Data-Driven Discrimination: A Case for Equal Protection in the Racially Disparate Impact of Big Data

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INTRODUCTION

In May 2018, the Department of Housing and Urban Development ("HUD") rescinded its Assessments for Fair Housing Tool for Local Governments ("AFH").[1] Local governments receiving HUD funds would use AFH data to determine whether they complied with their duty to affirmatively further the goals of the Fair Housing Act.[2] This data included maps demonstrating "racially and ethnically concentrated areas of poverty, dot density maps showing the geographic dispersion of different racial and ethnic groups, and thematic maps showing disparities in the location of

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1. DEP'T HOUSING & URBAN DEV., Press Release, *HUD Withdraws Fair Housing Assessment Tool* (May 18, 2018), https://www.hud.gov/press/press_releases_media_advisories/HUD_No_18_044 [https://perma.cc/2Q3R-C49C] [hereinafter HUD Press Release].

2. DEP'T HOUSING & URBAN DEV., AFFH RULE GUIDEBOOK 5-7 (Dec. 31, 2015), https://files.hudexchange.info/resources/documents/AFFH-Rule-Guidebook.pdf [https://perma.cc/2P2C-5YA8].

proficient schools across the jurisdiction and region."[3] Governments and housing authorities alike heralded the tool, which used big data to identify disparate impacts in fair housing programs, for providing a clear and standardized method for helping localities address disparities in housing patterns.[4] Despite widespread praise for the AFH, the Trump administration rescinded the tool for being "confusing, difficult to use, and frequently produc[ing] unacceptable assessments"[5]; fair housing advocates unsuccessfully sued under the Administrative Procedure Act and the Fair Housing Act to compel HUD to reverse its decision.[6]

Organizations increasingly face accusations of using big data in a way that disparately impacts people of color in hiring, housing, and advertising. Moreover, government actors increasingly use big data to not only streamline their internal organization, such as hiring, but also some of their legal processes: investigations and even criminal sentencing.[7] In both the private and public sectors, big data promises to increase the quality of services provided to citizens and consumers. But the racially discriminatory implications raise serious concerns.

The Civil Rights Act, Fair Housing Act, and other federal civil rights statutes have helped activists and civil rights organizations hold private actors liable for algorithmic discrimination. For example, employment and housing rights advocates have successfully settled with companies after alleging their housing and job advertisements discriminated on the basis of race. Credit card companies and banks have settled with the Department of Justice after being accused of denying credit cards to consumers based on language proficiency and ethnicity through discriminatorily constructed algorithms.[8]

State actors, however, are largely shielded from liability for the disparate impact of the use (or misuse) of tools which incorporate big data under the Equal Protection Clause of the Fourteenth Amendment.[9] Unlike federal civil rights statutes, the Supreme Court has largely foreclosed the ability of courts to adjudicate racial discrimination claims arising under the Fourteenth Amendment. In *Washington v.*

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3. *Id.* at 44. The Fair Housing Act requires HUD to administer programs in a manner "affirmatively to further the policies" of the Act, which would include the numerous grant-making programs to local governments. 42 U.S.C. § 3608 (2018).

4. *See The Fair Housing Act: Reviewing Efforts to Eliminate Discrimination and Promote Opportunity in Housing*, 116th. Cong. 12 (2019) (testimony of Debby Goldberg, Vice President, Housing Policy and Special Projects, Fair Housing Alliance), https://financialservices.house.gov/uploadedfiles/hhrg-116-ba00-wstate-goldbergd-20190402.pdf [https://perma.cc/MAX9-DXZA].

5. *See* HUD Press Release, *supra* note 1.

6. *See* NAT'L FAIR HOUSING ALLIANCE, *Background on* NFHA, et al. v. Carson, https://nationalfair housing.org/background-on-nfha-et-al-v-carson/ [https://perma.cc/T2RM-5KPU] (last visited Aug. 1, 2020); *see also* Nat'l Fair Hous. All. v. Carson, 330 F. Supp. 3d 14 (D.D.C. 2018).

7. *See infra* Part II, Section (b).

8. *See, e.g.*, United States v. Fid. Fed. Bank, No. 1:02-cv-03906-NG-MDG (E.D.N.Y. July 8, 2002) (settling allegations that the bank engaged in discriminatory data collection practices against Latinx consumers in violation of the ECOA); *see also* Andrea Freeman, *Racism in the Credit Card Industry*, 95 N.C. L. REV. 1071, 1121-27 (2017).

9. Government actors can also be liable for violations in civil rights statutes under disparate impact theory. The focus on this paper, however, will be the development of disparate impact liability under the Fourteenth Amendment for claims involving the use of big data.

Davis, the Supreme Court held that only claims of *intentional* racial discrimination, not merely unintentional disparate impact, by state actors are available under the Equal Protection Clause.[10] The Court foreclosed the availability of disparate impact theory, which would find defendants liable based on facially neutral actions that produced discriminatory outcomes, because it was worried the floodgates of litigation would overwhelm the judiciary and call all legislation into question:

> "A rule that a statute designed to serve neutral ends is nevertheless invalid, absent justification, if in practice it benefits or burdens one race more than another *would be far-reaching* and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white."[11]

A discriminatory impact standard like that found in civil rights statutes should be available in lieu of a strict intentional discrimination standard in claims involving a government actor's use of big data. Current racial discrimination jurisprudence cannot respond properly to the government's use of big data to provide services, which results in racially disparate effects. The brave new world of big data discrimination demonstrates that the concerns of the Court in *Washington v. Davis* are outdated and foreclose real solutions to twenty-first century racial discrimination. This Note will challenge the idea that disparate impact theory cannot alone establish concrete racial discrimination, at least in the context of big data instruments.

Part I will discuss the history of the racial discrimination jurisprudence under the Fourteenth Amendment and why we should refocus on the Equal Protection Clause in tackling racial discrimination by state actors. Part II will turn to current uses of big data by state actors and private companies and provide a comparative analysis of big data's use in evidencing discrimination under civil rights statutes. Part III will discuss how we can use knowledge about big data's interaction with civil rights statutes to develop a new jurisprudence under the Equal Protection Clause, which considers the racially discriminatory impact of the use of big data.

I. HOLDING THE GOVERNMENT LIABLE UNDER THE FOURTEENTH AMENDMENT

The Fourteenth Amendment grants the right of equal protection under the law to every person.[12] After the ratification of the Fourteenth Amendment, the Supreme Court grappled with whether a violation of the Equal Protection Clause required a showing that the state intentionally discriminated on the basis of race, or whether it was sufficient to show that an ostensibly neutral law was racist in its effect. The following section will discuss the history of equal protection jurisprudence. In limiting

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10. Washington v. Davis, 426 U.S. 229, 248-49 (1976). Importantly, disparate impact can still prove discrimination, but it cannot be the only showing; some proof of intent or mixed motive must be demonstrated. *See generally* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).

11. *Washington v. Davis*, 426 U.S. at 248 (emphasis added).

12. U.S. CONST. amend. XIV, § 1.

the ability of actors to prove discriminatory outcomes through disparate impact theory, the Supreme Court has stifled the pursuit of racial equality.

In *Yick Wo v. Hopkins*, the Court held that a facially neutral law nevertheless violated the Equal Protection Clause because the law clearly discriminated against business owners of Chinese descent.[13] Later, at the height of the Civil Rights Movement, the Court further examined the idea that a facially neutral policy or practice could nevertheless be discriminatory. In *Griffin v. County School Board of Prince Edward County*, the Court took a hard stance against segregation, holding a facially neutral decision to close all schools in Prince Edward County, Virginia, violated the Equal Protection Clause because the decision clearly impacted Black students.[14] Other cases preceding *Washington v. Davis* demonstrate a willingness on the part of the Court to use disparate impact to find Equal Protection violations; specifically if the result of a government action was obviously discriminatory, the Supreme Court was willing to acknowledge that sometimes facially neutral policies can have a racially discriminatory impact.[15]

In 1976, the Court rejected the more expansive understanding of equal protection found in its precedents. *Washington v. Davis* examined the constitutionality of an entrance exam to become a police officer in the District of Columbia.[16] The exam, which tested applicants on "certain physical and character standards," did not discriminate against Black applicants on its face.[17] Black applicants, however, were far less likely to pass the exam than white applicants.[18] The Court held that this showing was insufficient to state an equal protection claim, as such claims require a showing of intentional discrimination.[19] In so holding, the Court distinguished from prior cases like *Yick Wo* and *Hill v. Texas* because the facially neutral regulation in those cases so obviously discriminated on the basis of race."[20]

What has become obvious is that racially discriminatory policies are often constructed on facially neutral terms. As scholars note, the holding in *Washington v.*

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13. Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886) ("[T]he facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that, *whatever may have been the intent of the ordinances as adopted, they are applied* by the public authorities charged with their administration, and thus representing the state itself, *with a mind so unequal and oppressive as to amount to a practical denial* by the state of that equal protection of the laws . . .") (emphasis added).

14. Griffin v. Cty. Sch. Bd. of Prince Edward Cty., 377 U.S. 218 (1964) ("Virginia law, as here applied, unquestionably treats the school children of Prince Edward differently . . . Closing Prince Edward's schools bears more heavily on Negro children in Prince Edward County since white children there have accredited private schools which they can attend, while colored children until very recently have had no available private schools, and even the school they now attend is a temporary expedient . . . *the result* is that Prince Edward County school children, if they go to school in their own county*, must go to racially segregated schools* . . .") (emphasis added).

15. *E.g.*, Hill v. State of Tex., 316 U.S. 400, 404 (1942) (holding that a facially-neutral jury selection statute was racially discriminatory because "chance or accident could hardly have accounted for the continuous omission of negroes from the grand jury lists for so long a period as sixteen years or more.").

16. *Washington v. Davis*, 426 U.S. at 229, 234.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 241-45.

Davis and its progeny[21] have slowed antidiscrimination litigation under constitutional theories to a slow grind, because discrimination no longer makes a blatant display.[22] Professor Derrick Bell noted that post-*Washington v. Davis*, equal protection jurisprudence and the "commitment to racial equality" was "moderated and compromised" by an imposing burden-shifting which placed a heavy burden on the plaintiff to show intentional discrimination.[23] Because structural barriers are more complicated than mere intent, *Washington v. Davis* serves to foreclose most possibilities for creative solutions to structural inequality. This is especially pertinent in the age of big data, where facially neutral discrimination can take the form of complex systems using infinite (and often unknown) sources of data to provide government services, including health care, education, and security.

Relatedly, equal protection suits can provide relief for forms of racial discrimination that are not covered by the civil rights statutes. The Fifth Amendment applies the equal protection guarantee to the federal government.[24] Private persons bring Fourteenth Amendment claims against state and local actors under 42 U.S.C. § 1983, which grants the right for any person who is deprived of a federal constitutional right to sue a person acting "under the color of any statute, ordinance, regulation, custom, or usage," of the state.[25] Notwithstanding the theories of state action,[26] the possibility for civil liability could serve as a deterrent against racially discriminatory behavior for organizations and government entities alike. Explained below, the door to Equal Protection claims should be open to disparate impact claims for racial discrimination in the use of big data, and we can model current jurisprudence in civil rights statutes to do so.

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21. Later cases affirmed the holding in *Washington v. Davis*. *See, e.g.*, Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.").

22. Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 767 (2011) (noting that "state action that perpetuates the subordination of historically disadvantaged groups will tend to express itself in facially neutral terms.").

23. DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 657 (2d. ed. 1980).

24. Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (holding that racial segregation by the federal government violated due process under the Fifth Amendment).

25. 42 U.S.C. §1983 (2018). Additionally, 42 U.S.C. §1982 (2018) provides a private right of action for discrimination in property rights, which could arguably provide an alternative pathway for redress for racially discriminatory housing discrimination through big data. Because §1982 effectuates the Thirteenth Amendment, however, analysis of civil liability under §1982 goes beyond the scope of this paper (although the benefits of civil litigation generally would still apply).

26. State action doctrine would likely preclude private actors like Facebook from liability under the Fourteenth Amendment. However, it is worth noting that scholars have argued that big technology companies like Facebook and Google should be considered analogous to governments due to their largely unregulated nature and seemingly endless profit margins that outsize the GDP of some countries. Some have even gone as far to argue that these company are themselves de facto sovereignties. I will leave for future authors the theory under which these companies can be considered state actors. For more information, see, for example, Henry Farrell, Margaret Levi & Tim O'Reilly, *Mark Zuckerberg Runs a Nation-State, and He's the King*, VOX (Apr. 10, 2018), https://www.vox.com/the-big-idea/2018/4/9/17214752/zuckerberg-facebook-power-regulation-data-privacy-control-political-theory-data-breach-king [https://perma.cc/T2RM-5KPU]; Max Read, *Does Mark Zuckerberg Even Know What Facebook Is?*, N.Y. MAG. (Oct. 7, 2017), http://nymag.com/intelligencer/2017/10/does-even-mark-zuckerberg-know-what-facebook-is.html [https://perma.cc/L69J-BX93].

II. What Happens When Big Data is Racist

A. What is Big Data?

Big data can roughly be defined as datasets comprised of "large, diverse, complex, longitudinal, and/or distributed datasets generated from instruments, sensors, Internet transactions, email, video, click streams, and/or all other digital sources available today and in the future."[27] The sources of data are infinite. Public and private entities alike gather data from voluntary user input or other user interactions, such that organizations are constantly accumulating data sets for their own use.

In the private sector, tech giants like Facebook, Amazon, Google, and Netflix use the information provided by their users and the tools that users opt into, including location services, file storage programs (the cloud), personal data, and tracks of likes and clicks.[28] Mass data sets are also available for public use.[29] For example, organizations use demographic data provided by the government, such as Census data, and federal and local crime reports.[30] Organizations and individuals also use publicly available data from tech companies, known as application program interfaces (APIs). Companies including Twitter, Facebook, and the employment listing company, Glassdoor, all provide APIs for developer use.[31]

The government uses big data in a variety of ways. The Department of Health uses information including age, health status, and location to track health patterns for preventative care and fee services, which became especially significant after the passage of the Affordable Care Act.[32] The Department of Education uses big data to create online learning tools for educators, using student data to develop methodology catered to specific student needs.[33] The Department of Homeland Security uses big data in a variety (albeit problematic) ways, including the technology for airport inspections, which incorporate big data to identify people moving through airports.[34] Before it withdrew the AFH, the HUD used big data to help localities receiving grants to identify disparities in their housing programs.[35] Former National Security Agency officer Edward Snowden revealed that the federal government uses big data provided by network providers like Verizon to track, and sometimes listen to, users'

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27. Exec. Off. President, Big Data: Seizing Opportunities, Preserving Values 3 (2014) (internal citation omitted), https://obamawhitehouse.archives.gov/sites/default/files/docs/big_data_privacy_report_may_1_2014.pdf [https://perma.cc/Z6M7-4QYT] [hereinafter Seizing Opportunities].

28. *See* Dylan Curran, *Are You Ready? Here is All the Data Facebook and Google Have on You*, Guardian (Mar. 30, 2018), https://www.theguardian.com/commentisfree/2018/mar/28/all-the-data-facebook-google-has-on-you-privacy [https://perma.cc/46Y3-GZTY]; Kristen Korosec, *This Is the Personal Data that Facebook Collects—And Sometimes Sells*, Fortune (Mar. 18, 2018), http://fortune.com/2018/03/21/facebook-personal-data-cambridge-analytica/ [https://perma.cc/B53N-7ZKU].

29. Bernard Marr, *Big Data And AI: 30 Amazing (And Free) Public Data Sources For 2018*, Forbes (Feb. 26, 2018), https://www.forbes.com/sites/bernardmarr/2018/02/26/big-data-and-ai-30-amazing-and-free-public-d.ata-sources-for-2018/#379359d35f8a [https://perma.cc/V3HE-F8TS].

30. *Id.*

31. *See id.*

32. *See* Exec. Off. President, Seizing Opportunities, *supra* note 27, at 22-24.

33. *Id.* at 24-25.

34. *Id.* at 27-29.

35. *See supra* notes 5-6 and accompanying text.

telephone calls; reports indicate that the NSA targeted people of the Muslim faith after 9/11 under this program.[36] The accumulation and use of big data can be used for both innovative and insidious ways.

B. The Consequences of Big Data

Like most technology, the application of big data began as a promise of betterment. Proponents believed the mass accumulation of data would remove human error from selection processes because machines could be programmed against bias and operate objectively. Because big data is viewed as objective, the logic goes, its use can eliminate the unconscious bias that permeates human behavior and thus provide services free of human error.[37] Accordingly, big data ostensibly plays a role in preventing or remedying racial discrimination. An Obama administration report elucidated big data's promise to that effect. In *Big Data: A Report on Algorithmic Systems, Opportunity, and Civil Rights*, the Obama administration found that big data instruments could increase access and opportunity in affordable credit lending, higher education admissions, employment, and criminal justice.[38] Because massive datasets are now so accessible, government services can not only be improved, but the resulting efficiencies could also save taxpayer dollars.[39]

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36. *See* Charlie Savage and Matt Apuzzo*, U.S. Spied on 5 American Muslims, A Report Says*, N.Y. TIMES (July 9, 2014), https://www.nytimes.com/2014/07/10/us/politics/nsa-snowden-records-glenn-greenwald-first-look.html [https://perma.cc/Q8LX-3VKP]. The ACLU filed a lawsuit to compel the Foreign Intelligence Surveillance Court to unseal its legal opinions which allowed the NSA to engage in this "bulk collection" of data; the court is still moving through FISA court on procedural grounds. *See* Motion of the ACLU, the ACLU of the Nation's Capital, and the Media Freedom and Information Access Clinic for the Release of Court Record, in re Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act, No. Misc. 13-08 (FISA Ct. Nov. 7, 2013), https://www.fisc.uscourts.gov/sites/default/files/Misc%2013-08%20Motion-2.pdf [https://perma.cc/PMZ7-CTH8].

37. Facebook is a principle example of big data's idealistic roots. A company whose mission centers around the idea of connection, Facebook curates an experience using troves of user (and, often, nonuser) data. In 2015, Mark Zuckerberg said of Facebook:

> "Our mission at Facebook is to connect the world. We often think about this as connecting you with your friends and family – those who matter to you most. But this also means helping people connect with businesses, governments and other organizations in their lives as well. By helping businesses connect with new and existing customers, and by helping developers share their apps with the world, the Facebook community is creating a lot of jobs and economic opportunity around the world."

Mark Zuckerberg, FACEBOOK (Jan. 20, 2015), https://www.facebook.com/zuck/posts/10101865957208591 [https://perma.cc/C96M-V55X]. Users opt-in to sharing their data with companies like Facebook in exchange for the ability to communicate with the rest of the world online. And these companies have, in fact, developed a generation of young people who undertake social and political movements entirely online. *See, e.g.*, Monica Anderson et al., *Activism in the Social Media Age*, PEW RSCH. CTR. (July 11, 2018), https://www.pewinternet.org/2018/07/11/activism-in-the-social-media-age/ [https://perma.cc/UXN4-PMUW] (demonstrating five years after the launch of Black Lives Matter that social media has sparked activism). The ability to connect to the world, which is only made possible through these companies' use of data, is unparalleled with any other era in history.

38. EXEC. OFF. PRESIDENT, BIG DATA: A REPORT ON ALGORITHMIC SYSTEMS, OPPORTUNITY, AND CIVIL RIGHTS (2016), https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/2016_0504_data_discrimination.pdf [https://perma.cc/SXS8-HJWR] [hereinafter REPORT ON ALGORITHMIC SYSTEMS].

39. *See id.* at 5.

There are already some examples of this algorithmic good. Twitter used the data it collects to successfully weed out millions of accounts created for the purpose of ISIS recruitment (although critics question why the company has not done the same for white supremacist terrorism).[40] Facebook recently worked with a coalition of civil rights organizations to develop a new antidiscrimination policy that will use big data to direct searches for white supremacist ideology towards the white supremacist rehabilitation group Life After Hate.[41] Clearly, these companies have the ability to combat racial discrimination and other forms of hate on a massive scale.

Big data also serves a role in proving racial discrimination for investigative purposes. A report by the Future of Privacy Forum and the Anti-Defamation League highlighted several cases in which advocates used big data to combat racial discrimination.[42] The FBI's Uniform Crime Reporting program uses big data to track and analyze reports of hate crimes across the country.[43] The Equal Employment Opportunity Commission's ("EEOC") Federal Sector Equal Employment Opportunity Portal (FedSEP) streamlines the reporting process for claims of discrimination for federal employees by aggregating data and reports from across the federal government.[44] The Urban Institute uses the Department of Education's National Center for Education statistics to map public school segregation across the country.[45]

However, what big data giveth, it taketh away. There are many ways in which its use *reproduces* racially discriminatory practices, rather than reduces them. The algorithm is perhaps the most common big data instrument; algorithms sort through the mass accumulation of data to make decisions on behalf of the algorithm's creator. Because algorithms (and other big data instruments) are created by humans, they are inherently subject to the same human prejudices that their use was designed to eliminate.[46] Indeed, studies have shown that algorithms, in attempting to eliminate race-conscious decision-making, in fact disparately impact applicants of color in decisions such as loan applications, credit card applications, and college admissions.[47] Studies

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40. *See* Ryan Broderick and Ellie Hall, *Tech Platforms Obliterated ISIS Online. They Could Use The Same Tools On White Nationalism*, Buzzfeed News (Mar. 20, 2019), https://www.buzzfeednews.com/article/ryanhatesthis/will-silicon-valley-treat-white-nationalism-as-terrorism [https://perma.cc/6AMR-9D5J].

41. Facebook, Press Release, *Standing Against Hate* (Mar. 27, 2019), https://newsroom.fb.com/news/2019/03/standing-against-hate/ [https://perma.cc/3RLJ-9HGB].

42. Future of Privacy F. & Anti-Defamation League, Big Data: A Tool for Fighting Discrimination and Empowering Groups (2014), https://fpf.org/wp-content/uploads/Big-Data-A-Tool-for-Fighting-Discrimination-and-Empowering-Groups-Report1.pdf [https://perma.cc/3M28-BZ6B].

43. *Id.* at 5.

44. *Id.* at 7.

45. *Id.* at 9 (Urban Institute maps aggregate public school enrollment by county and identify where white children predominantly attend majority-white schools and where minorities attend schools with predominantly minority classmates).

46. *See* Kate Crawford, *The Hidden Biases in Big Data*, Harv. Bus. Rev. (Apr. 1, 2013), https://hbr.org/2013/04/the-hidden-biases-in-big-data [https://perma.cc/U595-DJV9].

47. Victoria Hudgins, *When Algorithms Are Racist: How to Protect Against Biased Algorithms*, Law.com (Mar. 7, 2019), https://www.law.com/legaltechnews/2019/03/07/when-algorithms-are-racist-how-to-protect-against-biased-algorithms/?slreturn=20190226205505 [https://perma.cc/K5R7-288K]; *see generally* Jiahao Chen et al., *Fairness Under Unawareness: Assessing Disparity When Protected Class Is Unobserved*, FAT* '19: Conference on Fairness, Accountability & Transparency (Jan. 29-31, 2019), https://arxiv.org/pdf/

also demonstrate that algorithms used to predict criminal behavior are biased against Black people, leading to harsher sentences for Black defendants.[48]

C. Responding to Big Data's Challenges Through Civil Rights Statutes

To respond to the challenges facing citizens in the world of big data, civil rights statutes have adapted, with varying degrees of success. The successes of these cases and others can serve as a guide for developing a theory for constitutional claims under the Equal Protection Clause. Unlike equal protection jurisprudence many civil rights statutes provide a framework for disparate impact claims and the remedies therefrom. This section will revisit disparate impact theory in the context of making claims using big data. It will examine claims arising under two of the most important federal antidiscrimination statutes: Title VII of the Civil Rights Act and the Fair Housing Act.

Title VII of the Civil Rights Act of 1964 bars certain employers from discriminating against employees on the basis of "race, color, religion, sex, or national origin."[49] In *Griggs v. Duke Power Co.*, the Supreme Court held that disparate impact claims for unlawful employment practices can be made under Title VII[50]; the standard for disparate impact claims is now codified in Title VII.[51] To establish a disparate impact claim under Title VII, an employee must demonstrate that an employer uses a "particular employment practice" that causes a disparate impact, and that there is no business necessity for this practice.[52] Alternatively, the employee may demonstrate that the employer was offered an alternative employment practice that disparately impacted the protected group less, but the employer refused to implement the practice.[53] Complaints of employment discrimination under Title VII must begin in the EEOC, but civil action in federal court can be pursued after administrative proceedings have been exhausted.[54] In the private sector, claims of data-driven racial discrimination under Title VII have seen success.[55]

1811.11154.pdf [https://perma.cc/3LWC-KQW9]; Andrea Freeman, *Racism in the Credit Card Industry*, 95 N.C. L. REV. 1071 (2017).

48. *See* Julia Angwin et al., *Machine Bias*, PROPUBLICA (May 23, 2016), https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing [https://perma.cc/R549-P3R8].

49. 42 U.S.C. § 2000e-2 (2018).

50. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

51. *See* 42 U.S.C. § 2000e-2(k).

52. *Id.*

53. *Id.*

54. 42 U.S.C. § 2000e-5 (2018).

55. In 2015, the retailer, Target, settled with the EEOC for $2.8 million dollars for its allegedly discriminatory hiring test, which disparately impacted applicants based on race and sex. *See* Press Release, *Equal Employment Opportunity Commission, Target Corporation to Pay $2.8 Million to Resolve EEOC Discrimination Finding* (Aug. 24, 2015), https://www.eeoc.gov/eeoc/newsroom/release/8-24-15.cfm [https://perma.cc/CUP7-HQ5M]. In settling, Target agreed to make changes to its data collection processes to determine whether there are "potentially adverse effects on race, ethnicity, and gender." *Id.* In 2019, Facebook and several major employers settled a lawsuit against a class of plaintiffs for its alleged violation of Title VII in using big data collection to target applicants based on race and gender. ACLU, OUTTEN & GOLDEN LLP & COMMUNICATIONS WORKERS OF AMERICA, Press Release, *Facebook Agrees to Sweeping Reforms to Curb Discriminatory Ad Targeting Practices* (Mar. 19, 2019), https://www.outtengolden.com/news/facebook-agrees-sweeping-reforms-curb-discriminatory-ad-targeting-practices [https://perma.cc/DZ2J-NY5J]. Facebook

Likewise, Congress passed the Fair Housing Act ("FHA") in 1968 to eliminate discrimination in housing policy on the basis of race, color, religion, sex, familial status, or national origin.[56] While the original statute did not expressly state that disparate impact claims were available under the FHA, the act was unanimously understood by the nine circuits to include disparate impact liability.[57] In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc*, the Supreme Court finally affirmed that disparate impact claims were available under the FHA, holding that Congress implicitly affirmed the lower courts' longstanding interpretation of the Act by retaining the text of the statute.[58] Under *Inclusive Communities*, a plaintiff must make a prima facie showing that there is a causal connection between the disparate impact on a racial group and a government policy or practice.[59] A business or governmental entity may defeat disparate impact liability if they prove that the practice serves a legitimate business interest or a legitimate public interest, respectively.[60] A plaintiff may go directly to federal court to state a claim under the FHA, although many cases are adjudicated through HUD's administrative proceedings.[61] Recently, Facebook settled a lawsuit that alleged claims of Fair Housing violations.[62] Though the settlement has not been made public, we can glean that the complainants alleged that Facebook's use of big data had a racially disparate impact in violation of the FHA, and Facebook eventually settled.

The successful litigation against private actors show that government actors might also be held liable. If efforts have reined in large companies like Target and Facebook, why not state actors? The following section will discuss how to apply these data-driven impact theories to equal protection jurisprudence.

III. Revisiting Fourteenth Amendment Jurisprudence for Racial Discrimination in the Age of Big Data

The Supreme Court currently permits plaintiffs to prevail under the disparate impact theory in suits brought under civil rights statutes. But under the Court's

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allowed employers to use its massive collection of data to target potential employees based on race and gender using its advertising tools. *Id.*

56. 42 U.S.C. 3604 (2018).

57. Tex. Dep't of Housing and Community Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507, 2519 (2015).

58. *Id.* Speaking for the majority, Justice Kennedy noted that "[w]hen it amended the FHA, Congress was aware of this unanimous precedent [among the nine circuits]. And with that understanding, it made a considered judgment to retain the relevant statutory text." *Id.*

59. *Id.* at 2523-24.

60. *See Inclusive Communities*, 135 S. Ct. at 2511.

61. *See* 42 U.S.C. § 3613(2) (2018) ("An aggrieved person may commence a civil action under this subsection whether or not a complaint has been filed [with HUD]. . . .").

62. Complaint, Nat'l Fair Housing Alliance v. Facebook, Inc., (S.D.N.Y. Mar. 27, 2018) (No. 1:18-CV-02689), 2018 WL 1505634. In its complaint against Facebook, the National Fair Housing Alliance alleged that the company used a "treasure trove of information to enable advertisers to target the people who are right for [their] business." *Id.* at ¶ 43. The complaint noted that Facebook acquires this data "through self-reported information on Facebook, and through tracking its users' online activity— both on Facebook itself and elsewhere through the internet." *Id.* at ¶ 42. The complaint also referred to Facebook's big data trove as "arguably the most complete consumer profile on earth, as it reflects each Facebook user's demographics, location, interests, and online behaviors." *Id.* (internal citation omitted).

reinterpretation of the Equal Protection Clause after *Washington v. Davis*, this theory is not cognizable for constitutional violations.[63] According to the Court, claims made under the Equal Protection Clause must be more exacting because Fourteenth Amendment doctrine gives more deference to the government. In the context of state-sponsored discrimination driven by increasingly ominous technology, this deference does not hold water. Regardless of the intention of the creator, these tools threaten the pursuit of racial equality, and challenges to their biases must be available to plaintiffs. The post-*Davis* jurisprudence leaves little room for creative solutions to a very big problem: the proliferation of racial disparities resulting from the government's use of big data. Nevertheless, a pathway can be found in Justice Kennedy's majority opinion in *Inclusive Communities* to inform future arguments for disparate impact claims that involve big data. Discussed below, this holding opens the door for a new framework for disparate impact theory.

Consistent with Justice Kennedy's burden-shifting mechanism in *Inclusive Communities*, I propose that under the Equal Protection Clause, any claim alleging that a big data instrument which is a product of a government institution that results in a racially disparate impact be cognizable. To demonstrate disparate impact, the claimant must show that the effects of the instrument do more than create a statistical disparity, but result in a racially disparate impact in the service the tool provides.[64] Any remedy, then, would be limited to the removal of the unnecessary barrier which creates the constitutional violation, and compensatory remedy for the injury which occurred as a result of the constitutional violation. I will take each element of the test in turn.

First, the claimant must demonstrate that the government actor used a tool for a particular policy that relies on big data, which created racially disparate outcomes. Writing for the majority in *Inclusive Communities* and holding that disparate impact theory claims can be made under the Fair Housing Act (FHA), Justice Kennedy remarked that "[I]f such liability were imposed based solely on a showing of a statistical disparity," then the disparate impact theory would pose a constitutional problem because "[d]isparate-impact liability mandates the 'removal of artificial, arbitrary, and unnecessary barriers,' not the displacement of valid governmental policies."[65] According to Kennedy, disparate impact theory does not run afoul of the Fourteenth Amendment when employers are still able to operate effectively."[66] Accordingly, the

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63. Though *Washington v. Davis* involved racially discriminatory hiring practices by employers, which would violate seemingly Title VII under *Griggs v. Duke Power Co.*, the court distinguished its holding by the source of law: "However this process proceeds [under Title VII], it involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed." Washington v. Davis, 426 U.S. 229, 247 (1976).

64. For example, *Inclusive Communities* noted that "a plaintiff challenging the decision of a private developer to construct a new building in one location rather than another will not easily be able to show this is a policy causing a disparate impact because such a one-time decision may not be a policy at all." *Inclusive Communities*, 135 S. Ct. at 2524. The policy would ostensibly need to demonstrate a pattern of the actor's algorithm in choosing one neighborhood over the other.

65. *Id.* at 2522 (internal citation omitted).

66. *Id.* at 2518.

plaintiff would demonstrate the human biases that went into account in the creation of the tool itself, the use of which created a disparate impact on the basis of race.[67] This holding is consistent with the burden-shifting framework provided in *Washington v. Davis*, because under Kennedy's theory, the plaintiff would still have the heavy burden of showing an action produced a disparate impact on the basis of race.

   In demonstrating disparate impact, the plaintiff would have the additional burden of proving that the outcomes were not merely a "statistical disparity" with which Justice Kennedy was concerned. Instead, the plaintiff would show the tool resulted from a series of design choices which can be identified and resolved. Assuming that the plaintiff made a prima facie showing that the tool created a disparate impact, the burden would then shift to the defendant in showing that the tool had a legitimate purpose, and no alternative would serve the same purpose. *Inclusive Communities* held government actions that pose "artificial, arbitrary, and unnecessary barriers" are a prima facie showing of disparate impact liability under the FHA.[68] In a data-driven discrimination claim, the government-defendant has the burden of showing a big data instrument does not pose arbitrary and unnecessary barriers on the basis of race.

   When the government fails to meet this burden, any remedy would be limited to "the elimination of the offending practice" that "arbitrarily operates invidiously to discriminate on the basis of race."[69] As the Obama administration noted, big data instruments have identifiable problems including: poorly designed "matching systems" intended to help the user find services; personalized services which narrow the scope of a user's options based on their race; systems that assume that correlation is equal to causation; and datasets that lack accurate information about racial minorities.[70] These tools can result in a disparate impact on people of color regardless of the intent of the tool's designer, creating "artificial, arbitrary, and unnecessary" barriers to the services the tools were developed to help provide. Accordingly, claims made against the actors who use these tools can find a concrete remedy that does not impede the actor from carrying out legitimate interests, such as fixing the tools. For example, a remedy might include a court order which enjoins the government actor from using the tool. Compensatory damages might be also be found in the violation of the plaintiff's right to equal protection.[71]

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   67. While data can be difficult to define, courts can look to its creation to understand how data produces disparate outcomes. Data creation can be subject to the very "unintentional perpetuation and promotion of historical biases," that data should ostensibly not take into account, because its curators are humans. Crawford, *supra* note 46.

   68. *Inclusive Communities*, 135 S. Ct. at 2524.

   69. *Id.* at 2525.

   70. EXEC. OFF. PRESIDENT, REPORT ON ALGORITHMIC SYSTEMS, *supra* note 38, at 9-10.

   71. Compensatory damages are available for the violation of a constitutional right by a state actor. Carey v. Piphus, 435 U.S. 247, 254 (1978) (regarding state and local government actions); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971) (holding that a "violation . . . by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct).

Limiting the relief to removing only "identifiable problems" or replacing them with alternative algorithms addresses the concerns of *Washington v. Davis* while also bringing big data under the purview of the Equal Protection Clause. By only removing "artificial" barriers that have a racially disparate impact, my proposed rule is adequately narrow. The rule prevents the "far-reaching" effect of disparate impact liability under the Fourteenth Amendment that worried the Court in *Washington v. Davis*. It is worth noting that my solution, which makes claims under the disparate impact theory cognizable under the Fourteenth Amendment, is not a cure-all for resolving structural racial inequality. As Derrick Bell noted, post-*Washington v. Davis*, plaintiffs now carry a much heavier burden of demonstrating discrimination in a system with seemingly insurmountable barriers.[72] After *Washington v. Davis*, plaintiffs have the burden of showing intentional discrimination on the part of the government, and it is often impossible for plaintiffs to meet the requisite evidentiary standard. However, it is a necessary first step. By expanding the disparate impact theory's legal applications, we can remove institutional disparities which engage in "race-based," if not always "race-conscious," decision-making at the expense of people of color. Disparate impact should not be beyond the reach of the Constitution when government actors employ systems that clearly and systemically impact people of color.

IV. CONCLUSION

New problems call for new solutions. The Equal Protection Clause, in mandating that "[n]o state shall . . . deny to any person within its jurisdiction equal protection of the laws," sought to eliminate inequality in governmental institutions that provide necessary and imperative services to citizens. In the age of big data, the way people are targeted for certain services has racially discriminatory implications. When the tools that governments use to provide these services result in a racially discriminatory impact on groups of citizens, those citizens should be able to find refuge in the Equal Protection Clause. Ideally, *Washington v. Davis* would be reconsidered and overturned, and disparate impact claims would be available under the Fourteenth Amendment in all instances. In the meantime, a new theory for disparate impact claims should be explored within the current jurisprudential framework to open the door for claims that could not have been contemplated in 1976 when *Washington v. Davis* was decided.

To address contemporary concerns, I propose that when a state actor uses a big data instrument to promulgate a policy or practice resulting in a disparate impact on a protected group, that claim should be cognizable under the Equal Protection Clause. In the age of big data, intentional discrimination is not an apt description of racially discriminatory actions. The use of federal civil rights statutes to tackle claims of racial discrimination in the use of big data demonstrates a necessity and possibility for a new contemplation of the constitutional implications of these uses. In light of new technology, the intentional discrimination requirement under *Washington v. Davis* should be revisited, and claims that involve the use of big data should be taken seriously as cognizable Fourteenth Amendment claims.

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72. BELL, *supra* note 23.