Definition, at <http://www2.ed.gov/fund/grant/about/discgrant.html> (on file with the *Columbia Law Review*) (last visited Oct. 22, 2010); see also Kamina Aliya Pinder, Using Federal Law to Prescribe Pedagogy: Lessons Learned from the Scientifically-Based Research Requirements of No Child Left Behind, 6 *Geo. J.L. & Pub. Pol'y* 47, 53 (2008) (describing Department of Education's grant process).

113. ARRA §§ 14001–14005, 123 Stat. at 279–83.

114. Id. §§ 14006–14007, 123 Stat. at 283–84.

115. Id. § 14005(d), 123 Stat. at 282–83; U.S. Dep't of Educ., Guidance on the State Fiscal Stabilization Fund Program 3–4 (2009), available at <http://www.ed.gov/programs/statestabilization/guidance.pdf> (on file with the *Columbia Law Review*) (last visited Oct. 22, 2010). As described above, a state seeking stabilization funds must provide an assurance that it will establish a longitudinal data system that has the capacity to link preschool, K–12, postsecondary education, and workforce data. ARRA makes a separate, non-SFSF allocation of \$250 million available in the form of grants to states to develop and implement these systems, which will enable states to monitor student- and teacher-related reforms and make particular changes to advance them. See ARRA, div. A, tit. VIII, 123 Stat. at 183–84 (funding Institute of Education Sciences); see also Fact Sheet, U.S. Dep't of Educ., Statewide Longitudinal Data Systems, available at <http://www2.ed.gov/programs/slds/factsheet.pdf> (on file with the *Columbia Law Review*) (last visited Oct. 22, 2010) (describing elements of data systems).

116. See State Fiscal Stabilization Fund Program, 74 Fed. Reg. 37,837–41 (July 29, 2009) (establishing data reporting requirements for grant recipients). States are not required to demonstrate progress in the reform areas in order to get funds, but they have to ensure that the data regarding their progress is available to the public. Id.

117. ARRA § 14006, 123 Stat. at 283–84; Fact Sheet, U.S. Dep't of Educ., Race to the Top, available at <http://www2.ed.gov/programs/racetothetop/factsheet.pdf> (on file with the *Columbia Law Review*) (last visited Oct. 22, 2010).

118. ARRA § 14005(c), 123 Stat. at 282.

detail steps it is taking to improve the achievement of disadvantaged groups (such as racial minorities), improve graduation rates, address the needs of high-need school districts, and close the racial and ethnic achievement gap.¹¹⁹

A key requirement of the Race to the Top Fund is that states permit the establishment of charter schools, without placing caps on their number or otherwise restricting student enrollment in these schools.¹²⁰ The DOE awarded grants to two states in March 2010¹²¹ and awarded the remaining grants to ten applicants in August 2010.¹²²

c. *Additional Education Provisions.* — The Recovery Act establishes an Investing in Innovation Fund that provides \$650 million in competitively awarded grants to expand education programs that improve K–12 achievement and close achievement gaps, decrease dropout rates, increase high school graduation rates, and improve teacher and school leader effectiveness.¹²³ The Recovery Act also provides an additional \$200 million for the DOE’s Teacher Incentive Fund, which supports grants to school districts that establish compensation systems providing teachers and principals in high-need schools with differentiated levels of compensation based on student achievement gains, as well as on classroom evaluation.¹²⁴

119. *Id.*

120. *Id.*

121. Delaware received \$100 million in funding; Tennessee \$500 million. Press Release, U.S. Dep’t of Educ., Delaware and Tennessee Win First Race to the Top Grants (Mar. 29, 2010), at <http://www2.ed.gov/news/pressreleases/2010/03/03292010.html> (on file with the *Columbia Law Review*).

122. See Press Release, U.S. Dep’t of Educ., Nine States and the District of Columbia Win Second Round Race to the Top Grants (Aug. 24, 2010), at <http://www.ed.gov/news/press-releases/nine-states-and-district-columbia-win-second-round-race-top-grants> (on file with the *Columbia Law Review*) (announcing award of grants to District of Columbia and nine states—Florida, Georgia, Hawaii, Maryland, Massachusetts, New York, North Carolina, Ohio, and Rhode Island).

123. ARRA § 14007, 123 Stat. at 284; Press Release, U.S. Dep’t of Educ., Secretary Duncan Releases Application for \$650 Million to Support Innovation (Mar. 8, 2010), at <http://www.ed.gov/news/press-releases/secretary-duncan-releases-application-650-million-support-innovation> (on file with the *Columbia Law Review*).

124. Fact Sheet, U.S. Dep’t of Educ., Teacher Incentive Fund, at <http://www2.ed.gov/programs/teacherincentive/factsheet.pdf> (on file with the *Columbia Law Review*) (last visited Oct. 22, 2010). The goals of the Teacher Incentive Fund are: “improving student achievement by increasing teacher and principal effectiveness; [r]eforming teacher and principal compensation systems so that teachers and principals are rewarded for increases in student achievement; [i]ncreasing the number of effective teachers teaching poor, minority, and disadvantaged students in hard-to-staff subjects; and [c]reating sustainable performance-based compensation systems.” U.S. Dep’t of Educ., Teacher Incentive Fund, at <http://www2.ed.gov/programs/teacherincentive/index.html> (on file with the *Columbia Law Review*) (last visited Oct. 22, 2010).

B. *Stimulus and Equity*

Drawing on the lessons of the New Deal and postwar spending programs, this Part considers the ways in which stimulus programs risk producing and reproducing racial inequity. The purpose of this section is not to make an empirical assessment that the stimulus will actually harm African Americans or other groups. Rather, it is to suggest that the stimulus has the power to create racial harm and, second, that to avoid that harm, equity advocates must rely not only on the familiar tools of legal advocacy, but also on a range of new structures that have emerged to monitor federal spending.

1. *Scale.* — As noted in Part I,¹²⁵ the size of the stimulus is an important starting point for examining its potential impact on racial inequality. Much like the New Deal, the stimulus provides a large, concentrated burst of federal funding and programming. The stimulus buttresses existing federal programs that have long proved important in providing for social welfare and infrastructure needs. For instance, low-income housing and transportation programs are heavily dependent on federal government funding.¹²⁶ The stimulus also creates new programs. In particular, its initiatives in education¹²⁷ have the potential to restructure the delivery of education at the state and local level, and expand federal control.¹²⁸

2. *Structuring Citizenship.* — A next question is whether the Recovery Act might, by design, exclude certain groups from the benefits of federal programs. Today, as at the time of the Great Depression, African Americans, Latinos, and other racial minorities are more likely to be low-income, to have been disparately affected by this latest recession, and to be particularly reliant on the state institutions and social welfare programs that are facing budget strain.¹²⁹ The Recovery Act provides a set of

125. See *supra* notes 20–27 and accompanying text.

126. In low-income housing, for instance, the federal government funds programs to help maintain and revitalize public housing. See 42 U.S.C. §§ 1437c(a), 1437i (2006) (detailing funding for capital costs for public housing); Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, 112 Stat. 2461, 2473 (codified at 42 U.S.C. § 1437) (creating “HOPE VI” program to revitalize public housing). It also operates the country’s largest program for creating low-income rental housing. See Philip D. Tegeler, *The Persistence of Segregation in Government Housing Programs*, in *The Geography of Opportunity*, *supra* note 76, at 197, 201 (describing Low-Income Housing Tax Credit Program and arguing that it “has operated with little civil rights oversight”). Through a variety of programs, the federal government has provided seventy-five to ninety percent of the funding for urban mass transit programs and the interstate highways since the 1950s. See Peter W. Salsich, Jr., *Saving Our Cities: What Role Should the Federal Government Play*, 36 *Urb. Law.* 475, 485 n.71 (2004).

127. See *supra* Part II.A.3 (detailing various education initiatives under ARRA).

128. See Steven Brill, *The Teachers’ Unions’ Last Stand*, *N.Y. Times*, May 23, 2010, at MM32 (detailing dramatic education reforms and shifting power balances as states pursue *Race to the Top* Fund grants).

129. See Amanda Logan & Christian E. Weller, *Ctr. for Am. Progress, The State of Minorities: The Recession Issue* (2009), at <http://www.americanprogress.org/issues/>

immediate increases in federal funding to stem the recession's immediate impact, as well as to shore up public institutions in a range of areas such as health, education, and housing.¹³⁰ Because of the disproportionate need in minority communities, many of these programs can be expected to directly benefit minority individuals. In addition, several Recovery Act programs are specifically targeted at minorities and women, including funding for transportation-related job training focused on "minorities, women and the socially and economically disadvantaged" and for disadvantaged businesses.¹³¹ In transportation, the Recovery Act funds new high-speed rail programs to better link metropolitan areas in ways that may prove useful in breaking down the economic and geographic isolation of low-income African Americans.¹³²

The most significant set of innovations are those promoting racial equity in education. States applying for funding from the State Fiscal Stabilization Fund must implement a range of improvements in educational quality, including addressing inequities in the distribution of highly qualified teachers to high poverty and minority schools. As noted above, competitive grants are available to promote other federally backed initiatives.¹³³

To be sure, political and practical challenges may curb education innovation in implementing the stimulus. In addition to the persistent difficulty of reforming K-12 education, the education measures lay bare the challenges of innovating in a time of recession. Initial evidence suggests that some states are using stimulus funds to fill budget shortfalls rather than adopting new federally mandated reforms (in part because state budget shortfalls in education were larger than initially forecast).¹³⁴ Another impediment is that the reforms are themselves contested. States

2009/01/state_of_minorities.html (on file with the *Columbia Law Review*) (describing minorities' particular vulnerability to economic downturns).

130. See ARRA Signing Statement, *supra* note 86 (describing recovery plan as first step in economic recovery process by saving jobs and investing in education, health care, and technology).

131. See, e.g., H.R. Rep. No. 111-16, at 94, 470 (2009) (allocating \$20 million for highway surface transportation and technology training, \$20 million for disadvantaged business enterprises bonding assistance, and additional set asides for "on-the-job training programs focused on minorities, women, and the socially and economically disadvantaged").

132. See Mark Muro et al., Brookings Inst., *Metro Potential in ARRA: An Early Assessment of the American Recovery and Reinvestment Act 20–21* (2009) [hereinafter Muro et al., *Metro Potential*] (discussing \$53 billion budgeted for transportation improvements in American Recovery and Reinvestment Act, \$9.5 billion of which will go toward passenger rail projects).

133. See *supra* text accompanying notes 117–124.

134. See Michael A. Rebell et al., *Stimulating Equity?: A Preliminary Analysis of the Impact of the Federal Stimulus Act on Educational Opportunity 6–13* (2010), available at http://www.equitycampaign.org/i/a/document/12857_Stimulating_Equity_Report_FINAL.pdf (on file with the *Columbia Law Review*) (finding SFSF has proved useful in stemming effects of recession but few of twenty surveyed states have used funds to promote reforms); see also Alyson Klein, *Dual Aims in Stimulus Stir Tension*, *Educ. Week*, June 10,

and education stakeholders might disagree on a range of issues such as the efficacy and desirability of boosting charter schools,¹³⁵ how to administer merit-based pay for teachers, and the impacts of such changes on student performance.¹³⁶

In short, several important programs in the stimulus seek to advance racial equity. These measures are significant because they do not accede to the claimed universalism that attended some New Deal programs.¹³⁷ Rather, they self-consciously harness federal spending power to promote racial equity reform.

However, much as in past programs, the Recovery Act embodies decisions about when to defer to states and localities and when to condition funding on the adoption of equality norms or goals.

The most compelling examples are in housing. The Recovery Act increases investments into the federal government's largest program for creating low-income rental housing, the Low-Income Housing Tax Credit (LIHTC) program, augmenting capital funds to LIHTC programs that have stalled because of the recession.¹³⁸ One question has been whether the LIHTC program must adopt civil rights rules that limit HUD's ability to site public housing in areas of high poverty and concentrated minority populations. The Treasury Department's Internal Revenue Service (IRS), not HUD, administers the LIHTC, and has so far declined to adopt regulations to promote integration in site selection.¹³⁹ Even as the

2009, at 1, 24 (noting states face tension between using stimulus funds for reform purposes and using them to fill preexisting deficits).

135. Researchers disagree on the benefits of encouraging more charter schools. Compare Nat'l Ctr. for Educ. Stat., *A Closer Look at Charter Schools Using Hierarchical Linear Modeling*, at vi (2006) (analyzing 2004 and 2006 data and finding traditional public schools outperform charter schools on reading and math standardized tests), and Steven M. Ross et al., *Achievement and Climate Outcomes for the Knowledge Is Power Program in an Inner-City Middle School*, 12 *J. Educ. for Students Placed at Risk* 137, 137 (2007), with Erik W. Robelen, *KIPP Success Cited, with Caveats*, *Educ. Week*, Nov. 12, 2008, at 5 (reporting on study findings that students in charter schools tend to perform better, although noting rigorous programs of charter schools may select out less motivated or prepared students and their families).

136. See Alyson Klein, *Budget Would Boost Incentive Pay, Turnaround Aid*, *Educ. Week*, May 13, 2009, at 20 (detailing concerns of critics of incentive pay systems).

137. See *supra* text accompanying note 56 (describing New Deal's effect of defining and circumscribing citizenship). Professor John Powell has called this "false universalism." John A. Powell, *Post-Racialism or Targeted Universalism?*, 86 *Denv. U. L. Rev.* 785, 791-92 (2009) (arguing "Social Security Act, often described as the quintessential universal policy, was universal, only insofar as the universal was a white, male, able-bodied worker").

138. The Recovery Act provides \$2.25 billion in capital investments for the LIHTC program through grants to state housing finance agencies under the HOME Investment Partnership Program. ARRA, Pub. L. No. 111-5, div. A, tit. XII, 123 Stat. 115, 220-21 (2009). The portion of the program that is funded as a grant should be covered by Title VI of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000d-2000d-4a (2006), as well as by Title VIII of the Fair Housing Act, 42 U.S.C. §§ 3601-3608, but HUD has not made clear the civil rights requirements of these provisions.

139. As discussed earlier, the stimulus also advances civil rights with respect to LIHTC by mandating for the first time that state housing finance authorities collect data on the

Recovery Act extends funding for this program, Congress did not include civil rights rules that would prohibit the expansion of racial segregation. Without federal- and state-level rules promoting integration, the program is likely to continue its current pattern, and to thus result in expanding or maintaining prior segregation.¹⁴⁰

A similar example is the Neighborhood Stabilization Program, which provides grants to states and localities to purchase abandoned and foreclosed property.¹⁴¹ This program stands to benefit African Americans and Latinos disproportionately affected by the foreclosure crisis, since it targets neighborhoods with the highest rates of foreclosure.¹⁴² The program helps minorities by allowing foreclosed property (which is often located in high-poverty neighborhoods) to become new housing for low-income renters. As in the LIHTC program, however, Congress did not mandate that recipients of federal subsidies have opportunities to live in low-poverty, predominantly white areas.¹⁴³ Without explicit civil rights

race and ethnicity of residents of LIHTC developments. Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, § 2835, 122 Stat. 2654, 2874–75.

140. Cf. Carissa Climaco et al., Abt Assocs. Inc., *Updating the Low-Income Housing Tax Credit (LIHTC) Database: Projects Placed in Service Through 2006*, at 55–57 (2009), available at [http://www.abtassociates.com/reports/Climaco_\[1\]_LIHTC%20through%202006.pdf](http://www.abtassociates.com/reports/Climaco_[1]_LIHTC%20through%202006.pdf) (on file with the *Columbia Law Review*) (finding “tax credit units are more likely than households in general or rental units in general to be located in high poverty areas” and “more likely to be located in tracts with large minority populations or large proportions of female-headed households, compared to households in general or rental units in general”); Jill Khadduri et al., Abt Assocs. Inc., *Are States Using the Low Income Housing Tax Credit to Enable Families with Children to Live in Low Poverty and Racially Integrated Neighborhoods?* (2006), available at http://www.prrac.org/pdf/LIHTC_report_2006.pdf (on file with the *Columbia Law Review*) (describing study of “the extent to which each of the states administering the tax credit program has used the program to place rental housing in” low-poverty, racially integrated neighborhoods); Tegeler, *supra* note 126, at 202 & n.20 (finding LIHTC program “mirrors existing conditions of racial and economic segregation” in many states and citing testimony of Fair Housing Center of Greater Boston before Massachusetts Department of Housing and Community Development stating “almost two-thirds of LIHTC projects within Boston are very heavily concentrated in census tracts whose residents are predominantly black and Hispanic” (internal quotation marks omitted)). Studies also reveal the program’s great potential to promote mixed-income, racially integrated neighborhoods. In a few regions, the program appears to be encouraging the development of low-income housing outside of poor, minority areas. See, e.g., Khadduri et al., *supra*, at 11–21.

141. On January 14, 2010, HUD awarded \$1.93 billion under the Recovery Act’s Neighborhood Stabilization Program (known as NSP2). U.S. Dep’t of Hous. & Urban Dev., *Neighborhood Stabilization Program 2*, at <http://hud.gov/offices/cpd/communitydevelopment/programs/neighborhoodspg/arrafactsheet.cfm> (on file with the *Columbia Law Review*) (last updated Apr. 12, 2010).

142. See ARRA, div. A, tit. XII, 123 Stat. at 217–18 (“[I]n selecting grantees, the Secretary of Housing and Urban Development shall ensure that the grantees are in areas with the greatest number and percentage of foreclosures.”).

143. Courts and federal agencies have interpreted the Fair Housing Act’s provisions that require federal agencies and grant recipients to affirmatively further fair housing as mandating that federally subsidized housing be sited in low-poverty, nonminority areas. See *infra* Part III.B. Under ARRA, NSP2 funds are treated as Community Development

guidance, this new program is likely to follow the pattern of other federal low-income housing programs that reproduce segregation, and that fail to provide opportunities for minorities to live in low-poverty neighborhoods.¹⁴⁴

These two instances parallel legislative and administrative failures for much of the twentieth century to explicitly require civil rights protection in federal public housing. The harmful impacts of these programs occur not through explicit exclusion, but through legislative and administrative silence. This silence can perpetuate existing patterns of race and class segregation in housing.¹⁴⁵

3. *Embedding Inequality?* — Important aspects of the Recovery Act threaten to deepen patterns of racial inequality by continuing and expanding the harmful funding and institutional structures of the past century. The question is one of risk because, at least in some programs, federal and state level policymakers could make decisions about how to implement these programs, and could establish rules that would mitigate the potential harms of these programs. A compelling manifestation of the possibility of entrenching existing patterns of inequality is in the Recovery Act's emphasis on "shovel ready" projects. This is key to the economic thinking behind the stimulus—emphasizing immediate federal spending to deliver a quick economic boost.¹⁴⁶ Indeed, some of the explicit conditions that the Recovery Act places on federal spending are to ensure that the money is spent quickly.¹⁴⁷ Yet "shovel ready" is often in tension with goals of inclusion.

For one, "shovel ready" emphasizes infrastructure-related jobs, an area that suffered severe job losses.¹⁴⁸ The construction trade, however,

Block Grant (CDBG) funds, which are governed by explicit civil rights objectives. See 42 U.S.C. § 5301 (stating CDBG's goal of promoting neighborhood "diversity and vitality," reducing isolation of low-income groups, and increasing "spatial deconcentration" of low-income individuals).

144. See *supra* note 140 (detailing data from LIHTC program).

145. No doubt the relevant equity norm is more contested here than in the area of civil rights protections in public housing programs in the 1950s. The fair housing goal of integration is frequently in tension with the goal of creating affordable housing opportunities in high-poverty neighborhoods. See Myron Orfield, *Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low Income Housing Tax Credit*, 58 *Vand. L. Rev.* 1747, 1803–04 (2005) [hereinafter Orfield, *Racial Integration*] (noting tension between duty to affirmatively further fair housing and LIHTC siting preferences).

146. See, e.g., Letter from Peter Orszag, Dir., Office of Mgmt. & Budget, Exec. Office of the President, to David Obey, Chairman of House Appropriations Comm. (Jan. 27, 2009), available at http://www.whitehouse.gov/sites/default/files/omb/assets/legislative_letters/obey_012709.pdf (on file with the *Columbia Law Review*) (urging direct federal boost to lift nation out of recession).

147. See ARRA, div. A, tit. XII, 123 Stat. at 203–214 (setting obligation schedule for ARRA transportation funding).

148. See Bracken Hendricks & Matt Golden, Ctr. for Am. Progress, *Taking on the Tool Belt Recession 1–4* (2010), available at <http://www.americanprogress.org/issues/>

has historically underrepresented blacks and women.¹⁴⁹ Thus, in the absence of intervention to change hiring patterns in that industry, the Recovery Act's heavy emphasis on construction jobs may exclude African Americans, women, and other vulnerable groups.

In addition, the Recovery Act emphasizes infrastructure projects that are underway or already planned, again for the worthy goal of providing urgent economic improvements.¹⁵⁰ Yet, these choices devote considerable federal funds to buttressing transportation policies that helped produce residential and economic segregation. Transportation is the largest of the Recovery Act's infrastructure funding programs. While the Recovery Act requires that the money be used in economically distressed areas, more than half of the funding goes to the Surface Transportation Program.¹⁵¹ This creates incentives to build highway and transportation networks that have long had the effect of concentrating poverty and racial groups, and which do little to enhance regional cooperation between majority-minority and poor cities, struggling inner ring suburbs, and low-poverty suburbs.¹⁵²

Indeed, the speed of spending deemed necessary to achieve the economic recovery goals of the stimulus is in tension with rethinking funding structures and with redesigning programs in ways that might promote racial inclusion. At the metropolitan level, regions have been experimenting with integrating suburban and city transportation and housing programs with huge implications for bridging the spatial divide that has proved deleterious to neighborhoods of concentrated poverty.¹⁵³ Yet the stimulus funnels its funds through separate programmatic funding streams, and apportions funds between state, county, and local governments, which does little to encourage experiments in bridging program-

2010/03/pdf/construction_jobs_memo.pdf (on file with the *Columbia Law Review*) (finding unemployment rate for construction workers was 24.7% in January 2010).

149. See, e.g., Kris Paap, *How Good Men of the Union Justify Inequality: Dilemmas of Race and Labor in the Building Trades*, 33 *Lab. Stud. J.* 371, 376 (2008) (documenting underrepresentation of blacks and women in construction trades and role of labor unions in preserving discriminatory status quo); Roger Waldinger & Thomas Bailey, *The Continuing Significance of Race: Racial Conflict and Racial Discrimination in Construction*, 19 *Pol. & Soc'y* 291, 292, 300 (1991) (asserting "persistence of discrimination in construction is not simply an unpleasant exception to the general case").

150. See ARRA, div. A, tit. XII, 123 Stat. at 204, 206 (requiring priority funding be given to transportation projects that can be completed in three years).

151. See Muro et al., *Metro Potential*, supra note 132, at 20 (noting half of transportation infrastructure funds are channeled through Surface Transportation Program).

152. See id. at 10, 20 (finding that in twenty-three states' plans only half of funding would go to largest metropolitan areas, where minorities disproportionately reside).

153. See, e.g., Brookings Inst., *MetroPolicy: Shaping a New Federal Partnership for a Metropolitan Nation* 36-37 (2008), available at http://www.brookings.edu/~media/Files/rc/reports/2008/06_metropolicy/06_metropolicy_fullreport.pdf (on file with the *Columbia Law Review*) (describing efforts in Denver, New York, and Portland to better coordinate regional transit systems and address affordable housing needs across metropolitan areas).

matic areas, or to allow governance innovation at the metropolitan level.¹⁵⁴

The speed of spending can operate to exclude small and disadvantaged businesses, including those run by minorities and women in transportation development programs. The Recovery Act requires states to use fifty percent of their transportation funds within 120 days of apportionment, and to give funding priority to projects that can be completed within three years.¹⁵⁵ Additionally, many transportation projects are subject to longstanding federal affirmative action requirements.¹⁵⁶ Yet, in part because of the priority placed on quick disbursement of funds (as well as some states' emphasis on funding rural projects), some states are failing to meet goals for equitable hiring of minorities and women.¹⁵⁷

C. Implications

This account reveals the potential effect of specific stimulus programs on racial inequity. Ultimately, this Essay does not claim that the stimulus will *necessarily* lead to racial harm, but seeks to point out specific

154. See Mark Muro et al., Brookings Inst., *Implementing ARRA: Innovations in the Design in Metro America* 8–9 (2009), available at http://www.brookings.edu/~media/Files/rc/reports/2009/0723_american_recovery_reinvestment_act/0723_american_recovery_reinvestment_act_brief.pdf (on file with the *Columbia Law Review*) (arguing few provisions would allow creative communities to link, align, or mix even obviously related funding flows to achieve synergistic effects).

155. U.S. Gov't Accountability Office, GAO-09-926T, *Recovery Act: States' Use of Highway and Infrastructure Funds and Compliance with the Act's Requirements* 2 (2009).

156. See, e.g., Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. No. 109-59, § 1101(b), 119 Stat. 1144, 1156–57 (2005) (“Except to the extent that the Secretary determines otherwise, not less than 10 percent [of certain transportation programs] . . . shall be expended through small business concerns owned and controlled by socially and economically disadvantaged individuals.”); 49 C.F.R. § 26.21 (2009) (requiring recipients of federal highway funds and those receiving certain planning and capital grants above \$250,000 to participate in disadvantaged business program); *id.* § 26.3 (listing statutes subject to disadvantaged business enterprise requirement); see also 15 U.S.C. § 637(d) (2006) (defining “socially and economically disadvantaged individuals” while presuming minority businesses meet definition).

157. See, e.g., Letter from Will Kempton, Dir., Cal. Dep't of Transp., to Transp. Constr. Cmty. (Mar. 4, 2009), available at http://www.dot.ca.gov/hq/bep/documents/DBEAnnouncement-Construction_v4_.pdf (on file with the *Columbia Law Review*) (urging state transportation community to meet federal targets for disadvantaged contractor hiring); Aaron Glantz, *Minority Contractors Unite to Demand Share of Stimulus Dollars*, New Am. Media, July 23, 2009, at http://news.newamericamedia.org/news/view_article.html?article_id=fed888cd4172f69e3283d024371a4008 (on file with the *Columbia Law Review*) (noting minority and disadvantaged contractors have failed to receive substantial share of contracts even though California law banning affirmative action does not apply to stimulus contracting); Jason Hoppin, *MnDOT Shorting Disadvantaged Firms on Stimulus Projects, Report Says: But MnDOT Predicts More Work for Disadvantaged Firms*, Pioneer Press, Oct. 14, 2009, at <http://www.allbusiness.com/society-social/religion-spirituality-religion/13201054-1.html> (on file with the *Columbia Law Review*) (noting Minnesota Department of Transportation has failed to meet state goal of fifteen percent disadvantaged contractor participation rate in construction projects).

areas in which the stimulus risks reproducing and entrenching forms of racial inequality by excluding particular groups from full participation in the benefits of federal programs. Given these risks, policymakers and equity advocates should think about the stimulus's broad economic recovery goal as an occasion to *interrupt*, rather than reproduce, patterns of inequity and to advance social inclusion. The goal here is to suggest that the stimulus—particularly given its size—should prompt a set of questions about federal spending programs' effects on equity. These questions include who benefits from federal spending, and how federal spending operates to shape patterns of equality in various communities.

These questions should be part of the executive and legislative design of federal spending programs. But, as a practical matter, it is too late to reshape the stimulus's essential design. Instead these questions remain relevant to the federal administrative agencies implementing the stimulus, as well as to state and local governments that will spend stimulus funds. In the next Part, this Essay examines the capacity of legal tools and norms to prompt governments to examine the equity effects of federal spending.

III. STIMULUS AS CIVIL RIGHT

This Part turns to the question of how civil rights tools might help ensure racial equity in the current stimulus, as well as interrupt the broader institutional pathways and mechanisms identified in Part I.¹⁵⁸ At the time of the New Deal, civil rights reformers sought to draw attention to the potential adverse impact of the new federal spending programs on African Americans.¹⁵⁹ They voiced concerns to the President and his executive team of New Deal proponents, to Congress, and to the public about the exclusion of black workers from Social Security and the deference granted to states under many New Deal programs.¹⁶⁰ For the most part, their lobbying efforts were unsuccessful. African Americans had little electoral power or influence in Washington at that time, and national civil rights groups like the NAACP and the National Urban League were relatively new and still politically weak.¹⁶¹ Their efforts had difficulty finding political traction: Civil rights groups were in the midst of a higher visibility campaign to enact a federal antilynching law with the help of FDR's New Deal allies.¹⁶² Moreover, many in the black community and in FDR's Roosevelt coalition did not react favorably to criticisms

158. See *supra* Part I.B–C.

159. See Poole, *supra* note 57, at 97–139 (recounting lobbying efforts of NAACP, National Urban League, and Joint Committee on National Recovery to eliminate discriminatory provisions of New Deal federal spending programs).

160. See *id.* at 116–39.

161. See *id.* at 130–39 (detailing NAACP's simultaneous efforts to define its legal agenda and pressure Congress for inclusion of African Americans in Social Security Act).

162. See *id.* at 108–11 (describing NAACP's efforts to generate support for antilynching legislation).

of federal programs that, in the main, vastly expanded support for blacks suffering from the Depression.¹⁶³

The landscape has now changed. The civil rights movement of the 1960s mobilized minority communities and strengthened the political power of African Americans and national civil rights groups.¹⁶⁴ National antidiscrimination law emerged in the 1960s and provides baseline statutory antidiscrimination protections as a fundamental right of citizenship.¹⁶⁵ These laws harness expanded federal power created by New Deal and postwar spending programs to advance antidiscrimination norms. Indeed, the civil rights laws that condition federal spending are—at least in theory—among the most powerful civil rights laws because of the breadth of federal spending and the potential financial consequences to grantees for noncompliance.¹⁶⁶ Specifically, Title VI of the 1964 Civil Rights Act and particular provisions of the federal Fair Housing Act provide significant, if underenforced, mechanisms for advancing equity and interrupting the reproduction of inequality in federal spending programs.¹⁶⁷

What this Part suggests, however, is that, beyond the antidiscrimination law of the 1960s, the stimulus is generating a new model for promoting equity in federal spending that seeks to respond to the complex, multiple ways in which spending programs might exclude particular groups and advance larger notions of citizenship and inclusion. Because of the magnitude of the investments of the stimulus, and its self-conscious goal of reshaping the delivery of many state and local services, the stimulus has prompted a set of new interventions to promote accountability in how these funds are spent. Rights and equity groups have begun to use these new transparency tools and technology (1) to map the racial and ethnic impacts of federal spending, and (2) to make equity claims on spending at the federal, state, and local levels. These emerging efforts may not be immediately recognizable as law, since they do not center on court enforcement. Yet they seek to advance equity claims by harnessing laws requiring transparency in stimulus spending, race and ethnicity data collection requirements, the monitoring capacity of new state and local

163. See *id.* at 130–39 (noting that although “New Deal programs provided many African Americans, for the first time, genuine and substantial federal support through emergency relief,” civil rights groups faced difficulty of contesting exclusion without alienating white liberal supporters of Social Security Act).

164. See Peter Skerry, *Racial Politics in the Administrative State*, *Society*, Jan./Feb. 2005, at 38 (noting mobilized black community and stronger public interest politics were key legacies of social upheavals during 1960s).

165. See Hugh Davis Graham, *The Civil Rights Era: Origins and Development of National Policy 1960–1972*, at 467 (1990) (“The civil rights laws of 1964, 1965, and 1968, with their nationwide bans on discrimination in public facilities and accommodations, and private jobs and housing, became politically unassailable.”). Cf. *id.* at 190–210 (noting EEOC’s role as “subversive bureaucracy” in civil rights and women’s rights movements).

166. See *infra* notes 171–181 and accompanying text (analyzing civil rights laws as weapons against state discriminatory action).

167. See *infra* notes 189–190 and accompanying text.

government entities created in the wake of stimulus, and the “hard” law principles of Title VI and the Fair Housing Act.

A. Antidiscrimination Baseline

Weeks after the President signed the Act, the White House Office of Management and Budget (the office responsible for preparing the President’s budget and supervising its implementation¹⁶⁸), developed a set of guidelines to govern disbursement of stimulus funding.¹⁶⁹ The guidance included the directive that all executive branch departments and agencies involved with disbursing stimulus funds distribute their funds in accordance with “antidiscrimination and equal opportunity” statutes that apply to federal contracts, including Title VI of the Civil Rights Act of 1964 and Title VIII of the Fair Housing Act of 1968.¹⁷⁰

The inclusion of this explicit language in the guidance is likely for emphasis; technically such a specification should be unnecessary. Title VI has long forbidden discrimination on the basis of race and ethnicity in federally funded programs, applying to federal agencies and departments as well as recipients of federal financial assistance.¹⁷¹ And other statutory civil rights protections govern federal spending programs, including the Rehabilitation Act of 1973, which forbids disability discrimination in fed-

168. See Office of Mgmt. & Budget, Exec. Office of the President, Open Government Plan, at i (Apr. 7, 2010), available at <http://www.whitehouse.gov/sites/default/files/microsites/100407-omb-opengov-plan.pdf> (on file with the *Columbia Law Review*) (“OMB’s central mission . . . is to assist the President in overseeing the preparation and implementation of the Federal Budget and to oversee and coordinate the Administration’s legislative, management, performance management, and regulatory policies.”).

169. Memorandum from Peter R. Orszag, Dir., Office of Mgmt. & Budget, Exec. Office of the President, to the Heads of Dep’ts & Agencies § 1.6, at 7 (Feb. 18, 2009), available at http://www.recovery.gov/About/Documents/Initialrecoveryactimplementing_guidance_feb18.pdf (on file with the *Columbia Law Review*).

170. See *id.* at 7. Section 1.6 of the guidance provides:

1.6 What additional responsibilities exist for Executive Branch agencies?

The Executive Branch shall distribute Recovery Act funds in accordance with: All anti-discrimination and equal opportunity statutes, regulations, and Executive Orders that apply to the expenditure of funds under Federal contracts, grants, cooperative agreements, loans, and other forms of Federal assistance. Grant-making agencies shall ensure that their recipients comply with Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and any program-specific statutes with anti-discrimination requirements. Generally applicable civil rights laws also continue to apply, including (but not limited to) the Fair Housing Act, the Fair Credit Reporting Act, the Americans With Disabilities Act, Title VII of the Civil Rights Act of 1964, the Equal Educational Opportunities Act, the Age Discrimination in Employment Act, and the Uniform Relocation Act.

Id.

171. Section 601 of Title VI prohibits discrimination based on race, color, or national origin in any “program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d (2006).

eral agencies and in programs receiving federal financial assistance;¹⁷² Title IX, which forbids gender discrimination in federally funded programs or activities;¹⁷³ and the Age Discrimination Act, enacted in 1975, which forbids age discrimination by recipients of federal financial assistance.¹⁷⁴

In conditioning federal spending on state and local compliance with antidiscrimination rules, Title VI represented a “watershed” moment in American history.¹⁷⁵ The most immediate trigger was the failure of states and localities to comply with desegregation requirements following *Brown*,¹⁷⁶ but the statute expansively applies to all programs and activities receiving federal funds.¹⁷⁷ In introducing the bill, President Kennedy—who had not long before resisted notions of cutting off funds to segre-

172. Rehabilitation Act of 1973, 29 U.S.C. § 794 (2006).

173. Education Amendments of 1972, tit. IX, 20 U.S.C. §§ 1681–1688 (2006).

174. 42 U.S.C. §§ 6101–6107.

175. See Stephen C. Halpern, *On the Limits of the Law: The Ironic Legacy of Title VI of the 1964 Civil Rights Act 1* (1995) (“Heralded as ‘one of the legislative milestones in modern American history’ . . . the 1964 Civil Rights Act was a watershed event in American law and politics.”). The roots of conditioning federal spending to advance civil rights stem from efforts in the New Deal and postwar period. In the 1930s, President Roosevelt, and his officials, harnessed executive power to combat discrimination, issuing an executive order prohibiting employment discrimination in federal agencies, see Exec. Order No. 8802, 3 C.F.R., ch. 2, at 234 (Supp. 1941) (prohibiting racial, ethnic and national origin discrimination against workers in defense industries and in government); Exec. Order No. 7046, microformed on CIS No. 1935-EO-7046 (Cong. Info. Serv. 1935) (forbidding discrimination in newly established Works Progress Administration (WPA)); Sitkoff, *supra* note 49, at 321 (discussing Executive Order 8802, which also established Committee on Fair Employment Practices (FEPC) in Office of Personnel Management to administer the order). Harold Ickes, President Roosevelt’s long-serving Secretary of the Interior, “insisted that the Public Works Administration (PWA) construction projects hire [blacks] as skilled as well as unskilled laborers” despite the fact that the statute was silent on the question of discrimination. *Id.* at 66–67. He also required that all PWA contractors hire a percentage of blacks equal to blacks’ proportion in the 1930 occupational census. See *id.* at 67 (noting provision was sometimes ignored by local officials and contractors). Congress in 1939 amended the New Deal’s Emergency Relief Act to prohibit discrimination by relief officials on the ground of “race, creed, or color.” *Id.* at 69. President Eisenhower in 1951 extended prohibitions on employment discrimination to recipients of federal contracts. See Exec. Order No. 10,479, 18 C.F.R. § 4899 (1953) (banning discrimination by contractors on federally financed construction sites); Goluboff, *supra* note 49, at 42 (“In 1953, even Eisenhower, a reluctant supporter of African American civil rights, followed the by then decade-long precedent of taking executive action to eliminate discrimination in government contracting.”).

176. See Charles F. Abernathy, *Title VI and the Constitution: A Regulatory Model for Defining “Discrimination,”* 70 *Geo. L.J.* 1, 1 (1981) (“Congress passed title VI during a period of intense concern with public school desegregation.”).

177. See 42 U.S.C. § 2000d (prohibiting discrimination in any “program or activity receiving Federal financial assistance”); see also Kenneth Wing, *Title VI and Health Facilities: Forms Without Substance*, 30 *Hastings L.J.* 137, 152 & n.56, 153 n.58 (1978) (documenting legislative concern with prohibiting discrimination in health care, particularly in hospital services).

gated schools systems¹⁷⁸—advanced a capacious notion of federal responsibility, stating that “[s]imple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination.”¹⁷⁹ Title VI’s language forbidding “discrimination” was not defined by Congress,¹⁸⁰ and federal agencies quickly interpreted that provision to prohibit not just intentional discrimination but practices that created an unjustified disparate impact.¹⁸¹ In forbidding both intentional discrimination and actions with a disparate impact by all federal grantees, Title VI would appear to provide a forceful tool for legal advocates seeking to ensure racial fairness in the use of federal stimulus funds.

Enforcement of Title VI, however, faces important practical constraints. For one, Title VI has operated most clearly as a prohibition on intentional discrimination. Title VI’s disparate impact regulations have not provided a consistently effective mechanism for ensuring that federally funded programs are attentive to racial impacts in program design and implementation.¹⁸² In part this is because courts have often declined to enforce capacious understandings of Title VI that might move

178. President Kennedy and other members of Congress initially opposed the idea of withholding federal aid, as an affront to localism in education, and as a potentially dangerous accumulation of federal power. See Gary Orfield, *The Reconstruction of Southern Education: The Schools and the 1964 Civil Rights Act* 31–32 (1969).

179. 109 Cong. Rec. 11,178 (1963). Twenty years later, the U.S. Civil Rights Commission, the federal agency charged with issuing reports and recommendations on the federal enforcement of Title VI and other civil rights provisions, would describe the statute as intended to “demolish the lingering barriers to full participation faced by minorities,” and argue that these “barriers are the legacy of legally mandated or tolerated segregation and discrimination, and, experience has shown, can be dismantled only with the leadership and assistance of the Federal Government.” U.S. Comm’n on Civil Rights, *Federal Civil Rights Commitments: An Assessment of Enforcement Resources and Performance* 2 (1983).

180. Title VI does not define the prohibited discrimination, but, in section 602 of the Act, it directs agencies that distribute federal funds to “effectuate” the regulations by issuing “rules, regulations, or orders of general applicability.” Pub. L. No. 88-352, § 602, 78 Stat. 241, 252 (1964) (codified at 42 U.S.C. § 2000d-1). Congress required presidential approval of the regulations, and also directed that the regulations be “consistent with achievement of the objectives of the statute authorizing the financial assistance.” *Id.*

181. See, e.g., 28 C.F.R. § 42.104(b)(2) (2009) (proposing regulations by Justice Department that would prohibit “arrangements . . . which have the effect of subjugating individuals to discrimination”); 45 C.F.R. § 80.3(b)(3) (2009) (establishing Department of Health and Human Services regulations prohibiting “mak[ing] selections . . . with the purpose or effect of defeating . . . the objectives of the Act or this regulation”). The first regulations promulgated under Title VI—drafted in 1965 by the same executive branch officials who contributed to the drafting of the statute—included regulations extending the statute to practices having a racially discriminatory effect. Cf. Comment, Title VI of the Civil Rights Act of 1964—Implementation and Impact, 36 *Geo. Wash. L. Rev.* 824, 845–46 (1968) (explaining how Justice Department officials compiled agency plans for implementing Title VI).

182. See Olatunde C.A. Johnson, *Disparity Rules*, 107 *Colum. L. Rev.* 374, 396–401 (2007) (discussing difficulty in enforcement of Title VI’s prohibition on disparate impact). The Supreme Court essentially curtailed judicial enforcement of Title VI’s disparate

federal agencies and grantees to broadly evaluate the effects of their spending programs.¹⁸³ And, more recently, the Supreme Court's 2001 decision in *Alexander v. Sandoval*¹⁸⁴ cut off the use of an implied private right of action to enforce Title VI's effect regulations.¹⁸⁵ Second, agency enforcement of Title VI has produced mixed results in promoting a robust requirement that agencies and their grantees take affirmative steps to assess racial impacts and to avoid harmful racial effects. Since courts have not clearly defined a particular norm, agencies feel no compunction to advance one.¹⁸⁶ In the absence of strong judicial enforcement of Title VI's disparate impact regulations, most federal agencies have not adopted meaningful elaborations of the disparate impact requirement. While federal agencies adopted the Title VI effects test, few have done much work to elaborate what sorts of disparate impacts are unjustified in federal spending programs, much less to advance the larger notion that grantees affirmatively consider or correct racial impacts.¹⁸⁷

impact standard. See *Alexander v. Sandoval*, 532 U.S. 275, 285 (2001) (holding Title VI's disparate impact regulations are not privately enforceable).

183. A telling example is an early disparate impact case in which the Second Circuit declined to interpret Title VI to require the City of New York to consider less discriminatory alternatives to closing a hospital that served a predominantly minority population. See *Bryan v. Koch*, 627 F.2d 612, 618–19 (2d Cir. 1980) (holding Title VI, unlike Title VII, did not require courts to consider less discriminatory alternatives as Title VI's breadth would mean such an inquiry would be too “open-ended” and thus beyond capacity of courts).

184. 532 U.S. at 293. For a critique of the Court's decision in *Sandoval*, see Pamela H.S. Karlan, *Disarming the Private Attorney General*, 2003 U. Ill. L. Rev. 183, 198–99 (arguing that Court improperly framed issue as whether Title VI created individual rights, rather than allowing private parties to enforce federal regulations, and failed to consider that at time of Title VI passage Congress would have assumed private lawsuits would be central pillar of enforcement, even in absence of express right of action).

185. Following the Supreme Court's 2002 decision in *Gonzaga University v. Doe*, 536 U.S. 273, 285 (2002) (holding § 1983 analysis of whether Congress intended to create enforceable right is no different than in implied right of action cases), lower courts have declined to find the effects regulations enforceable under § 1983. See, e.g., *S. Camden Citizens in Action v. N.J. Dep't of Env't. Prot.*, 274 F.3d 771, 774 (3d Cir. 2001) (holding § 1983 could not be used to enforce disparate impact regulations).

186. Early enforcement of Title VI to mandate school desegregation often mirrored relatively weak judicial standards. See Halpern, *supra* note 175, at 72–75 (noting agency tasked with enforcing Title VI had “standards [that] . . . were little more than the requirements of the Constitution as federal judges had interpreted those requirements”). Indeed, when the Department of Education adopted requirements to promote school integration that went beyond remedying intentional, explicit exclusion, critics faulted the agency for arbitrarily interpreting the statute and for going beyond what federal courts required. See *id.* at 54–57 (“Critics maintained that in mandating the percentages of students who had to be in desegregated schools, HEW had exceeded its authority under Title VI.”).

187. Johnson, *supra* note 182, at 401, 414 & n.176. There have been some instances of attempted formal rulemaking under Title VI to enforce an affirmative norm. For instance, the Environmental Protection Agency in 2000 issued draft guidance advising funding recipients to affirmatively consider racial impacts in the operation of their funding programs, but this draft guidance was never formally adopted. See Draft Recipient

Even with these limitations, Title VI has potential to serve as an important tool for equity advocates seeking to shape the spending of stimulus funds. In February 2010, for example, the Federal Transit Administration denied \$70 million in stimulus funds to Northern California's public transit agency after local groups filed an administrative Title VI complaint claiming that the regional transit agency had failed to conduct an adequate environmental review or to properly service minority communities.¹⁸⁸

B. Duties to Affirmatively Further

Title VIII of the Fair Housing Act of 1968, which requires that federal agencies and their grantees work to "affirmatively . . . further"¹⁸⁹ the goals of the Fair Housing Act, also promotes equity in federal spending. Additionally, because it creates affirmative requirements for grantees, Title VIII can, at least in the area of housing, operate to counter the complex harms and institutional arrangements generated by federal spending programs.¹⁹⁰

The relevant provisions of the Fair Housing Act require the federal government to take steps to administer its "programs and activities relating to housing and urban development . . . in a manner affirmatively to further the purposes of [the Fair Housing Act]."¹⁹¹ These provisions arise in the Fair Housing Act precisely because of legislative recognition of the role federal government spending played in structuring segregation through federal grant programs, and the perceived inadequacies of Title VI.¹⁹² In response, the Act places on the federal government an affirmative and forward-looking duty unusual in civil rights law.

Guidance, 65 Fed. Reg. 39,650, 39,657 (June 27, 2000) (providing guidance regarding environmental permitting programs).

188. See Complaint Under Title VI of the Civil Rights Act of 1964 & Executive Order 12,898 at 17–23, *Urban Habitat Program v. Bay Area Rapid Transit Dist.* (Dep't of Transp. Sept. 1, 2009), available at http://issuu.com/transform/docs/fta_title_vi_complaint_09-1-09_final (on file with the *Columbia Law Review*) (alleging failure to "comply with Title VI and Environmental Justice requirements"); see also Press Release, Pub. Advocates, On Eve of Stimulus Anniversary, Obama Administration Denies Funds Due to Civil Rights Failures (Feb. 16, 2010), available at http://www.publicadvocates.org/news/documents/Transit/FTA_Natl_Release_021610.pdf (on file with the *Columbia Law Review*) (describing Obama Administration's reaction to alleged Title VI violations).

189. Fair Housing Act of 1968, tit. VIII, 42 U.S.C. § 3608(d) (2006).

190. See 42 U.S.C. § 3608(d), (e)(5) (establishing requirements to affirmatively further fair housing goals).

191. 42 U.S.C. § 3608(d).

192. Because it prohibited racial discrimination in federally funded programs, Title VI covered public housing and other government-subsidized programs. Even prior to Title VI, President Kennedy's 1963 executive order required federal agencies to take "appropriate action" to abandon discriminatory practices in federal housing programs. Exec. Order No. 11,063, 3 C.F.R. 261 (Supp. 1962), reprinted as amended in 42 U.S.C. app. § 1982. Civil rights groups argued that both were insufficient: The executive order was not well enforced by federal agencies, see, e.g., *Civil Rights: Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary on S. 3296, Part 2,*

This affirmative duty arises because, unlike Title VI, which was driven primarily by notions of state and local complicity—that is, their failure to comply with *Brown's* dictates—the drafters of Title VIII sought to correct *federal* responsibility for creating residential segregation patterns.¹⁹³ Indeed, while the legislative record contains little discussion of the specific “affirmatively to further” language,¹⁹⁴ what emerges is a new theory of how the federal government should now function in relation to states and localities. No longer would it be permissible for the federal government to practice what this Essay has called “strategic deference.”¹⁹⁵ Now the federal government was to leverage its considerable spending power to affirmatively address discrimination and segregation.

For this provision to be powerful in requiring federal grantees to consider how federal programs might further housing segregation, its scope and the consequences for noncompliance had to be clear. Yet, this was not the case. Courts in the 1970s authorized judicial review through an implied right of action or under the Administrative Procedure Act (APA)¹⁹⁶, and defined it expansively to require that the federal government refrain from racial segregation in site selection and instead create opportunities for poor minorities to live in low-poverty, majority white

89th Cong. 1430–31 (1966) [hereinafter 1966 S. Hearings] (statement of Jack E. Wood, Associate Executive Director, National Committee Against Discrimination in Housing) (“This massive misuse of federal funds [for projects that reinforce segregated housing patterns] flows from a lack of firm and determined action by the Secretary of HUD . . . to affirmatively implement Executive Order 11063 . . .”), and Title VI failed to require agencies to undertake affirmative remedial measures. See Citizens Comm’n on Civil Rights, *A Decent Home: A Report on the Continuing Failure of the Federal Government to Provide Equal Housing Opportunity* 16–25 (1983) (detailing structural weaknesses and lack of enforcement of Kennedy’s executive order); Florence Wagman Roisman, *Keeping the Promise: Ending Racial Discrimination and Segregation in Federally Financed Housing*, 48 *How. L.J.* 913, 913–14 (2005) (arguing Title VI was “not an effective interdiction of racial discrimination and segregation”).

193. See, e.g., Fair Housing Act of 1967: Hearing on S. 1358, S. 2114, and S. 2280 Before the Subcomm. on Hous. & Urban Affairs of the S. Comm. on Banking & Currency, 90th Cong. 6 (1967) (statement of Ramsey Clark, Att’y Gen. of the United States) (“[T]he Federal Government fostered discrimination in housing . . .”); see also Orfield, *Racial Integration*, *supra* note 145, at 1767–68 (noting in debates surrounding the FHA several lawmakers alleged direct government role in segregation and proposed strengthening provisions of Title VI); Florence Wagman Roisman, *Affirmatively Furthering Fair Housing in Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation*, 42 *Wake Forest L. Rev.* 333, 389 (2007) [hereinafter Roisman, *Regional Housing Markets*] (“HUD’s role in creating the problem was fully recognized by Congress; the ‘affirmatively further’ language was included specifically to address that.”).

194. Similar language appeared in the Civil Rights Bill first introduced by President Lyndon B. Johnson in 1966, and was retained when—after a long struggle—the Fair Housing Act was eventually enacted in 1968. See Roisman, *Regional Housing Markets*, *supra* note 193, at 389 (discussing intended purpose of “affirmatively further” language).

195. See *supra* text accompanying notes 58–75 (discussing both local and federal governments’ use of deference to “avoid complying with antisegregation norms”).

196. 5 U.S.C. §§ 551–559, 701–706 (2006).

neighborhoods.¹⁹⁷ Yet, as the Supreme Court's private right of action law has changed,¹⁹⁸ some courts have held that the provision is not privately enforceable,¹⁹⁹ and courts disagree on the extent to which the provision requires grantees to further integrate federally funded housing programs.²⁰⁰

197. See *Hills v. Gautreaux*, 425 U.S. 284, 299 (1976) (holding regional remedy was appropriate because "the wrong committed by HUD confined the respondents to segregated public housing. The relevant geographic area for purposes of the respondents' housing options is the Chicago housing market, not the Chicago city limits"); *id.* at 301–02 ("An order directing HUD to use its discretion under the various federal housing programs to foster projects located in white areas . . . would be consistent with and supportive of well-established federal housing policy."); *Gautreaux v. Chi. Hous. Auth.*, 503 F.2d 930, 938 (7th Cir. 1974) (discussing duty to promote integration); *Shannon v. U.S. Dep't of Hous. & Urban Dev.*, 436 F.2d 809, 816, 819–20 (3d Cir. 1970) (finding HUD liable for constructing low-income subsidized housing in area with already high concentrations of poor minorities, which violated HUD's duty to affirmatively further fair housing in "non-ghetto areas" with lower race and poverty concentrations). *Shannon* involved the construction of Section 221 public housing, also known as project-based Section 8. The court read the affirmative duty to further in conjunction with Title VI. See *Shannon*, 436 F.2d at 817; see also *NAACP v. Sec'y of Hous. & Urban Dev.*, 817 F.2d 149, 155 (1st Cir. 1987) (authorizing review pursuant to APA and holding the statute requires "that HUD do more than simply not discriminate itself . . . [but] use its grant programs to assist in ending discrimination and segregation to the point where the supply of genuinely open housing increases").

198. See *Gonzaga Univ. v. Doe*, 536 U.S. 273, 286 (2002) ("[W]here the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under § 1983 or under an implied right of action.").

199. See, e.g., *Asylum Hill Problem Solving Revitalization Ass'n v. King*, 36 Conn. L. Rptr. 422 (Super. Ct. 2004), *aff'd* 890 A.2d 522 (Conn. 2006). For a discussion of the problems of enforcing the FHA's affirmatively furthering provisions pursuant to § 1983, see generally 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. 2135 (2010). The judicial enforcement strategy recently bore some fruit with the August 2009 settlement of a case against Westchester County for failing to comply with the duty to affirmatively further. The settlement stemmed from an August 2006 complaint which, unlike the Connecticut case, did not claim a direct right to enforce the statute. Instead, the plaintiffs—the Anti-Discrimination Center of Metro New York (ADC)—brought a qui tam action on behalf of the federal government claiming that Westchester County had, over a six-year period, received over \$50 million dollars in HUD funds under the Community Development and Block Grant program, in violation of the False Claims Act, by falsely certifying each year that it was affirmatively furthering fair housing. *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty.*, 668 F. Supp. 2d 548, 550–51 (S.D.N.Y. 2009). After a district court granted partial summary judgment in favor of the plaintiffs, HUD decided to intervene to secure a settlement in the case. Memorandum of Law of the United States of America in Support of Its Application to Intervene at 7, *Anti-Discrimination Center*, 668 F. Supp. 2d 548 (No. 06 Civ. 2860). In the end, the brokered settlement required Westchester County to create more than \$50 million in affordable housing in predominantly white areas of the county. Sam Roberts, *Housing Accord in Westchester: Seeks to Desegregate Mostly White Towns*, N.Y. Times, Aug. 11, 2009, at A1.

200. See *In re Adoption of the 2003 Low Income Hous. Tax Credit Qualified Allocation Plan*, 848 A.2d 1, 13–26 (N.J. Super. Ct. App. Div. 2004) (reviewing and

Yet, even with these limitations, civil rights groups have been able to mobilize at the administrative level to shape housing programs in part because of the legislature's push to promote integration within federal housing programs and early court decisions interpreting an affirmative duty to integrate.

An example of successful mobilization to enforce the affirmatively furthering requirement can be found in a recent agency notice to potential grantees under the Recovery Act's Homelessness Prevention and Rapid Re-Housing Program, which provides \$1.5 billion for communities to prevent homelessness among at-risk individuals and families and funds to help those who become homeless transition to stable housing.²⁰¹ HUD's recent notice of requirements for funding grantees specifies that grantees must comply not only with antidiscrimination requirements under Title VI, but with the duty to affirmatively further fair housing, not simply with respect to race, but with respect to other categories covered by the FHA as well (i.e., gender and disability).²⁰² Significantly—and in contrast to HUD's prior funding notices—HUD delineates the types of specific actions that meet this affirmative duty, including affirmatively marketing programs to people with disabilities, providing fair housing counseling and referral to fair housing agencies, and recruiting landlords and service providers in a range of communities so as to promote housing choice.²⁰³

In short, the FHA's "affirmatively furthering" requirement stands as the best statutory embodiment of an affirmative federal duty to consider racial impacts and promote equity outcomes in federal spending. As a practical matter, however, determining how to enforce the principle in courts, and to promote it outside of courts, is fraught with difficulty. These enforcement limitations are borne partly out of the Supreme

applying various tests for "establishing a discriminatory impact in a Title VIII case" and holding that agency's "'affirmatively to further' duty must be defined congruent with its statutory powers"); Orfield, *Racial Integration*, supra note 145, at 1784–90 ("Although agencies administering [housing] program[s] are bound by the duty [to further integrate], substantial disagreement remains as to the scope of that duty and its importance in relation to other statutory commands." (footnote omitted)); Kenneth H. Zimmerman, *The Low Income Housing Tax Credit Program and Civil Rights Law: Updating the Fight for Residential Integration*, in *Nat'l Low Income Hous. Coal., The NIMBY Report, Fifty Years Later: Brown v. Board of Education and Housing Opportunity* 24, 24–31 (2004), available at www.nlihc.org/doc/2004-1.pdf (on file with the *Columbia Law Review*) (discussing *In re Adoption of the 2003 Low Income Hous. Tax Credit* and noting "the most troubling aspects of the decision concern its failure to provide any substance, content, or standards to the 'affirmatively to further' mandate").

201. See ARRA, Pub. L. No. 111-5, div. A, tit. XII, 123 Stat. 115, 221–22 (2009).

202. Dep't of Hous. & Urban Dev., Notice of Allocations, Application Procedures, and Requirements for Homelessness Prevention and Rapid Re-Housing Program Grantees Under the American Recovery and Reinvestment Act of 2009, Docket No. FR-5307-N-01, at 41–42 (2009), available at http://portal.hud.gov/portal/page/portal/RECOVERY/nofa_portlet/hrp-notice.pdf (on file with the *Columbia Law Review*).

203. See *id.* at 42.

Court's doctrines on implied private rights of action for Spending Clause legislation and the amorphous nature of the statutory requirement. They also result from, more broadly, the willingness and competence of courts to decide between conflicting goals for federal spending (such as integration versus affordable housing development).²⁰⁴ Thus, while the principle extends beyond Title VI's nondiscrimination goals in important ways, shaping the meaning of the federal government's duty will be as much the domain of administrative and programmatic mobilization as it is the domain of the courts.

C. *Spending and Racial Inclusion*

However, the challenges that exist to advancing equity in federal spending through the longstanding civil rights framework are not insurmountable. The stimulus itself holds new promise for using law and legal frameworks to promote racial equity. The stimulus is spurring new forms of regulating and monitoring federal spending, which though not all specifically aimed at questions of race or social inclusion, provide an avenue for advancing racial equity. In particular, the current push toward increasing transparency in federal spending, and the new state agencies created to administer and monitor stimulus spending, present a new opportunity for advancing the goals incompletely realized by civil rights statutes. The stimulus contains new legislative rules and executive branch regulations to promote transparency,²⁰⁵ which equity advocates could leverage to provide new forms of equity accountability. These efforts can build on notions in Title VI and Title VIII that federal funds should not entrench or subsidize racial inequity, yet more fully realize these statutes by creating a more expansive and inclusive process of enforcement and accountability.

1. *"Transparent" Spending.* — President Obama repeatedly invoked the goal of improving government transparency and accountability both as a general matter and in relation to the Recovery Act and government spending programs in particular. On his first day in office, the President signed a memorandum expressing his commitment to an "unprecedented level of openness" so as to promote accountability, enhance government efficacy, and encourage public participation in democracy.²⁰⁶ The President also instructed the Office of Management and Budget (OMB) to issue an Open Government Directive.²⁰⁷ In December 2009, OMB issued its directive, encouraging agencies to employ a variety of

204. See *supra* notes 198–200 and accompanying text.

205. President Obama has repeatedly sounded the open government theme as an executive branch goal, stating that the ARRA will be implemented "with an unprecedented level of transparency and accountability." See ARRA Signing Statement, *supra* note 86.

206. Executive Office of the President, Transparency and Open Government: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4685 (Jan. 26, 2009).

207. *Id.*

mechanisms to promote “transparency, participation and collaboration.”²⁰⁸ The Directive required that each federal agency designate, under the direction of the White House, a high-level senior official to be accountable for the quality of information on federal spending.²⁰⁹

Beyond asserted executive-level commitment to transparency, a range of legislative rules attempt to advance the goal of transparency in the Recovery Act in particular. By statute, the Recovery Act establishes the Recovery, Accountability, and Transparency Board to prevent fraud, mismanagement, and waste, and to track for the public how Recovery Act funds are used by states, local governments, and private recipients.²¹⁰ The Board must issue quarterly and annual reports on its oversight findings and provide advice to government agencies.²¹¹ Significantly, the Recovery Act also requires that the government create and maintain a “user-friendly, public facing” website, which is now at www.recovery.gov.²¹² A visit to www.recovery.gov reveals, among other things: background on the stimulus, visual maps on the geographic location of Recovery Act funds, data on jobs created including by geographic location, and opportunities for citizens and groups to apply for stimulus-funded jobs and grants.²¹³ In addition, each federal agency has a web page tracking spending under the Recovery Act. While leading government watchdog groups have noted shortcomings in the Administration’s implementation of these transparency measures, they have praised this strong emphasis on transparency.²¹⁴

208. Office of Mgmt. and Budget, M-10-06, Memorandum for the Heads of Executive Departments and Agencies: Open Government Directive 1 (Dec. 8, 2009), available at http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-06.pdf (on file with the *Columbia Law Review*).

209. *Id.* at 3–4.

210. See Recovery Accountability & Transparency Bd., Mission Statement, at <http://www.recovery.gov/About/board/Pages/TheBoard.aspx> (on file with the *Columbia Law Review*) (last visited Oct. 23, 2010) (“The Recovery Accountability and Transparency Board was created by the American Recovery and Reinvestment Act of 2009 . . .”). The Board is chaired by Earl E. Devaney, who was appointed by President Obama, and includes twelve federal Inspectors General from various government agencies. Recovery Accountability & Transparency Bd., Board Members, at <http://www.recovery.gov/About/board/Pages/BoardMembers.aspx> (on file with the *Columbia Law Review*) (last visited Oct. 23, 2010). In addition, President Obama appointed Vice President Joe Biden to oversee implementation of the stimulus plan. Press Release, White House Office of the Press Sec’y, Vice President Biden to Oversee the Administration’s Implementation of the Recovery Act’s Provisions (Feb. 23, 2009), available at http://www.whitehouse.gov/the_press_office/Vice-President-Biden-to-Oversee-the-Administrations-implementation-of-the-Recovery (on file with the *Columbia Law Review*).

211. Recovery Accountability & Transparency Bd., Power and Functions, at http://www.recovery.gov/About/board/Pages/Powers_Functions.aspx (on file with the *Columbia Law Review*) (last visited Oct. 23, 2010).

212. ARRA, Pub. L. No. 111-5, § 1526, 123 Stat. 115, 293 (2009).

213. See www.recovery.gov, at <http://www.recovery.gov> (on file with the *Columbia Law Review*) (last visited Oct. 23, 2010).

214. See, e.g., OMB Watch, Recovery Act Transparency: Implementation and Current Issues 18 (2009), available at <http://www.accountablerecovery.net/sites/default/>

These legislative and executive transparency and accountability measures on spending build on past initiatives that emphasize increased public reporting of federal spending and that understand web technology as a key tool for promoting transparency and accountability.²¹⁵ The most comprehensive of these is the Federal Funding Accountability and Transparency Act of 2006 (FFATA), which requires OMB to provide access to information on federal funding awards through a searchable, publicly available website, which was established at usaspending.gov.²¹⁶

State governments also have implemented a variety of accountability and transparency measures. Although not required by the Recovery Act, President Obama requested that states name “czars” to oversee their share of funds from the stimulus package.²¹⁷ Over a dozen states have appointed such “czars,” while others have created boards tasked with coordinating and monitoring Recovery Act expenditures.²¹⁸ After urging from the White House, states created websites dedicated to tracking and providing public information on spending under the Recovery Act.²¹⁹

Nongovernmental organizations are building on the technology of transparency and using transparency and accountability as a frame for evaluating the stimulus. Groups representing a variety of interests—good government, civil rights, labor, environment—are creating their own web-

[files/Transparency%20in%20the%20Recovery%20Act.pdf](#) (on file with *the Columbia Law Review*) (expressing “guard[ed] optimis[m]” about new transparency and accountability measures but suggesting specific improvements in what data is collected and in public dissemination of that data).

215. See, e.g., David Robinson et al., *Government Data and the Invisible Hand*, 11 *Yale J.L. & Tech.* 160, 161 (2009) (advocating government’s role as information provider to ensure “private parties [can] compete on equal terms”).

216. Federal Funding Accountability and Transparency Act (FFATA) of 2006, Pub. L. No. 109-282, § 2(b), 120 Stat. 1186, 1187. The FFATA builds on prior efforts to increase accountability and public availability of information on federal spending. See, e.g., E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2919–20 (codified as note to 44 U.S.C. § 3501 (2006)) (requiring OMB to develop and maintain repository and website that provides information about research and development funded by federal government); Federal Financial Assistance Management Improvement Act of 1999, Pub. L. No. 106-107, 113 Stat. 1486 (codified as amended as note to 31 U.S.C. § 6101 (2006)) (requiring each federal agency to create and implement plan for reporting agency’s disbursement of federal funds).

217. See Pamela M. Prah, *Downturn Creates State Spending Czars*, *Stateline.org* (Apr. 9, 2009), at <http://www.stateline.org/live/details/story?contentId=391122> (on file with *the Columbia Law Review*) (describing creation of “state stimulus ‘czars’”).

218. *Id.* (noting that states with budget or chief operating officers include Idaho, Illinois, Maine, Minnesota, Missouri, Montana, Nebraska, North Dakota, Oklahoma, South Dakota, Tennessee, and Washington).

219. See Philip Mattera et al., *Good Jobs First, Show Us the Stimulus (Again): An Evaluation of State Government and Recovery Act Websites 1* (2010), at <http://www.goodjobsfirst.org/pdf/ARRAwebreportjan2010.pdf> (on file with *the Columbia Law Review*) (“Every state government has a website reporting on its role in implementing the American Recovery and Reinvestment Act . . .”).

sites to monitor and track the stimulus as well as monitor the sufficiency of federal and state transparency efforts.²²⁰

2. *Civil Rights Accountability.* — These transparency innovations provide new possibilities for responding to the complex ways, detailed in Part I, through which federal spending risks reproducing racial inequality. These new approaches innovate by (1) promoting a set of new metrics for advancing racial inclusion at the state and local levels, (2) using spending as a focus for advancing citizenship and inclusion claims, and (3) making visible the racial impacts of federal spending.

a. *Broadening Equity Metrics.* — The administrative and legislatively established transparency and accountability measures described above are geared to the monitoring of fraud and waste, and not to questions of civil rights. Thus, data is often not compiled or collected in a way that permits a race or gender equity analysis. As an example, OMB's guidance for Recovery Act grant recipients does not specifically require tracking race and ethnicity at the employee level.²²¹ Still, in some areas, the stimulus establishes new types of race- and ethnicity-specific data collection that equity advocates can employ to bolster efforts to monitor racial impacts. For instance, the Housing and Economic Recovery Act requires, for the first time, data collection of the racial and ethnic occupancy of projects developed pursuant to certain federally subsidized housing programs, allowing nongovernmental organizations to buttress current efforts to evaluate the extent to which the developments are providing access to minorities and furthering integration.²²²

Civil rights interests can organize around this and other available data. Federally funded contractors must meet goals for hiring small, disadvantaged, and women- and minority-owned businesses,²²³ which has resurrected long-standing debates about the propriety of affirmative ac-

220. E.g., Coalition for an Accountable Recovery, at <http://www.coalitionforanaccountablerecovery.org/> (on file with the *Columbia Law Review*) (last visited Oct. 23, 2010); ProPublica, Eye on the Stimulus, at <http://www.propublica.org/ion/stimulus> (on file with the *Columbia Law Review*) (last visited Oct. 23, 2010); States for a Transparent and Accountable Recovery, at <http://www.accountablerecovery.org/> (on file with the *Columbia Law Review*) (last visited Oct. 23, 2010); see also Mattera et al., *supra* note 219 (evaluating state government websites).

221. See Office of Mgmt. & Budget, Webinar, Prime Recipient Reporting (July 22, 2009), at http://www.whitehouse.gov/assets/documents/Webinar_5_ARRA_Recipient_Reporting_-_Prime_Recipient_1.pdf (on file with the *Columbia Law Review*) (describing reporting requirements tied to receipt of ARRA funding).

222. See Housing and Economic Recovery Act of 2008, Pub. L. 110-289, sec. 1125, § 1324, 122 Stat. 2654, 2693-95.

223. See, e.g., Exec. Order No. 11,246, 3 C.F.R. 167 (Supp. 1965) (prohibiting discrimination and requiring affirmative action for most contractors and subcontractors with federal contracts involving more than "specified amounts of money or specified numbers of workers").

tion²²⁴ as well as allowed significant civil rights innovations. Building on data, minority groups in several states have criticized state agencies for insufficient hiring of minority contractors with federal stimulus funds²²⁵ while, on the other hand, California is facing lawsuits from white contractors for violating state-based prohibitions against affirmative action.²²⁶ In short, in those areas in which civil rights and race-related data is available, interest groups and nongovernmental organizations can build on the government's own transparency and accountability efforts to provide an account of race and gender disparities in federal funding beneficiaries.

No doubt, producing metrics for broad concepts such as equity, inclusion, and fairness in federal spending will often be contested. Disparities in quantifiable areas, such as racial or gender disparities in stimulus job creation, might be amenable to measurement and benchmarking. By contrast, the effect that spending on roads, public transit design, and housing has on particular groups may be more difficult to quantify. Moreover, the claimed "equity" goal may itself be contested. As we have already seen in the context of enforcing the FHA's duty to affirmatively further, the statutory mandates and the equity norms may be in conflict: Expanding affordable housing might be in tension with promoting racial and economic integration.²²⁷

Rather than a limitation, the challenges in defining equity present an opportunity for governments and stakeholders to develop a more textured set of metrics for evaluating the impact of federal spending than is required under current civil rights law. In addition to easily quantifiable markers such as the racial, ethnic, or gender disparities in job creation, metrics might seek to evaluate whether transportation networks are designed to connect historically disadvantaged groups to areas of economic opportunity, or whether affordable housing development promotes neighborhood revitalization as well as racial integration.

As an example, several equity groups are creating their own metrics to help communities evaluate whether the implementation of stimulus programs furthers racial and ethnic equity. One mechanism for doing so is through the creation of "opportunity impact statements" intended to measure the extent to which federal stimulus programs, and other federal programs, further opportunity for racial and ethnic minorities.²²⁸

224. See generally John David Skrentny, *The Ironies of Affirmative Action: Politics, Culture, and Justice in America 19-35* (1996) (cataloguing conventional arguments against affirmative action).

225. See *supra* note 157 and accompanying text (noting failure of some states to meet minority hiring goals set in conjunction with stimulus funding).

226. E.g., *Complaint for Declaratory and Injunctive Relief, Associated Gen. Contractors of Am., San Diego Chapter v. Cal. Dep't of Transp.*, No. 2:09-CV-01622-JAM-GGH (E.D. Cal. June 11, 2009).

227. See *supra* note 200 and accompanying text (noting disagreements among courts regarding extent to which FHA requires grantees to further integrate housing programs).

228. See, e.g., *Opportunity Agenda, The Opportunity Impact Statement: Expanding the American Dream 2-5* [hereinafter *Opportunity Agenda, Impact Statement*], at <http://>

Such statements might be formal mechanisms used by federal and state agencies to measure the impacts of federal spending programs²²⁹ as well as tools used by advocacy groups and citizens.²³⁰ Opportunity impact statements would include familiar civil rights equity goals such as ensuring that government aid reaches low-income and minority communities, providing contracting opportunities for minority- and women-owned businesses, and collecting employment data by race and ethnicity.²³¹ However, this approach also considers whether stimulus funds sustain infrastructure in cities (which are often predominantly minority), invest in public transportation, connect low-income, low-skilled workers to job training and career pathways, and create low-income housing in racially integrated, low-poverty neighborhoods.²³²

None of this is to suggest that governments or nongovernmental organizations will always agree on the relevant equity metric. Stakeholders may disagree over racial equity goals and whether particular outlays of stimulus funds are furthering that goal. Attempts to judicially and administratively enforce Title VI and Title VIII constraints on federal spending led to similar disputes—with stakeholders disagreeing over the federal role in promoting integration.²³³ These new equity metrics are not immune from such contestations, but this new approach permits groups to organize around more expansive conceptions of equity than are often permissible under existing civil rights laws.

b. *Structuring Citizenship.* — Particular substantive equity goals and the process of making equity and fairness claims of federal spending can serve to structure citizenship. The ultimate goal is to promote inclusion in the benefits of recovery, but also the broader idea that inattention to race in federal spending can serve to cement or exacerbate inequality.

opportunityagenda.org/files/field_file/The%20Opportunity%20Impact%20Statement.pdf (on file with the *Columbia Law Review*) (last visited Oct. 23, 2010) (detailing components of opportunity impact statement).

229. See *id.* at 8–11 (proposing process for agency incorporation of opportunity impact assessments and statements).

230. See Opportunity Agenda, *Ensuring Equal Opportunity in Our Nation's Economic Recovery Efforts 3–5* (2009) [hereinafter *Opportunity Agenda, Ensuring*], at http://opportunityagenda.org/files/field_file/Fact%20Sheet%20-%20Ensuring%20Equal%20Opportunity%20in%20Our%20Nation's%20Economic%20Recovery%20Efforts.pdf (on file with the *Columbia Law Review*) (detailing how advocates can monitor stimulus effort).

231. See, e.g., Kirwan Inst. for the Study of Race & Ethnicity at Ohio State Univ., *Ten Recommendations*, at <http://fairrecovery.org/docs/tenrecommendations.pdf> [hereinafter *Kirwan Institute, Ten Recommendations*] (on file with the *Columbia Law Review*) (last visited Oct. 23, 2010) (outlining ten principles for “fair” recovery); Opportunity Agenda, *Impact Statement*, *supra* note 228, at 11–12 (proposing assessment of minority inclusion in contracting and employment opportunities).

232. See, e.g., Kirwan Institute, *Ten Recommendations*, *supra* note 231.

233. See *supra* notes 182–203 and accompanying text (describing enforcement history of Title VI and Title VIII).

The citizenship and inclusion norms already present in federal civil rights laws provide a foundation for these claims. Stakeholders draw on existing civil rights laws to further the broader principle that federal spending fairly benefit all groups, and to help advance equity for historically disadvantaged groups. Indeed, civil rights and equity groups that have begun to monitor the stimulus often explicitly ground their quest for “fairness” in stimulus spending on the values embedded in civil rights laws governing federal spending.²³⁴

Certain difficulties no doubt attend efforts to make such claims. One difficulty is that more powerful civil rights interests, such as minority and women contractors, are likely to prevail in the political marketplace over less powerful minority interests, such as women receiving welfare or unemployed construction workers. Already, minority contractors—historically among the most organized minority interest groups at the federal and state levels—have been among the most prominent critics of the implementation of the Recovery Act.²³⁵

Another difficulty is that claims that appear as rights claims may seem as subordinate to the broad goal of economic recovery and job creation. Given the universalist aspirations of the stimulus effort, claims of racial fairness may seem illegitimate.²³⁶ In the context of a severe recession, too, these claims may appear luxurious. This parallels the problem that the fledgling civil rights interest groups had in challenging what they saw as insufficient attention to race in New Deal programs.²³⁷ Yet, the New Deal manifests the very lesson that equity advocates seek to make plain in their responses to the current recovery effort—that substantive inequality can result from inattention to racial consequences.

c. Increasing Visibility. — Finally, the promise of increased visibility for federal spending questions may hold the most promise. The technological tools of transparency—the use of web technology and data mapping—allow visualization of the equity impacts of federal spending and render visible what is otherwise invisible. As discussed in Part I, the effects of federal spending become hidden in subsidies and in state and local government action,²³⁸ and thus federal responsibility and the effect of federally created structures might be difficult for the general public to track and apprehend.

234. See, e.g., Opportunity Agenda, Ensuring, *supra* note 230, at 1 (“This fact sheet . . . describes the ways in which existing laws require equal opportunity in jobs, housing, health care, transportation, and other sectors, and offers specific ideas for holding public and private officials accountable.”).

235. See Glantz, *supra* note 157 (“Minority contractors say they’re seeing only a small fraction of the stimulus dollars.”).

236. See Powell, *supra* note 137, at 798–800 (“Once a race-blind position is adopted, it becomes difficult to justify race-sensitive or race-specific policies or laws. . . . If race is irrelevant, what is the justification legally or otherwise for using it?”).

237. See Poole, *supra* note 57, at 97–139 (discussing challenges New Deal-era civil rights groups faced in promoting equity during development of Social Security Act).

238. See *supra* text accompanying notes 40–47.

In addition, visualization and mapping also address another form of invisibility: They translate technical information about budgets and spending—previously understood by only a small set of experts—to a broader group of potential stakeholders. The work of monitoring federal spending programs has been limited to a few groups and lawyers in Washington, D.C., who are familiar with federal budgets and programs, monitoring contracting compliance, and administrative and legislative advocacy. These new efforts potentially expand the range of groups involved, permit new connections between traditional Washington-based interest groups and state and local organizations, and expand the forms of advocacy. Thus, Washington-based interest groups are reaching out to state and local women's groups, immigrants, and racial minority groups to provide technical assistance on how these groups and their communities can benefit from stimulus funding as well as track impacts.²³⁹

* * *

In short, while there are challenges to leveraging the transparency and accountability frame, the approach holds promise. Given the lack of robust rights-based constraints to federal spending, this new approach allows equity groups to move beyond conceptions of antidiscrimination rights, and mobilize around more expansive notions of fairness, equity, and inclusion. The principle that expenditures of federal money should be fair and inclusive might not yet be fully realized—these principles are contested and difficult to enforce administratively and judicially, or to realize in the political sphere. Yet mobilization efforts to promote equity in federal spending need not be limited by existing notions of fairness; they can commence a process to elaborate and embed these norms in the public sphere.

239. See, e.g., Kirwan Inst. for the Study of Race & Ethnicity at Ohio State Univ., *Beyond the Quick Fix: ARRA Contracting, Jobs, and Building a Fair Recovery for Florida* 1, 24–25 (2010), available at <http://fairrecovery.org/docs/beyondthequickfix.pdf> (on file with the *Columbia Law Review*) (measuring impact of ARRA and recommending policy changes in order to “maximiz[e] job creation from ARRA funding and help[] hard hit communities of color to get their fair share of jobs”); Kirwan Inst. for the Study of Race & Ethnicity at Ohio State Univ., *How Fair Is Florida? Recession, Recovery, Equity and Opportunity in Florida* 3–4, 16–22 (2009), available at <http://fairrecovery.org/docs/fl2.pdf> (on file with the *Columbia Law Review*) (analyzing data on ARRA contracts and proposed projects, finding ARRA’s resource allocation follows current race and gender opportunity disparity, and arguing for holistic plan for “ensur[ing] that [ARRA] funds are disbursed in a fair and equitable manner”); Office of Research, Advocacy, and Legislation, Nat’l Council of La Raza, *The American Recovery and Reinvestment Act of 2009: Key Components of Interest to Latino Communities* 3–6 (2009), available at http://www.nclr.org/index.php/publications/memo_to_nclr_affiliates_the_american_recovery_and_reinvestment_act_of_2009_key_components_of_interest_to_latino_communities/ (on file with the *Columbia Law Review*) (outlining key ARRA program investments of interest to Latino community and requesting information regarding secured ARRA funding for tracking purposes).

CONCLUSION

In the 1930s, nascent civil rights groups began to sound the alarm about the adverse racial impacts of New Deal programs. Their advocacy efforts were spotty, overshadowed by the imperative of battling the patent horrors of lynching and Jim Crow, and thus failed to prompt broader forms of mobilization.²⁴⁰

This time could be different. Antidiscrimination laws provide avenues for promoting affirmative and racially inclusive uses of federal money that were unavailable to prior generations. The limited equity metrics embodied in the 1964 Civil Rights Act, and the challenges of enforcing the relevant provisions of the Fair Housing Act, require that equity advocates harness these laws in novel ways to interrupt the multifarious mechanisms through which federal spending reproduces inequality. This Essay shows that promise lies in employing new forms of data, transparency, and technology to press for racial equity and inclusion through federal spending. The hope is that the civil rights infrastructure that is emerging to evaluate, monitor, and respond to the current stimulus will endure, and that the equity impacts of federal spending become a core focus of civil rights advocacy and commentary. Ultimately, the success of any of these efforts will depend on working at many levels—in courts, agencies, and the public sphere—to persuade relevant decisionmakers that federal spending matters for substantive racial equality. By directing attention to the equity effects of federal spending, this Essay aims to inspire fresh thinking on additional mechanisms for leveraging federal spending to promote racial and other forms of inclusion.

240. See Poole, *supra* note 57, at 97–139 (discussing work of civil rights groups who sought to challenge New Deal exclusions).

