CHALLENGING LAND CONTRACTING ON THE BASIS OF DISPARATE IMPACT AFTER *TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS V. INCLUSIVE COMMUNITIES PROJECT, INC.*: A VIABLE OPTION OR A DEAD END?

Allison N. Kruschke[*]

2020 MICH. ST. L. REV. 547

TABLE OF CONTENTS

* Senior Notes Editor, *Michigan State Law Review*; J.D. 2020, Michigan State University College of Law; B.A. 2013, Marquette University. The author would like to thank Professor Brian Gilmore for his guidance and encouragement in advising this Comment. The author would also like to thank Kelsey Reiner, Chelsea Austin, and all the other current and former members of the *Michigan State Law Review* who helped edit this piece. Lastly, the author would like to thank her family and her partner John Fleet for their unwavering love and support. All errors are my own.

INTRODUCTION

When Clyde Ross purchased his home in the North Lawndale neighborhood of Chicago in 1961, he saw it as the last step in his journey toward the American dream.[1] Ross, a Black man, moved to

1. *See* Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), http://www.theatlantic.com/magazine/archive/2014/06/the-case-for-

Chicago from Clarksdale, Mississippi to escape the terror that governed the lives of people of color in the South.[2] When he arrived in Chicago, he attempted to get a Federal Housing Administration (FHA)-backed mortgage but was told there was no financing available.[3] When he found his home in North Lawndale, he purchased the home "on contract," meaning the seller kept the deed for the house until he paid the contractual monthly payments in full.[4] Per the terms of his contract, if Ross missed a single payment, he would immediately forfeit his $1,000 down payment, all of the monthly payments he made on the contract, and all of the money he spent improving and maintaining the property.[5] Unlike most contract buyers, Ross eventually made every required payment on his contract and came to own his house in full; however, in the end, he had paid $27,500 for a home that the previous owner—a white man who peddled similar contracts around predominantly Black neighborhoods in Chicago—had bought for $12,000.[6]

reparations/361631 [https://perma.cc/95QL-9HQ8] (last visited Apr. 27, 2020) (discussing the story of Clyde Ross and his purchase of a home on contract).

2. *See id.* (discussing how Ross moved to Chicago from Clarksdale in 1947 to take a job with Campbell's Soup).

3. *See id.* ("[T]he truth was that there was no financing available for people like Clyde Ross."). Congress created the FHA in 1934 to insure private mortgages, which caused a significant drop in interest rates and helped reduce the down payment needed to buy a home. *See id.* While the FHA was beneficial to white buyers, the agency essentially shut out Black buyers by creating maps that rated neighborhoods according to their perceived stability. *See id.* For example,

> [o]n the maps, green areas, rated "A," indicated "in demand" neighborhoods that, as one appraiser put it, lacked "a single foreigner or Negro." These neighborhoods were considered excellent prospects for insurance. Neighborhoods where [B]lack people lived were rated "D" and were usually considered ineligible for FHA backing. They were colored in red. . . . Redlining went beyond FHA-backed loans and spread to the entire mortgage industry, which was already rife with racism, excluding [B]lack people from most legitimate means of obtaining a mortgage.

Id. "Redlining" has become infamous as one of the most insidious forms of racist housing policy in the U.S. *See id.*

4. *See id.* As explored in Part I, contract buyers like Ross usually gain no equity in their homes, despite months or even years of making payments. *See id.*

5. *See id.* (discussing how forfeiture clauses required contract buyers to relinquish all equity built in the home in the event of a default).

6. *See id.* ("The men who peddled contracts in North Lawndale would sell homes at inflated prices and then evict families who could not pay—taking their down payment and their monthly installments as profit. Then they'd bring in another [B]lack family, rinse, and repeat. 'He loads them up with payments they can't meet,' an office

Fifty years later, in 2011, another Black man named Zachary Anderson saw a "SALE" sign in the front yard of a small bungalow in Capitol Park, a predominately Black neighborhood in Atlanta.[7] He had always wanted to own a home but could never qualify for traditional financing or save enough money for a down payment.[8] A representative from Harbor Portfolios, the owner of the property, gave Anderson the key to a lockbox on the property and told him to take a look around.[9] He noticed that the house needed some work but felt like he could make most of the improvements himself.[10] The representative told Anderson he could purchase the home, which Harbor Portfolios said was worth $46,750, by paying a $1,000 deposit and signing a contract.[11] The contract provided that if he missed a single payment, he would forfeit all the money he had paid to Harbor Portfolios.[12] Furthermore, it also said that he was responsible for all taxes and expenses for the property—all while Harbor Portfolios retained title to the house.[13] A year later, after falling behind on payments while he was hospitalized after being injured at work, Anderson received an eviction notice from Harbor Portfolios.[14] Determined to keep the value

secretary told *The Chicago Daily News* of her boss, the speculator Lou Fushanis, in 1963. 'Then he takes the property away from them. He's sold some of the buildings three or four times.'").

7. *See* Alana Semuels, *A House You Can Buy but Never Own*, ATLANTIC (Apr. 10, 2018), https://www.theatlantic.com/business/archive/2018/04/rent-to-own-redlining/557588/ [https://perma.cc/JX46-WFV4] (last visited Apr. 27, 2020) (discussing modern land contracting and its effects on wealth building for Black Americans in the South).

8. *See id.* (noting that "[i]t was not until a few years after he moved in that Zachary Anderson realized that he was not, in fact, the owner of the house he thought he'd purchased").

9. *See id.*

10. *See id.* ("[Anderson] also didn't know how difficult it would be to keep up the terms of the contract, because he didn't realize just how much work the house would need. There is no requirement that a home inspector look at the house before a contract-for-deed agreement is signed. When Harbour told him he needed to get insurance, he says, the insurance company started sending him problems with the house that he didn't even know existed.").

11. *See id.* (discussing Anderson's contract terms).

12. *See id.* ("If he failed to make any of the agreed-upon payments, the contract said, he would forfeit all the money he had paid to the seller.").

13. *See id.* ("The contract, sent to him in the mail, also required that he paid all taxes on the property and kept the property insured.").

14. *See id.* High monthly payments and exorbitant repair costs often cause land contract buyers to fall behind on payments and be evicted as if they were tenants. *See id.* A report from professors at the University of Texas-Austin to the Texas Department of Housing and Community Affairs reported that almost half of contract buyers had defaulted or had their contracts canceled over a twenty-one-year period.

he had added to the home, he caught up on his payments, but he continued to struggle to stay current while paying for the maintenance and improvements of a home he did not actually own.[15] Anderson will not actually own his home until he makes the last payment on the contract.[16]

Land contracting, which allows contract sellers to retain title to a piece of property until a contract buyer makes a certain number of monthly payments, is not new.[17] During the second wave of the Great Migration between 1940 and 1970, thousands of families of color in the Midwest who fled the Jim Crow South, like Clyde Ross and his family, fell victim to predatory land contracts because they were systematically excluded from the legitimate, government-backed housing market.[18] Discrimination in both private mortgage lending and government agencies tasked with insuring mortgages made the traditional American dream of home ownership nearly impossible for people of color.[19] Decades later, predatory land contract sellers continued to target low-income families of color through the 2000s.[20]

See PETER M. WARD ET AL., EXECUTIVE SUMMARY: THE CONTRACT FOR DEED PREVALENCE PROJECT–A FINAL REPORT TO THE TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS X (2012) ("Of the lots foreclosed, 44% were foreclosed within a year of the sale, and 62% were foreclosed less than two years after the sale.").

15. *See* Semuels, *supra* note 7 ("Anderson's contract, for example, required that he make his property 'habitable' within four months. This turned out to be an expensive proposition.").

16. *See id.* ("If he misses one payment, thus violating the agreement, he can be evicted, losing all the equity he put into the home.").

17. *See id.* (explaining that land contracting has been prevalent in minority communities since the 1950s and 1960s); *see also* Coates, *supra* note 1 (discussing how "[f]rom the 1930s through the 1960s, [B]lack people across the country were largely cut out of the legitimate home-mortgage market").

18. *See* Charles Lewis Neir III, *The Shadow of Credit: The Historical Origins of Racial Predatory Lending and Its Impact on African American Wealth Accumulation*, 11 U. PA. J.L. & SOC. CHANGE 131, 191 (2008) ("The impact of such discriminatory allocation of credit was to suppress home ownership among African Americans, particularly in the major urban centers of the North.").

19. *See id.* (explaining that "[a]t the end of the Great Depression, twenty-three percent of dwellings occupied by African Americans were owner occupied whereas forty-six percent of such dwellings were owner occupied by whites"). This phenomenon was particularly prevalent in urban areas, where levels of Black home ownership were even lower than those in rural areas. *See id.*

20. *See* Robert M. Curry & James Geoffrey Durham, *Ohio Land Contract Law*, 19 U. DAYTON L. REV. 563, 564–65 (1994) (discussing litigation surround land contract issues in Ohio during the mid-1980s through the mid-1990s); Eric T. Freyfogle, *The Installment Land Contract as Lease: Habitability Protections and the Low-Income Purchaser*, 62 N.Y.U. L. REV. 293, 239–95 (1987) (advocating for the interpretation of installment land contract as leases based on court's increased

The void left in predominately minority neighborhoods following the foreclosure crisis and Great Recession in 2008 created a ripe environment for predatory land contracts to reappear as a device that disadvantages low-income people of color like Zachary Anderson.[21]

In the midst of land contracting's resurgence among low-income and minority communities, the Supreme Court decided *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc*.[22] In deciding whether the Texas Department of Housing and Community Affairs's allocation of housing tax credits had a disparate impact on Black residents of Dallas, the Court announced that disparate impact claims were cognizable under the Fair Housing Act.[23] Some Fair Housing advocates and scholars cautiously celebrated the ruling as a victory, saying that the ruling presented a return to a progressive interpretation of the disparate impact doctrine.[24] While the ruling solidified

enthusiasm for the implied warranty of habitability); Stacy Purcell, Comment, *The Current Predatory Nature of Land Contracts and How to Implement Reforms*, 93 NOTRE DAME L. REV. 1771, 1774 (2018) ("In the first half of the twentieth century, land contracts were largely used by members of minority groups who were shut out of the traditional homebuying market. Racist lending practices prevented African Americans from receiving bank-financed mortgages, so they turned to land contracts."); Heather K. Way, *Informal Homeownership in the United States and the Law*, 29 ST. LOUIS U. PUB. L. REV. 113, 129 (2009) (discussing how "installment contracts have a long and widespread history in the United States" and how land contracts are often used in low-income home purchases).

21. *See* Christopher Barron, *Are Land Contracts Preying on Low-Income Buyers or Are They Offering a Different Avenue for Home Ownership?*, 6 U. BALT. J. LAND & DEV. 1, 5–7 (2016) (discussing the resurgence of land contracting after the Great Recession and its disproportionate effects on low-income homebuyers).

22. *See* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2518 (2015) (holding that disparate impact claims are cognizable under the Fair Housing Act).

23. *See id.* ("Together, *Griggs* holds and the plurality in *Smith* instructs that antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose.").

24. *See, e.g.*, Justin D. Cummins & Beth Belle Isle, *Toward Systemic Equality: Reinvigorating a Progressive Application of the Disparate Impact Doctrine*, 43 MITCHELL HAMLINE L. REV. 102, 135 (2017) (stating the Supreme Court's recognition of a disparate impact claim under the Fair Housing Act offered "hope for the future"); Kriston Capps, *What the Supreme Court's 'Disparate Impact' Decision Means for the Future of Fair Housing*, CITYLAB (June 25, 2015) https://www.citylab.com/equity/2015/06/what-the-supreme-courts-disparate-impact-decision-means-for-the-future-of-fair-housing/396704/ ("The Supreme Court of the United States issued an opinion . . . that affirms the understanding of housing discrimination that has guided the nation for nearly 50 years.").

claimants' ability to bring disparate impact claims under the Fair Housing Act, it is unclear whether it gave them any greater chance of being successful because of how the Court interpreted the traditional burden-shifting test used in disparate impact claims.[25] This interpretation of the test requires that after a plaintiff shows a prima facie case of discriminatory effect, a defendant can rebut the prima face case by showing that a challenged practice is necessary to achieve a valid interest.[26] Under this iteration of the burden-shifting test, nearly any viable interest can serve as a reason for enacting a practice that may have a discriminatory effect on minorities.[27] These "cautionary standards" set forth in *Inclusive Communities* make it difficult for disparate impact claimants to win and weaken the ability of the doctrine to remedy covert discrimination.[28]

25. *See* Rigel C. Oliveri, *Disparate Impact and Integration: With* TDHCA v. Inclusive Communities *the Supreme Court Retains an Uneasy Status Quo*, 24 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 267, 284–85 (2015) (discussing the difficulties of making disparate impact claims under the Fair Housing Act and how these claims rarely result in good outcomes for plaintiffs); *see also generally* Kerri Thompson, Comment, *Fair Housing's Trap Door: Fixing the Broken Disparate Impact Doctrine Under the Fair Housing Act*, 25 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 435 (2017) (advocating for amending the Fair Housing Act to allow claimants to show a disparate racial impact of a certain housing policy without having to show a racially discriminatory intent on the part of the actor).

26. *See Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2514–15 (quoting 24 C.F.R. § 100.500(c)(2) (2013)) (stating that a defendant must "prov[e] that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests"); *see also* Fair Housing Act–Discriminatory Effect Prohibited, 24 C.F.R. § 100.500 (2013) (displaying The Department of Housing Development (HUD)'s codification of the disparate impact doctrine as amended in 2013).

27. *See* Oliveri, *supra* note 25, at 280 ("[I]n disparate impact cases, the analysis almost always turns on the defendant's ability to demonstrate that the challenged practice, in the language of the rule, 'is necessary to achieve one or more substantial, legitimate, non-discriminatory interests,' versus the plaintiff's ability to prove that another, less discriminatory alternative is available. The *Inclusive Communities* opinion, in essence, reminds us that fostering integration is just on one of many legitimate interests, such as revitalizing dilapidated neighborhoods, ensuring compliance with health and safety codes, and providing affordable housing, that a local government might pursue. This may well mean that housing improvement cases, which by definition involve legitimate goals, will always be an uphill battle on the merits for fair housing advocates using disparate impact theory.").

28. *See* Elizabeth L. McKeen et al., *Robust Causality and Cautionary Standards: Why the* Inclusive Communities *Decision, Despite Upholding Disparate-Impact Liability, Establishes New Protections for Defendants*, 132 BANKING L.J. 553, 553 (2015) ("[T]he majority opinion [in *Inclusive Communities*] is hardly as plaintiff-friendly as it has been portrayed. On closer inspection, *Inclusive Communities* limits disparate-impact liability, equipping defendants with valuable new protections from

With land contracting returning to the national spotlight and continuing to have a disproportionate impact on low-income people and minorities, challenging the practice on disparate impact grounds seems like a logical fit.[29] Fair Housing nonprofits, governmental actors, or land contract buyers could sue land contract sellers under the Fair Housing Act on disparate impact grounds.[30] Despite the Supreme Court's recent ruling in *Inclusive Communities*, however, litigants face an uphill battle bringing a disparate impact claim.[31] They face this battle in part because the burden-shifting test the Court applied in *Inclusive Communities* makes it nearly impossible for disparate impact claims to survive summary judgment.[32]

The *Inclusive Communities* test is not the first test the Supreme Court used to apply the disparate impact doctrine.[33] Previous iterations of the burden-shifting test, such as the test set forth in the 1975 employment discrimination case *Albemarle Paper Co. v. Moody*, placed a greater burden on disparate impact defendants to show that a practice disparately impacting minorities was absolutely necessary to achieve its goals.[34] While claimants challenging land contracting on disparate impact grounds would not likely succeed under the *Inclusive*

meritless—and costly—disparate-impact claims. In fact, under the heightened *Inclusive Communities* pleading standard, earlier disparate-impact cases that survived dismissal would today likely be doomed at the outset."); Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 AM. U.L. REV. 357, 393–94 (2013) (discussing quantitative outcomes for disparate impact plaintiffs between 1974 and 2013).

29. *See* Oliveri, *supra* note 25, at 281–82 (discussing the disproportionate effects of housing discrimination on minority communities).

30. *See Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2518 (holding that disparate impact claims are now cognizable under the Fair Housing Act).

31. *See* Oliveri, *supra* note 25, at 268 (explaining that, while allowing disparate impact claims under the Fair Housing Act is generally positive, "in a relatively obscure paragraph buried deep within the [*Inclusive Communities*] opinion, the majority telegraphs a strong hint at how many of these cases will be reviewed—not favorably—on the merits").

32. *See id.* at 284 ("Any discussion of disparate impact theory would be remiss without a realistic look at the existing state of affairs with respect to disparate impact claims in the courts: they are infrequently made and unlikely to result in a positive outcome for plaintiffs.").

33. *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405, 435–36 (1975) (discussing disparate impact claims in the employment law context); *see also* McKeen et al., *supra* note 28, at 554–56 (discussing disparate impact litigation before *Inclusive Communities*).

34. *See Albemarle Paper Co.*, 422 U.S. at 425 (outlining a three-part disparate impact test based on the Court's previous disparate impact rulings).

Communities test, they could succeed under a framework similar to that set forth in *Albemarle* if courts applied that framework to a disparate impact claim under the Fair Housing Act.[35] The *Albemarle* test, which places a greater burden on the defendant than the test in *Inclusive Communities*, would give claimants who challenge land contract practices on disparate impact grounds better chances of success and would better comply with legislative intent behind the Fair Housing Act.[36] Furthermore, using this test could create precedent that could effectively address the racially discriminatory nature of predatory land contracting and stop the practice on a large scale.[37]

This Comment explores how land contracts operate as a racialized practice in the modern legal landscape and how the resurgence of the practice mirrors its racially discriminatory roots.[38] Additionally, it discusses whether challenging land contracts on a disparate impact basis is a viable litigation strategy after *Inclusive*

35. *See Inclusive Cmtys. Project, Inc*., 135 S. Ct. at 2522 ("An important and appropriate means of ensuring that disparate-impact liability is properly limited is to give housing authorities and private developers leeway to state and explain the valid interest served by their policies."); *see also Albemarle Paper Co.*, 422 U.S. at 425 (outlining a three-part test to determine whether an employment practice has a disparate negative impact on minority applicants). Under the burden-shifting framework as outlined in *Albemarle*, the disparate impact plaintiff must first present statistical evidence showing that a prima facie case of disparate impact discrimination exists. *See id.* Then, the burden shifts to the defendant to show that the policy causing the disparate impact is necessary to achieve its goals. *See id.* Lastly, if the defendant can successfully show that the policy causing the disparate impact is necessary, the burden shifts back to the plaintiff to show that the justification offered by the defendant is merely a pretext for discrimination. *See id.* This framework made disparate impact cases easier to win for the plaintiff because it placed a greater burden of proof on the defendant. *See id.*

36. *See* McKeen et al., *supra* note 28, at 554–56 (discussing that, while the Court claimed that it made its ruling in *Inclusive Communities* in the spirit of the Fair Housing Act, the additional protections for defendants it enacted actually created a higher standard for plaintiffs to meet); Thompson, *supra* note 25, at 474 ("The next step is for Congress to reassert the purpose of the Fair Housing Act by amending it to better achieve 'balanced and integrated living patterns' by taking contextual factors into account, and by not separating impact from intent. Doing so will have the immediate effect of allowing plaintiffs to proceed past summary judgment and have the chance to have their evidence weighed instead of rejected.").

37. *See generally* JEREMIAH BATTLE, JR. ET AL., TOXIC TRANSACTIONS: HOW LAND INSTALLMENT CONTRACTS ONCE AGAIN THREATEN COMMUNITIES OF COLOR (2016) (discussing the racially discriminatory nature of modern land contracting).

38. *See* Semuels, *supra* note 7 ("What is surprising today is that, according to some housing advocates, these arrangements are in some ways even more predatory than the ones of half a century ago, even after decades of laws and regulations enacted to prevent racial discrimination in the housing market.").

Communities.[39] In Part I, this Comment provides background and historical information about what a land contract is, how buyers and sellers have used land contracts in the United States, and the predatory nature of land contracts.[40] In Part II, this Comment provides context about the development of the disparate impact doctrine, discusses its evolution in several key Supreme Court cases, and explores the evolution of the burden-shifting test prior to the Court's most recent interpretation in *Inclusive Communities*.[41] In Part III, this Comment analyzes whether challenging the practice of land contracting on disparate impact grounds under the Fair Housing Act is viable given the current state of the doctrine.[42] Part III then argues that returning to a burden-shifting test similar to the one the Court applied in *Albemarle* would allow a disparate impact claim under the Fair Housing Act against land contract sellers to survive.[43]

I. LAND CONTRACTS AND THEIR HISTORY IN THE UNITED STATES

A land contract is a type of alternative financing that allows sellers to contract with buyers to attempt to purchase homes without financing from a bank and without the regulations associated with a traditional mortgage.[44] The most notable difference between land contracts and traditional mortgages is that the contract buyer does not actually acquire title to the property until after the buyer makes the final contractual payment.[45] Land contract sellers also favor these

39. *See* Oliveri, *supra* note 25, at 268 (discussing the difficulties of winning a disparate impact claim after the additional protections for defendants the Court enacted in *Inclusive Communities*).

40. *See infra* Part I (discussing the mechanics and characteristics of land contracts, as well as their history as a home buying practice within the United States).

41. *See infra* Part II (discussing the disparate impact test set forth in *Inclusive Communities*).

42. *See infra* Part III (arguing that a return to the disparate impact test articulated in *Albemarle* will provide disparate impact claimants with a more viable route to remedy housing discrimination, which will better comply with the spirit of the Fair Housing Act).

43. *See id.*

44. *See* Barron, *supra* note 21, at 2 ("In the past, land contracts were utilized primarily for seller financing, because many buyers could not afford the full purchase price of a piece of property up front."); Purcell, *supra* note 20, at 1773–74 (quoting Grant S. Nelson, *The Contract for Deed as a Mortgage: The Case for the Restatement Approach*, 1997 BYU L. REV. 1111, 1114–15 (1998)) ("When land contracts first came into use in the late nineteenth century, they were 'accepted as an innovative and efficient new land financing technique.'").

45. *See* Barron, *supra* note 21, at 2 ("Typically, the buyer will pay a monthly payment with interest and a balloon payment near the conclusion of the contract. Once

agreements because they are free from the regulation that governs a traditional home sale, which allows them to have control over contract terms and charge any interest rate a purchaser is willing to pay.[46] While these contracts, in certain instances, can provide an avenue toward home ownership for buyers who might not be able to get traditional financing, they are often criticized for targeting low-income people of color.[47]

A. The Nature and Governance of Land Contracts

Land contracts, often called "installment contracts," "contracts for deed," or "rent-to-own" agreements, allow a purchaser to gain immediate possession of a piece of property and allow a seller to delay delivering the property's deed until a later date after the purchaser makes the required number of payments.[48] If a buyer defaults prior to the gaining of title, the seller can repossess the property as if the occupant was a tenant.[49] Furthermore, land contracts generally include forfeiture clauses.[50] These clauses allow contract sellers to keep all payments made on the contract up until the default, as well as retain

the terms of the contract have been negotiated, the buyer will take possession of the house and the seller will retain title of the house until all purchase obligations are complete.").

46. *See* Megan S. Wright, *Installment Housing Contracts: Presumptively Unconscionable*, 18 BERKLEY J. AFR.-AM. L. & POL'Y 97, 101–02 (2016) (discussing land contracts' unfair terms due to steep markups).

47. *See* Barron, *supra* note 21, at 5 ("The major criticism concerning land contracts is that they target and take advantage of low-income minority buyers.").

48. *See* Way, *supra* note 20, at 128–29 ("In a typical transaction, the buyer makes a down payment up front towards the purchase price and promises to make regular monthly payments with interest towards the sales price over a set contract term. The seller does not transfer legal title to the home, via a deed, until a completion of all the payments owed under the contract. The contract term typically runs for 15 to 30 years."); Cameron Custard, Comment, *Installment Contracts and Low-Income Buyers in Chicago: A Call for Legislative Reform*, 67 DEPAUL L. REV. 527, 529 (2018) ("After the buyer makes all the required payments under the contract, which often takes as long as thirty years, the seller finally conveys legal title of the property to the buyer."); *see also* RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 3.4(A) (AM. LAW INST. 1997) (stating that a land contract is a "contract for the purchase and sale of real estate under which the purchaser acquires the immediate right to possession of the real estate and the vendor defers delivery of a deed until a later time to secure all or part of the purchase price").

49. *See* Barron, *supra* note 21, at 4. A buyer can default, for example, by missing a payment on the contract. *See id.*

50. *See* Wright, *supra* note 46, at 102–03 (describing forfeiture clauses and their unfairness to contract buyers).

the value added to the property through improvements the buyer made.[51]

Because state law generally governs land contracts, there is little uniformity across state lines as to what kind of provisions a land contract must include.[52] In the Midwest, where the use of land contracts has increased in recent years, some states regulate land contracts extensively while others apply a more laissez faire approach to the practice.[53] Michigan, for example, has a statutory scheme governing the conveyance of land via land contract as well as statutes prohibiting the fraudulent conveyance of land.[54] Michigan also has a statutory scheme specifically prohibiting discriminatory advertising for housing.[55] In Wisconsin, both mortgages and land contracts are governed by the same statutory scheme.[56] Like Michigan, Wisconsin also has a statute prohibiting advertising that "indicates discrimination by a preference or limitation."[57] Additionally, Ohio has an extensive statutory scheme dedicated to governing land contracts.[58] It also has a

51. *See id.* (describing how land contract sellers in Illinois used state Forcible Detainer and Entry Laws, typically reserved for eviction proceedings, to evict land contract buyers who defaulted on their contracts).

52. *See* Barron, *supra* note 21, at 3 ("There are states that heavily regulate land contracts and offer stronger buyer protection. On the other hand, there are states that have minimal statutory regulations governing land contracts and these states favor the interests of the seller.").

53. *See id.* at 3–4. Barron explains that while land contracts are "well-defined" in the state of Ohio, "there are states such as New Hampshire that have a limited number of statutes governing land contracts. In New Hampshire, there are only four statutes that include land contracts. Furthermore, New Hampshire common law utilizes two cases . . . as legal precedent for enforcing land contracts." *See id.* at 4.

54. *See* MICH. COMP. LAWS ANN. § 565.361 (West 2020) (describing the statutory requirements of conveying land via land contract in Michigan); *see also id.* § 565.371.

55. *See id.* § 37.2502(f) (prohibiting advertising for housing with "an intent to make a preference, limitation, specification, or discrimination with respect to the real estate transaction").

56. *See* WIS. STAT. ANN. § 708 (West 2020) (describing the statutory requirements for conveying land in Wisconsin).

57. *See id.* § 106.50(d) (prohibiting discriminatory advertising for housing).

58. *See* OHIO REV. CODE. ANN. §§ 5313.01–5313.10 (West 2020); Curry & Durham, *supra* note 20, at 565 ("To be considered a residential land contract [in Ohio], the agreement must provide that the vendee agree to pay the purchase price in 'installment payments.' A lease-purchase agreement would satisfy this requirement if any of the lessee's 'rent' payments are to be applied to the purchase price, or if the lessee is required to make a deposit or down payment before the 'lessor' conveys title.").

statutory scheme, similar to Michigan and Wisconsin, prohibiting discriminatory targeting of minority groups in housing.[59]

Many contract buyers and sellers choose to enter into land contracts to avoid being subject to federal regulations that govern traditional mortgages, such as the Truth in Lending Act.[60] However, because land contracts have made a resurgence and garnered media attention in recent years, more nonprofits, scholars, and federal legislators are calling for national-level reforms.[61] In January 2017, Congressman Elijah Cummings sent a letter to the Federal National Mortgage Association (Fannie Mae) regarding the business practices of Vision Property Management (Vision), a prolific land contract seller, alleging that Vision was targeting people of color in blighted neighborhoods to make a profit.[62] Furthermore, in 2016, the Consumer Financial Protection Bureau (CFPB) began the process of investigating whether companies like Vision violated federal Truth-In-Lending laws by purchasing foreclosed homes in bulk and then selling them on contract.[63] Additionally, in May 2017, Senator Sherrod Brown told the Director of the Federal Housing Finance Agency—which is responsible for supervising Fannie Mae and the Federal Home Loan Corporation (Freddie Mac)—that sales to companies looking to sell foreclosed homes on contract should be severely limited.[64] According to some housing experts, calls for national-level

59. *See* OHIO REV. CODE ANN. § 4112.02(7) (West 2020) (prohibiting discriminatory advertising for housing).

60. *See* Way, *supra* note 20, at 133–34 (discussing the reasons why homebuyers choose to purchase homes through informal means like land contracts or "rent-to-own" agreements); *see also* Purcell, *supra* note 20, at 1783–84. The Truth in Lending Act, which was passed in 1968, was originally intended to give consumers important information about real estate transactions. *See id.* at 1789–90.

61. *See, e.g.*, BATTLE, JR. ET AL., *supra* note 37, at 9–11 (discussing potential reforms to the problems of land contracting).

62. *See* Letter from Elijah E. Cummings, Ranking Member of House Comm. on Oversight & Gov't Reform, to Timothy J. Mayopoulos, President & CEO of Fannie Mae (Jan. 18, 2017) (suggesting that land contract sellers were "churn[ing] unsuspecting tenants through ever-deepening money pits").

63. *See* Alexandra Stevenson & Matthew Goldstein, *Federal Watchdog Agency Steps Up Inquiry into Home Contracts*, N.Y. TIMES (Nov. 14, 2016), https://www.nytimes.com/2016/11/15/business/dealbook/federal-watchdog-agency-steps-up-inquiry-into-home-contracts.html [https://perma.cc/8P2M-2GYQ] (last visited Apr. 27, 2020) (discussing the CFPB investigation into Harbor Portfolios, an investment company responsible for selling hundreds of homes on contract throughout the Midwest).

64. *See* Alexandra Stevenson & Matthew Goldstein, *Housing Regulator is Pushed to Crack Down on Sales of Foreclosed Properties*, N.Y. TIMES (May 11, 2017), https://www.nytimes.com/2017/05/11/business/dealbook/foreclosed-houses-

reform are an attempt to reconcile the many regulatory differences between land contracts and regular mortgages.[65]

B. The Predatory Nature of Land Contracts Versus Traditional Mortgages

People who enter into land contracts usually do so because they cannot get financing through a bank or other traditional lender.[66] While land contracting provides a different avenue to home ownership for individuals who may never have the opportunity to own property otherwise, it also removes many of the protections associated with traditional mortgage-based home ownership, which is highly regulated.[67] Furthermore, land contracts often include unreasonable terms, and homes sold via land contract are often in poor condition.[68]

1. *Land Contracts and Their Differences from Mortgages*

Because a buyer does not gain legal title to a property when entering into a land contract, he or she is therefore stripped of many protections that come with a traditional mortgage.[69] State mortgage laws generally provide buyers a statutory right of redemption, which allows a defaulting home owner to redeem the property within a certain amount of time.[70] In a land contract, however, a contract buyer

investment-firms-predatory-practices.html [https://perma.cc/76PR-WBAT] (last visited Apr. 27, 2020) (noting that Sen. Brown called for Fannie Mae and Freddie Mac to prohibit or severely limit companies like Harbor Portfolios from selling foreclosed homes on contract).

65. *See* Barron, *supra* note 21, at 9–10 ("It is evident that federal oversight could bring greater uniformity to governance of land contracts.").

66. *See* Way, *supra* note 20, at 128, 133–34 (noting that land contracts are often referred to as a "poor man's mortgage" due to their informal nature).

67. *See id.* at 133–34. *But see* Barron, *supra* note 21, at 8–9 ("Land contracts represent an alternative path towards home ownership available to individuals who might not otherwise qualify for traditional financing. . . . Land contracts can be useful vehicles for traditionally unqualified buyers to acquire home ownership and improve their credit ratings.").

68. *See* Wright, *supra* note 46, at 102–03 (discussing the various reasons why land contracts are generally unjust and arguing that land contracts should be presumptively unconscionable).

69. *See* Way, *supra* note 20, at 136 (discussing the lack of protections afforded to home buyers who buy outside the traditional, regulated housing market).

70. *See id.* at 139–40 ("In the formal market, state foreclosure laws provide extensive protections to a homebuyer as mortgagor when the homebuyer has defaulted under the terms of a home loan agreement. The most fundamental right that state law extends to mortgagors is the right to a foreclosure sale and receipt of any surplus funds

has no opportunity for redemption upon default.[71] Similarly, home owners using traditional financing can generally count on a reinstatement period to cure a default if they miss a mortgage payment, which is not available for land contract buyers.[72] Additionally, home owners using traditional financing are afforded the protection of the lengthy foreclosure process that must occur for a mortgage holder to regain possession of the property.[73] Conversely, if a contract buyer defaults on the contract, a contract seller can regain possession of the property through summary proceedings, which are more commonly known as Eviction Court.[74] In some instances, the use of summary proceedings means that a contract seller can repossess the property in as little as ten days.[75]

In addition to stripping many of the protections available to buyers in traditional real estate transactions, land contracts also provide a variety of remedies favorable to the seller, like forfeiture clauses.[76] Forfeiture clauses prevent a contract buyer from gaining any equity from the value he or she has put into a property because the buyer does not gain title to the property until the buyer has paid in full.[77] Furthermore, under many forfeiture clauses, if a contract buyer

generated by the sale. Many states also provide homeowners in the formal market with a mortgagor's right of redemption, which gives the defaulting buyer the ability to redeem his property by some fixed date.").

71. *See* Wright, *supra* note 46, at 102 (discussing how contract sellers in Illinois often use state law governing eviction proceedings to evict contract buyers upon default).

72. *See id.* (contrasting the protections of traditional financing options with those containing forfeiture clauses).

73. *See* Custard, *supra* note 48, at 530 ("[M]ortgage foreclosure laws require the lender to submit to a structured and lengthy foreclosure process and ultimately sell the property at a public sale to recover the remaining loan balance.").

74. *See, e.g.*, MICH. COMP. LAWS ANN. § 600.5744(5) (West 2020). The Michigan statute, which governs the repossession of property in rental foreclosure as well as after a default on a land contract, serves as an example of the type of law that governs repossession of property after land contract default. *See id.* The statute states, in part, that "a writ of restitution must not be issued until the expiration of 10 days after the entry of the judgment for possession." *Id.*

75. *See id.* (noting when the court enters a judgment for possession for a landlord, that the tenant generally as ten days to vacate the premises from which they are being evicted).

76. *See* Wright, *supra* note 46, at 102 (discussing the unfairness of forfeiture clauses).

77. *See id.* ("Forcible Detainer and Entry Law only provided buyers two defenses to breach of contract: that they had actually made their housing payment or that they had not received notice of the eviction proceedings. While the buyer could appeal an eviction decision, they would have to post a bond of several thousand dollars in order to do so, which many could not afford. If the buyer lost in court, the seller

misses even one payment, the contract seller can use Forcible Detainer and Entry laws to repossess the property immediately—unlike a foreclosure, which can take months and gives buyers a reinstatement period.[78] These types of clauses allow a contract seller, upon repossession of the property, to retain all of the value added to the property by the contract buyer.[79] While contract buyers can appeal an eviction in court, many of the low-income people targeted by contract sellers do not have the financial resources to litigate their claims.[80] Instead, a contact buyer may choose to give up all monthly payments already made on the contract, as well as any down payments and money spent on repairs.[81]

2. *The Conditions of Homes Sold Via Land Contract and Unjust Markups*

Properties conveyed by land contract are often old and in need of significant repairs to satisfy local building codes.[82] In today's market, where large property management companies are buying up foreclosed homes in bulk, many homes sold on contract have sat vacant and accumulated significant repair costs for years prior to sale.[83] Contract sellers often conceal the true state of the properties

would then retain the buyer's down payment, and any payments that had been made—even if the buyer was years into the contract. The seller then repossessed the home, and could then immediately sell it to another [B]lack family, which resulted in great profit. In one case, a seller-speculator had twenty repossession actions at any given time.").

78. *See id.* (discussing the injustice of forfeiture clauses).

79. *See id.* (discussing how forfeiture clauses allow land contract buyers to be subject to state eviction laws).

80. *See id.* at 119 ("[S]tatutory reform to installment housing contracts, in the absence of other changes such as community organizing and access to counsel, is unlikely to help large numbers of buyers who are disproportionately non-white and poor.").

81. *See id.* at 118–19 (noting that land contract buyers facing eviction proceedings may face poor outcomes in eviction court).

82. *See id.* at 103 ("[H]omes bought on contract were often old and needed repairs in order to be up to city housing codes. The sellers did not inform the buyers of the required repairs before selling, and so buyers would find themselves stuck with extensive and expensive home repairs on top of their already high monthly installment payments. Although the buyers did not have legal title to the homes, they were still responsible for maintenance, and paying fines if the house was not up to code. Additionally, the sellers would sometimes tack on unexplained fees to the housing contracts, making them even more expensive.").

83. *See* BATTLE, JR. ET AL., *supra* note 37, at 3 ("Since the foreclosure crisis, investors . . . have purchased thousands of foreclosed properties through bulk sales

they sell and peddle them as "fixer-uppers" that would be a great deal for a homebuyer willing to put some time and money into making repairs.[84] For example, in Wisconsin, some contract sellers include provisions in their land contracts requiring contract buyers to bring homes up to local building code within ninety days of signing the contract.[85] The cost of making necessary repairs causes many contract buyers to sink under the financial burden of repairing these dilapidated homes on top of already high monthly installment payments.[86] Essentially, the contracts require buyers to have all the financial responsibilities of an owner, while only having the actual ownership status of a tenant.[87]

Additionally, properties sold by land contract are often sold at a significant markup, which allows contract sellers to maximize profit.[88] Contract sellers sometimes sell homes for 100% to 300% more than the actual appraised value of the home.[89] This markup allows contract sellers to make significant profits and then sell the home to another contract buyer when the current buyer inevitably defaults under the

and property tax foreclosures. Many of these homes are uninhabitable and in need of substantial repairs. Rather than repair and rent the homes, investors have found it more profitable to sell the properties to low-income buyers through land installment contracts.").

84. *See* Semuels, *supra* note 7 ("[Zachary Anderson] didn't know how difficult it would be to keep up the terms of the contract, because he didn't realize just how much work the house would need. There is no requirement that a home inspector look at the house before a contract-for-deed agreement is signed.").

85. *See* Nate Stewart, *Vision Property Management Continues Business in Wisconsin Despite Lawsuit*, WEAREGREENBAY.COM (Mar. 1, 2018, 9:09 AM), https://www.wearegreenbay.com/news/local-news/vision-property-management-continues-business-in-wisconsin-despite-lawsuit/1000873047 [https://perma.cc/6T6P-Q4BS] (noting that homes sold on contract by Vision Property Management require contract buyers to bring homes up to local building code as part of the contract for sale).

86. *See* Coates, *supra* note 1 (discussing the responsibilities and disadvantages of land contracts).

87. *See* Wright, *supra* note 46, at 101 ("[S]ellers priced the homes significantly higher than their appraised value in order to maximize profit. . . . The white homeowner, either out of fear of declining property values because of the presence of [B]lack neighbors or out of a racist dislike of [B]lack neighbors, would take the offer so they could move to white suburbs of Chicago. Then, the white speculator would immediately sell the home on contract to a [B]lack family for several thousand dollars more than the speculator's purchase price.").

88. *See* Coates, *supra* note 1 (noting that, in addition to charging significant markups on homes, contract sellers often "sell" homes three or four times over).

89. *See* Wright, *supra* note 46, at 101 (discussing how unreasonable price markups contribute to the unconscionability of land contracts).

weight of repair costs, monthly payments, and high interest rates.[90] Often, contract buyers are not aware of the large discrepancy between the appraised value of the home and the price they are paying, which has led some commentators to call for state and federal legislation requiring mandatory inspections of property conveyed via land contract.[91]

3. *Potential Benefits of Land Contracts*

Despite the many criticisms of land contracts, in some instances, they have the potential to make home ownership more accessible to a greater number of people.[92] Land contracts can allow low-income people who may not qualify for traditional financing to become home owners when contract terms are fair and bargaining power is equally distributed between the buyer and seller.[93] For example, some nonprofit housing organizations successfully use land contracting to make home ownership more accessible to low-income homebuyers.[94] When contract sellers are not motivated by large profits and agree to monthly payments that contract buyers can actually afford, land

90. *See id.* For example, a contract seller like Vision may purchase a vacant and dilapidated home for $14,000 and then sell it back to a contract buyer for $25,500. *See id.*

91. *See* Barron, *supra* note 21, at 8 (calling for greater oversight of land contracting by federal agencies such as the CFPB and for greater uniformity in the law governing land contracts across the country); *see also* BATTLE, JR. ET AL., *supra* note 37, at 9–11 (discussing proposed solutions to the problems presented by land contracts).

92. *See* Barron, *supra* note 21, at 8 ("Land contracts represent an alternative path towards home ownership available to individuals who might not otherwise qualify for traditional financing.").

93. *See id.* (discussing how, despite their flaws, land contracts can be a useful vehicle for low-income people to become homeowners when they are not written with inequitable terms).

94. *See id.* at 8–9 ("For example, Bridge to Success, a Minnesota nonprofit, uses land contracts to finance the sale of their houses and has made a positive impact on the lives of low-income buyers and the community at large. One such success story involves Betty Jo Zepeda, whose life was transformed through this organization. After a divorce, she was left homeless, and through Bridge to Success, was able to eventually buy a $180,000 house. Through her monthly interest payments, Betty was able to use her equity in her home to qualify for a mortgage from a bank. Prospective homebuyers utilizing a land contract can use their equity derived from monthly interest payments as collateral for bank financing in the future. Without the land contract a traditional bank mortgage would have required at least a 10% down payment in addition to collateral. The land contract permitted a small down payment with a monthly interest payment that she could afford.").

contracts are useful devices for traditionally unqualified buyers to become home owners and improve their credit scores.[95]

C. The Evolution of Land Contracts in the United States

Buyers in the United States have used land contracts since the 1800s, and general legal principles governing them have not changed drastically since then.[96] What has changed, however, are the motivations behind the use of land contracts and the parties engaging in them.[97] While many of the aspects of land contracting have remained the same since the mid-twentieth century, as demonstrated by the stories of Clyde Ross and Zachary Anderson, the identity of land contract sellers has changed significantly.[98] During the Great Migration era, land contract sellers were mostly white property owners who owned a small catalog of properties.[99] Now, land contract sellers are almost exclusively large property management companies that have purchased enormous portfolios of foreclosed properties.[100]

95. *See* Way, *supra* note 20, at 133–34 (discussing the various benefits to purchasing a home informally, including by land contract, and noting that many low-income buyers would be completely shut out of the home ownership market without devices like land contracts).

96. *See* Cent. Pac. R.R. Co. v. Mudd, 59 Cal. 585, 591 (1881) (holding that a land contract is a transaction of "mortgage, and not of purchase"). *See generally* Bean v. Atwater, 4 Conn. 3 (1821) (holding that land contracts are dependent contracts); Crane v. O'Reiley, 8 Mich. 312 (1860) (holding that a contract buyer is a tenant-at-will); Clarke v. Curtis, 38 Va. 559 (1841) (holding that under a contract for sale, the vendor holds a lien on all property before the purchase price is paid and title is delivered).

97. *See* BATTLE, JR. ET AL., *supra* note 37, at 3 (discussing how large property management companies are buying foreclosed homes in bulk post-foreclosure crisis and selling them on contract to low-income homebuyers).

98. *See id.* (explaining that most contract sellers are large property management companies); Purcell, *supra* note 20, at 1776–77 ("Private investment firms took advantage of the large stock of foreclosed homes after the Great Recession and bought many houses at low prices. The biggest firms in the business have bought thousands of homes in multiple states. For example, Harbour Portfolio Advisors purchased more than 6700 foreclosed homes and sold them to homebuyers through land contracts. Another company, Vision Property Management, 'owns more than 6,000 homes in two dozen states.' . . . Compared to the highly regulated home-mortgage market, land contracts give these investors the freedom to structure deals to their advantage and allow them to sell to people who may be eager to own a home, but are unable to get a bank-financed mortgage.").

99. *See* BATTLE, JR. ET AL., *supra* note 37, at 2 ("In the past, the primary sellers of land installment contracts were individuals with a few properties.").

100. *See id.* ("More recently, large investment firms with private equity backing, some of whom profited from the high-cost subprime lending that fueled the

Property managers like Harbor Portfolios, the company that sold Zachary Anderson his home, often contract with buyers for homes that have been in disrepair for years.[101] This phenomenon has caused a surge in land contracting in predominately minority neighborhoods, which were hit hard by the foreclosure crisis.[102]

While it is difficult to know exactly how often people use land contracts as a financing device because these transactions are often not recorded, research indicates that land contracts have seen a resurgence since the Great Recession, particularly in the Midwest.[103] Land contract sales increased by 50% between 2008 and 2013 in Minneapolis,[104] and Detroit saw more land contract sales than traditional mortgage transactions in 2015.[105] The practice's resurgence has brought the predatory nature of land contracts into the national spotlight, and governmental actors in both Wisconsin and Ohio have challenged the practice in court.[106] Furthermore, legal scholars and

foreclosure crisis, are increasingly using land installment contracts to make a profit off of the significant supply of foreclosed homes.").

101. *See id.* at 3 (discussing how many properties purchased by companies like Harbor Portfolios are in disrepair when land contract buyers purchase them).

102. *See id.* at 4 (noting that minority communities that "bore the brunt of the foreclosure crisis and economic melt-down that are now seeing a rise in land contracts").

103. *See id.* ("Last year in Detroit, land contracts outnumbered mortgage transactions.").

104. *See* Jeffery Meitrodt, *Contract for Deed Can be House of Horror for Buyers*, STAR TRIB. (July 5, 2013, 5:27 AM), http://www.startribune.com/jan-14-contract-for-deed-can-be-house-of-horror-for-buyers/185756982/ [https://perma.cc/PM4Z-GYJ3] ("In the aftermath of the housing market crash, contract-for-deed sales in the metro area have soared more than 50 percent in the past five years, as families with low income or bad credit are lured by the promise of homeownership.").

105. *See* Joel Kurth, *Land Contracts Trip Up Would-Be Homeowners*, DETROIT NEWS (Feb. 29, 2016, 12:04 AM), http://www.detroitnews.com/story/news/local/detroit-city/2016/02/29/land-contracts-detroit-tax-foreclosure-joel-kurth/81081186/ [https://perma.cc/F8VJ-DAKQ] (reporting 2,177 land contract sales compared to 2,023 home mortgage sales and saying that land contracts used in Detroit "often involve ramshackle homes purchased from tax foreclosure auctions and contracts that are 'written to fail'").

106. *See* Letter from Elijah E. Cummings, *supra* note 62 (arguing in favor of more federal oversight of property management companies selling large numbers of homes on contract); *see also* Stewart, *supra* note 85 (discussing litigation between the State of Wisconsin and Vision Property Management); James Leggate, '*Predatory' Property Investors Agree to Pay Cincinnati, Change Practices to Settle Lawsuit*, WCPO CINCINNATI, (Mar. 28, 2018), https://www.wcpo.com/longform/predatory-property-investors-agree-to-pay-cincinnati-change-practices-to-settle-lawsuit [https://perma.cc/YG6F-EDJN] (discussing the settlement agreement reached

civil rights activists recognize that an increase in land contract buying will perpetuate the devastating economic consequences minorities have suffered due to decades of racist housing policies.[107] Available data shows that more than three million people in the United States live in homes financed by land contracts as of 2018, and most of those homes are concentrated in minority communities.[108] This pattern mirrors the nature of land contract usage during the Second Wave of the Great Migration.[109]

D. The Racialized History of Land Contracts and Their Disparate Impact on Minorities

Barriers to homeownership are problematic for minority groups not only because they make finding stable housing more difficult, but also because they make building wealth difficult.[110] Land contract schemes that target minority home buyers have exacerbated this problem.[111] While land contract sellers in the mid-twentieth century used the contracts as a purposeful segregation device, land contracting

between the City of Cincinnati and Harbor Portfolios in litigation alleging that Harbor Portfolios engaged in predatory business practices).

107. *See* Coates, *supra* note 1 (discussing the economic consequences of being shut out of the legitimate housing market and their continued effects on minority wealth-building).

108. BATTLE, JR. ET AL., *supra* note 37, at 4 ("As with earlier forms of predatory lending, contract sellers target low-income buyers with limited resources who do not qualify for conventional mortgages. Immigrants and limited English proficient populations are especially at risk for this type of financing as they search for afford- able housing without access to conventional financing.").

109. *See id.* (describing how most people entering into land contracts are low-income people of color, much like they were when land contracting saw its first surge in popularity during the second wave of the Great Migration).

110. *See* Semuels, *supra* note 7 ("In the 1950s and 1960s, African Americans were prohibited from borrowing through traditional means, so they entered into contract-for-deed arrangements, which left them with little equity to pass on to their children. This had long-lasting effects—African Americans still have, on average, much lower credit scores than whites, in part because they didn't have the means of building wealth through homeownership that whites had. In the 1980s, 1990s, and 2000s, banks started lending more to African American buyers, but these buyers were frequently targeted by subprime loans with high interest payments and terms that were difficult to fulfill.").

111. *See* Wright, *supra* note 46, at 104 ("If the problems were so numerous, and the benefits so few, why would so many African Americans enter into these contracts? The answer is simple: they had no other choice. If [B]lacks wanted to be homeowners, buying on contract was the only way. While whites could obtain low-interest mortgages, the same opportunity was not available to [B]lacks.").

today targets minorities in a subtler way by using policies that disparately impact minority home buyers.[112]

1. *The Great Migration Era*

Land contract lending began as a racially targeted practice in the 1950s when racist federal homeownership programs systematically excluded Black Americans from the legitimate, government-backed housing market.[113] The Federal Housing Administration (FHA), Veterans' Affairs (VA), and Home Owner's Loan Corporation (HOLC) regularly denied financing and mortgage insurance to families trying to purchase homes in predominantly Black neighborhoods, which were identified on zoning maps in red or marked with a "D," meaning "hazardous" or severely in decline.[114] All of these agencies also denied credit and mortgage insurance to Black families trying to purchase homes in white suburbs or predominately white areas in cities.[115]

Furthermore, explicit discrimination by these government agencies legitimized housing and lending discrimination by private companies.[116] An examination of private lenders across the country concluded that private lending institutions in Chicago and Detroit actively avoided lending to minorities who were trying to purchase homes in the vicinity of white neighborhoods and refused to make

112. *See id.* (describing how the FHA contributed to de jure segregation through redlining); *see also* BATTLE, JR. ET AL., *supra* note 37, at 4 (noting that the same communities—low-income communities of color—that were disproportionately affected by the foreclosure crisis are now disproportionately affected by the problems that accompany land contracting).

113. *See* Neir, *supra* note 18, at 183 ("While exact figures regarding the FHA's discrimination against African Americans are not available, data analyzed on a county level show a clear pattern of redlining in center city counties and abundant loan activity in suburban counties.").

114. *See* Coates, *supra* note 1 (describing redlining and its detrimental effects of minority homeownership, particularly in Chicago, where Clyde Ross and his family purchased a home on contract).

115. *See id.* (describing how the FHA, the VA, and other federal agencies systematically denied Blacks the same housing opportunities regularly afforded to whites).

116. *See id.* ("'A government offering such bounty to builders and lenders could have required compliance with a nondiscrimination policy,' Charlies Abrams, the urban-studies expert who helped create the New York City Housing Authority, wrote in 1955. 'Instead, the FHA adopted a racial policy that could well have been culled from the Nuremberg laws.'").

even a symbolic number of loans to minority homebuyers.[117] Given the importance of the FHA, HOLC, and VA in the real estate market during this time period, minority home buyers were essentially shut out of the legitimate, government-backed housing market.[118] Because minorities were not afforded the same lending opportunities as white home buyers, they were forced to rely on unregulated, less-reliable means of owning a home, like land contracting.[119]

The racially predatory nature of land contracts from this time period is illustrated by the complaints set forward in *Clark v. Universal Builders*.[120] In *Clark*, a group of Black citizens who purchased newly constructed homes on contract sued the general contractor, Universal Builders, claiming that Universal Builders exploited their need for housing by building homes adjacent to Black neighborhoods in Chicago and then charging incredibly high prices for the homes on contract.[121] Sidney and Julia Clark, the plaintiffs, made a claim under § 1982 of the Civil Rights Act of 1866, which provides that all citizens are entitled to an equal right to buy and sell property.[122] While the plaintiffs lost at the District Court level, the

117. *See id.* ("The lasting damage done by the national government was that it put its seal of approval on ethnic and racial discrimination and developed policies which had the result of the practical abandonment of large sections of older, industrial cities. More seriously, Washington actions were later picked up by private citizens, so that banks and savings-and-loan institutions institutionalized the practice of denying mortgages 'solely because of the geographical location of the property.'").

118. *See* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 63–67 (2017) (discussing the creation of the HOLC and the FHA and how government actors used those agencies to perpetuate segregation by denying mortgages to minority homebuyers).

119. *See* Neir, *supra* note 18, at 185 ("In the absence of traditional sources of mortgage financing, one of the most common methods available for African Americans to finance a home purchase was the installment or land contract.").

120. *See generally* Clark v. Universal Builders, 501 F.2d 324 (7th Cir. 1974) (presenting the predatory aspects of land contracts).

121. *See id.* at 327 ("Plaintiffs contended that the demand among Blacks for housing greatly exceeded the supply of housing available in the Black market and that the defendants exploited this situation by building houses in or adjacent to Black areas and selling the houses to plaintiffs at prices far in excess of the amounts which white persons paid for comparable residences in neighboring urban areas, and on onerous terms far less favorable than those available to white buyers of similar properties, all in violation of plaintiffs' rights under the Thirteenth and Fourteenth Amendments and under the Civil Rights Act of 1866.").

122. *See id.* at 327–28 (discussing how the plaintiffs brought a claim under § 1982 of the Civil Rights Act); *see also* 42 U.S.C. § 1982 (1978) ("All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.").

Seventh Circuit Court of Appeals held that the Clarks had stated a claim under § 1982, asserting that this lending system pushed Black families into segregated inner-city neighborhoods and forced them to spend more of their income on housing than their white counterparts.[123] The Seventh Circuit found that the challenged land contracting system promoted racial segregation and put Black people in a perpetual state of social inequality.[124]

Community organizing efforts in Chicago also led to litigation surrounding land contracting.[125] The most notable of these efforts was the Contract Buyers League suit.[126] The Contract Buyers League started in 1967 when a community organizer named Jack MacNamara organized residents in the Lawndale neighborhood of Chicago—which was almost exclusively made up of Black families who bought their homes on contract—to demand better contract terms from sellers.[127] Members of the Contract Buyers League went to contract sellers' offices and attempted to negotiate for lower contract prices.[128] Eventually, some buyers began escrowing their monthly payments until they could get fairer contract terms.[129] The Contract Buyers

123. *See Clark*, 501 F.2d at 334 ("We hold accordingly that plaintiffs state a claim under section 1982 since they allege that (1) as a result of racial residential segregation dual housing markets exist and (2) defendant sellers took advantage of this situation by demanding prices and terms unreasonably in excess of prices and terms available to white citizens for comparable housing.").

124. *See id.* at 331 ("Through the medium of exorbitant prices and severe, long-term land contract terms [B]lacks are tied to housing in the ghetto and segregated inner-city neighborhoods from which they can only hope to escape someday without severe financial loss.").

125. *See* Coates, *supra* note 1 (describing the Contract Buyers League and the subsequent litigation that resulted from the group's community organizing efforts).

126. *See id.*

127. *See* Mary Lou Finley, *Inside the Contract Buyers League's Fight Against Housing Discrimination*, CHI. REP., (Feb. 15, 2016), https://www.chicagoreporter.com/inside-the-contract-buyers-leagues-fight-against-housing-discrimination/ [https://perma.cc/3S52-E7XE] ("The families put their payments in escrow, for future payment to the sellers after the contracts had been renegotiated. The payment strike went on for many months, sometimes years, between 1968 and the early 1970s, with about 500 families participating.").

128. *See id.* (describing how contract buyers confronted contract sellers and asked them to renegotiate their contract prices).

129. *See id.* ("By July 1971, 155 contracts had been renegotiated, with an average saving of $14,000 (about half the purchase price for a house). Other families were finally able to obtain regular mortgages; the FHA had changed its policies and was beginning to make mortgage insurance—and thus mortgages—available in [B]lack communities on a limited basis.").

League eventually sued sellers with the help of pro bono lawyers.[130] In *Contract Buyers League v. F & F Investments*, the group sued contract sellers, alleging numerous violations of the Civil Rights Act.[131] The United States District Court for the Northern District of Illinois held that, based on the terms of the contract and their effects on Black contract buyers, the Contract Buyers League had stated a claim that these land contracts were discriminatory under 42 U.S.C. § 1982.[132]

2. *Land Contracts Post-Great Recession*

The foreclosure crisis and Great Recession of 2008 created an ideal environment for the racially and economically predatory land contracts to resurge in the modern housing landscape.[133] The foreclosure crisis left many homes in low-income neighborhoods empty, and many banks in the wake of the foreclosure crisis were reluctant to provide loans to purchase these lower-priced homes.[134] Eventually, investment firms began buying these foreclosed properties in bulk.[135] The companies then began to sell these homes on contract,

130. *See id.* ("Thirty attorneys from prominent Chicago law firms offered pro bono legal services to the families facing eviction due to the payment strike . . . including Marshall Patner, Tom Sullivan, and Bob Ming.").

131. 300 F. Supp. 210 (N.D. Ill. 1969) ("Plaintiffs, suing as a class, seek relief with respect to contracts for the sale of used residential property in the City of Chicago. Their complaint contains five counts. The first alleges violation of the Civil Rights Act of 1866, 42 U.S.C. §§ 1981, 1982, 1983, 1985(3), and of the Thirteenth and Fourteenth Amendments of the Constitution of the United States. Counts two and three allege, respectively, violations of the federal antitrust laws and of the antitrust laws of the State of Illinois. Count four of the complaint alleges violation of the federal securities laws. Count five alleges violation of the Illinois common law regarding fraud, usury and unconscionable contracts.").

132. *See id.* at 216 ("[T]here is no reason to distinguish a refusal to sell on the ground of race and a sale on discriminatory prices and terms. Count I of this complaint states a claim under Section 1982 of the Civil Rights Act of 1866 . . . .").

133. *See* BATTLE, JR. ET AL., *supra* note 37, at 3 (discussing how, after the 2008 Great Recession, large property management companies bought foreclosed homes in bulk and sold them on contract to low-income homebuyers).

134. *See id.* at 2 ("Evidence suggests that land contracts are making a resurgence in the wake of the foreclosure crisis. An investigative report by the Star Tribune found that land contract sales in the Twin Cities had increased 50% from 2007 to 2013. Recent reports from *The New York Times* and *Bloomberg* reveal growing interest from private equity-backed investors in using land contracts to turn a profit on the glut of foreclosed homes in blighted cities around the country.").

135. *See* Semuels, *supra* note 7 ("[T]he banks took them over. Those that did not sell at auction—often those in predominately African American neighborhoods where people with capital did not want to go—ended up in the portfolio of Fannie

mostly in minority neighborhoods and to low-income people who were unlikely to purchase a home with traditional financing.[136] Furthermore, many families came out of the housing crisis with poor credit scores, which made it difficult for them to secure financing through traditional means.[137] Like in the post-Great Migration era, many people found the traditional home-buying path inaccessible and subsequently turned to informal means of home ownership like land contracts.[138]

Land contract transactions are often not recorded, which makes finding complete and meaningful data on their use difficult; however, available research indicates that land contracts have resurged since the Great Recession.[139] Large cities in the Midwest have seen an increase in the amount of recorded land contract sales,[140] and regions outside of the Midwest have also seen a resurgence of land contracts in pocket areas, such as among Hispanics living along the United States–Mexico Border.[141] Across the country, people of color enter into land contracts

Mae, which had insured the mortgages loan. . . . Fannie Mae then offered these homes up at low prices to investors who wanted to buy them, such as Harbour [Portfolios].").

136. *See id.* ("This [process] tees up another cycle of debt and lost equity in the housing market, and in the larger economy that could continue to drag down the very people that the law 50 years ago had tried to protect.").

137. *See* BATTLE, JR. ET. AL, *supra* note 37, at 4. In 2016, the National Consumer Law Center found that attorneys across the country noted that marketing schemes for land contract properties appeared to target minorities, whether or not contract sellers intended the disparity. *See id.* ("In NCLC's interviews with consumer attorneys from around the country, advocates echoed the common theme that land contracts were being sold predominantly to borrowers of color.").

138. *See id.* at 4 ("As with earlier forms of predatory lending, contract sellers target low-income buyers with limited resources who do not qualify for conventional mortgages. Immigrants and limited English proficient populations are especially at risk for this type of financing as they search for affordable housing without access to conventional financing.").

139. *See id.* at 2 ("More recently, large investment firms with private equity backing, some of whom profited from the high-cost subprime lending that fueled the foreclosure crisis, are increasingly using land installment contracts to make a profit off of the significant supply of foreclosed homes.").

140. *See* Meitrodt, *supra* note 104 (discussing the resurgence of land contracting in Minnesota); *see also* Wright, *supra* note 46, at 120–21 (discussing the prevalence of land contracting among Spanish-speaking neighborhoods in the South).

141. *See* Wright, *supra* note 46, at 120 ("Installment housing contracts are still entered into by African Americans at higher rates than whites, but the rate is highest for Hispanics. . . . These *colonias* are often created through discriminatory practices such as zoning restrictions on mobile homes, which effectively push some farm workers of Mexican descent into unregulated semi-rural settlements that often lack basic physical infrastructure, such as potable water, sanitary sewage, and adequate

more frequently than whites.[142] This discrepancy indicates that a disproportionate number of minority home buyers are suffering the effects of predatory land contracts and bearing the economic losses that often follow these transactions.[143]

In sum, while land contracting can serve legitimate purposes for home buyers who cannot obtain traditional financing, it carries more risk for buyers than using a traditional mortgage.[144] While contract sellers used land contracting explicitly as a segregation device during the second wave of the Great Migration, the discriminatory effect of land contracting post-Great Recession is more subtle.[145] Because the Great Recession left many foreclosed homes in mostly minority neighborhoods and property management companies that purchased those home are now selling them on contract, land contracts continue to disproportionately affect minority homebuyers.[146]

II. THE EVOLUTION OF THE DISPARATE IMPACT DOCTRINE

The disparate impact doctrine is a doctrine meant to give claimants an avenue to address more subtle forms of discrimination based on race, gender, or another protected class.[147] Essentially,

roads; this is similar to the conditions that made contracts for deed so problematic in 1960s Chicago.").

142. *See id.* Blacks and Hispanics use land contracts at higher rates than the national average. *See id.* This discrepancy occurs in part because of large property management companies purchasing foreclosed homes in bulk, many of which were located in low-income, minority neighborhoods, and selling them on contract. *See* BATTLE, JR. ET AL., *supra* note 37, at 3–4 (discussing why non-whites are more likely to enter into land contracts than are whites).

143. *See* BATTLE, JR. ET AL., *supra* note 37, at 4 (discussing how attorneys across the country have observed that land contracts seem to be disproportionately marketed to people of color).

144. *See* Barron, *supra* note 21, at 5–7 (describing the risks associated with purchasing a home on contract, including the predatory nature of land contracts and the lack of protections afforded to contract buyers).

145. *See* BATTLE, JR. ET AL., *supra* note 37, at 3–4 (describing how the neighborhoods impacted by the negative effects of land contracts are generally minority neighborhoods that were hit hard by the foreclosure crisis).

146. *See id.* at 4–5 (describing data showing that land contracts are used a predatory lending device).

147. *See, e.g.*, United States v. City of Black Jack, 508 F.2d 1179, 1185 (8th Cir. 1974). In *Black Jack*, the Eighth Circuit used the "prima facie" test to determine that a Black Jack city zoning ordinance had a disparate impact on Black residents. *See id.* at 1184, 1186. The court stated that housing ordinances could have an equally disparate impact on minorities as employment policies and recognized that "[j]ust as Congress requires the removal of artificial, arbitrary, and unnecessary barriers to

disparate impact claims address policies and processes that disproportionately affect minorities.[148] While disparate treatment cases address explicit discrimination based on a protected class in employment, housing, or other contexts, disparate impact cases often rest on the idea that a facially neutral practice has a statistically disproportionate effect on a minority group.[149] Since the Supreme Court first explicitly recognized this doctrine in 1971, its application of disparate impact theory has evolved significantly before landing where it has today with *Inclusive Communities*.[150] The future of the doctrine is uncertain after *Inclusive Communities* because of the Trump administration's hostility toward disparate impact theory and the departure of Justice Kennedy from the Supreme Court.[151]

employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification, . . . such barriers must also give way in the field of housing." *See id.* at 1184.

148. *See* Griggs v. Duke Power Co., 401 U.S. 424, 430–31 (1971) (employing the disparate impact doctrine for the first time to strike down a Duke Power Company employment policy that caused a disproportionate amount of minority applicants to be denied employment).

149. *See, e.g.*, Jones v. Alfred H. Mayer Co., 392 U.S. 409, 442–43 (1968) (asserting that "[w]hen racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery"); Cummins & Isle, *supra* note 24, at 105–06 ("Title VII [of the Civil Rights Act of 1964]'s silence about disparate-impact claims left the courts to interpret whether Congress intended for plaintiffs to be able to obtain remedies concerning 'neutral' policies that result in disparities between members of protected classes and others.").

150. *See* Cummins & Belle Isle, *supra* note 24, at 107–10, 114–19 (discussing various tests the Supreme Court used to strengthen and weaken the disparate impact doctrine throughout the 1900s).

151. *See* Daniel Sheehan, *Disparate Impact Liability Under the Fair Housing Act After* Inclusive Communities, 25 J. AFFORDABLE HOUSING & COMMUNITY. DEV. L. 391, 392 (2017) ("[W]hen the *Inclusive Communities* decision was handed down, it was hailed as a surprising and decisive victory for advocates of civil rights and residential integration and as a decisive defeat for private developers in the housing market."); *see also* Laura Meckler & Devlin Barrett, *Trump Administration Considers Rollback of Anti-discrimination Rules*, WASH. POST (Jan. 3, 2019, 7:00 AM), https://www.washingtonpost.com/local/education/trump-administration-considers-rollback-of-anti-discrimination-rules/2019/01/02/f96347ea-046d-11e9-b5df-5d3874f1ac36_story.html [https://perma.cc/T6MW-J5J9] (discussing Justice Kennedy's retirement, and the Trump administration's hostility towards the disparate impact approach).

A. The History of Disparate Impact Jurisprudence: From *Griggs* to *Inclusive Communities*

The Civil Rights Act of 1964 explicitly recognized a cause of action for disparate treatment based on race, color, religion, or national origin.[152] While the Act did not explicitly recognize a claim for disparate impact, the Supreme Court interpreted the Act to include a cause of action for disparate impact soon after Congress enacted it.[153] In addition to the Court's recognition of the doctrine in case law, it is also codified in regulations enacted by the Department of Housing and Urban Development (HUD), which articulate a three-part test similar to what the Court has set forth in case law.[154] Since the Court's first application of this doctrine in 1971, the tests that courts use to analyze a disparate impact claim have evolved from being more favorable to plaintiffs to being more favorable for defendants.[155]

152. *See* 42 U.S.C. § 2000a(a) (1964) (listing protected classes as "race, color, religion, or national origin").

153. *See* Cummins & Belle Isle, *supra* note 24, at 105–07 ("The legislative history and text of Title VII plainly indicate that the law targets explicit discrimination, otherwise known as disparate treatment. Congress did not, however, expressly codify a prohibition against disparate-impact discrimination—that is, conduct that appears to be nondiscriminatory but nonetheless has a discriminatory effect.").

154. *See* Fair Housing Act–Discriminatory Affect Prohibited, 24 C.F.R. § 100.500 (2013) (codifying the disparate impact rule as "(1) The charging party, with respect to a claim brought under 42 U.S.C. 3612, or the plaintiff, with respect to a claim brought under 42 U.S.C. 3613 or 3614, has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect. (2) Once the charging party or plaintiff satisfies the burden of proof set forth in paragraph (c)(1) of this section, the respondent or defendant has the burden of proving that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant. (3) If the respondent or defendant satisfies the burden of proof set forth in paragraph (c)(2) of this section, the charging party or plaintiff may still prevail upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect").

155. *See* Cummins & Belle Isle, *supra* note 24, at 106 ("Title VII's silence about disparate-impact claims left the courts to interpret whether Congress intended for plaintiffs to be able to obtain remedies concerning 'neutral' policies that result in disparities between members of protected classes and others.").

1. *Early Disparate Impact:* Griggs v. Duke Power Co. *and* Albemarle Paper Co. v. Moody

The Court first recognized the concept of disparate impact in *Griggs v. Duke Power Co.*[156] As part of its hiring and promotion process, Duke Power Company required applicants and current employees to have completed high school and receive satisfactory scores on certain aptitude tests.[157] A class of Black employees brought suit against Duke Power Company, saying that its hiring practices violated the Civil Rights Act because they resulted in a significantly lower number of Black applicants being hired or promoted.[158] The Court held that the Civil Rights Act prohibited practices that were not purposefully discriminatory but nonetheless had a discriminatory effect.[159] This holding marked the beginning of the Court's use of the disparate impact doctrine as an important tool to remedy discrimination under the Civil Rights Act of 1964.[160] Throughout the 1970s, the Court applied the doctrine roughly as set forth in *Griggs*

156. 401 U.S. 424 (1971) (recognizing that facially neutral policies can have disparate impacts on minority communities within the employment discrimination context).

157. *See id.* at 427–28 ("In 1955 the Company instituted a policy of requiring a high school education for initial assignment to any department except Labor, and for transfer from the Coal Handling to any 'inside' department (Operations, Maintenance, or Laboratory). When the Company abandoned its policy of restricting Negroes to the Labor Department in 1965, completion of high school also was made a prerequisite to transfer from Labor to any other department. From the time the high school requirement was instituted to the time of trial, however, white employees hired before the time of the high school education requirement continued to perform satisfactorily and achieve promotions in the 'operating' departments.").

158. *See id.* at 435–36 (describing the plaintiffs' claim under the Civil Rights Act).

159. *See id.* at 431. The Court further explained that

> [t]he objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices.

Id. at 429–30.

160. *See id.* (stating that the doctrine served as an important tool to remedy discrimination).

and attempted to clarify the application of the doctrine in a variety of circumstances.[161]

The Court clarified the burden-shifting test for disparate impact cases set forth in *Griggs* in *Albemarle Paper Co. v. Moody*.[162] Like in *Griggs*, in *Albemarle*, a class of Black employees brought suit against Albemarle Paper Company on the grounds that its hiring and promotion practices caused Black employees and applications to be rejected more often than white employees.[163] The *Albemarle* case further explained how courts should apply the disparate impact doctrine and articulated a burden-shifting test that placed a high burden on disparate impact defendants.[164] In subsequent cases, the Court applied this disparate impact framework to a variety of cases brought under Title IV of the Civil Rights Act.[165]

Under the burden-shifting framework in *Albemarle*, the plaintiff must first present statistical or other evidence showing that a prima facie case of disparate impact discrimination exists.[166] Then, the burden shifts to the defendant to show that the policy causing the alleged disparate impact has a "manifest relationship" to the employment.[167] Lastly, if the defendant can successfully show that the policy causing the disparate impact is "necessary," the burden shifts back to the plaintiff to show that the justification the defendant offered was merely a pretext for discrimination by offering a less

161. *See* Cummins & Belle Isle, *supra* note 24, at 105–07 ("Following Griggs, the '[d]isparate impact theory became an important tool for addressing more hidden discrimination.'").

162. 422 U.S. 405 (1975) (articulating the burden-shifting test after the Court's first recognition of disparate impact in *Griggs*).

163. *See id.* at 408–09 (describing the changes to various Albemarle employment systems that plaintiffs challenged on a disparate impact basis).

164. *See id.* at 425 (describing how courts should apply the disparate impact doctrine when examining potentially discriminatory employment policies). The Court in *Albemarle* expanded on the burden-shifting framework as articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–03 (1973).

165. *See* Cummins & Belle Isle, *supra* note 24, at 108–10 (discussing various cases where the Court applied the disparate impact doctrine in the 1970s and early 1980s).

166. *See Albemarle*, 422 U.S. at 425 ("This burden arises, of course, only after the complaining party or class has made out a prima facie case of discrimination, i.e. has shown that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants.").

167. *See id.* ("Title VII forbids the use of employment tests that are discriminatory in effect unless the employer meets 'the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question.'").

discriminatory alternative to the challenged practice.[168] This framework made disparate impact cases easier for plaintiffs to win because it placed a greater burden of proof—the burden of persuasion—on the defendant.[169]

2. *Disparate Impact During the Reagan Administration*

The political and judicial climate that allowed the Court's application of the disparate impact doctrine to flourish changed significantly in 1981 with the election of Ronald Reagan.[170] Reagan's administration was openly hostile to the disparate impact doctrine and the *Griggs* decision.[171] This political climate, along with the appointment of many conservative-leaning judges, eventually dismantled the ruling in *Griggs* and resulted in a much more regressive application of the disparate impact doctrine.[172]

The Supreme Court's holding in *Wards Cove Packing Co. v. Atonio* serves as one example of how the Court weakened the disparate impact doctrine during the Reagan era.[173] In *Wards Cove*, a class of

168. *See id.* ("If an employer does then meet the burden of proving that its tests are 'job related,' it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'").

169. *See* Cummins & Belle Isle, *supra* note 24, at 108–09 (explaining that "*Albemarle* strengthened the disparate impact doctrine because it placed a greater burden of proof on the defendant").

170. *See id.* at 110 ("The political—and, thus, judicial—climate that allowed the disparate impact doctrine to flourish dramatically changed in the 1980s: with the election of President Reagan, a concerted and expanding attack on the disparate impact doctrine began. . . . 'During President Reagan's eight-year tenure, 'his administration conducted a sustained political and legal campaign to get rid of the disparate impact theory because of the belief that the disparate treatment theory of discrimination, which requires proof of discriminatory intent, is the only theory of discrimination that is embraced in our national commitment to equality.'").

171. *See id.* at 111; *see also* OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL: REDEFINING DISCRIMINATION: "DISPARATE IMPACT" AND THE INSTITUTIONALIZATION OF AFFIRMATIVE ACTION i (1987) ("[I]if 'discrimination' is understood to mean statistically disproportionate effects alone, the result will be nothing less than the permanent institutionalization of race- and gender-conscious affirmative action.").

172. *See* Cummins & Belle Isle, *supra* note 24, at 114–15 (describing how "the growing Federalist Society influence over the lower courts escalated the hostility toward the disparate impact doctrine"). The influence of Reagan's appointment of right-wing judges on disparate impact policy lasted long after he left office in 1989. *See id.*

173. 490 U.S. 642 (1989) (holding that statistical evidence showing a high percentage of white workers in one category of jobs versus a low percentage of white

minority employees at Wards Cove Packing Company alleged that Wards's hiring practices had a discriminatory impact on minority workers that violated the Civil Rights Act.[174] The Court held that simply showing that the company hired a lesser percentage of minorities than whites was not enough to show that a hiring practice had a disparate impact on non-white applicants.[175] Furthermore, the Court held that if a lack of minorities in certain positions was due to a lack of non-white applicants, then the selection methods could not be said to have a disparate impact on minorities.[176]

The test the Court set forth *Wards Cove Packing Co. v. Atonio* weakened the disparate impact doctrine.[177] In *Wards Cove*, the Court held that after a plaintiff makes a prima facie showing that a policy has a disparate impact, the burden of production, rather than the higher burden of persuasion, shifts to the defendant to show a legitimate reason for the practice allegedly causing the disparate impact.[178] This change in the evidentiary standard for the burden-shifting framework made it much easier for a defendant to show a "legitimate business

workers in another category of jobs did not establish a prima facie case of discrimination under Title VII).

174. *See id.* at 647–48 ("[A] class of nonwhite cannery workers who were (or had been) employed at the canneries, brought this Title VII action against petitioners. Respondents alleged that a variety of petitioners' hiring/promotion practices—e.g., nepotism, a rehire preference, a lack of objective hiring criteria, separate hiring channels, a practice of not promoting from within—were responsible for the racial stratification of the work force and had denied them and other nonwhites employment as noncannery workers on the basis of race.").

175. *See id.* at 660, 664 ("The persuasion burden here must remain with the plaintiff, for it is he who must prove that it was 'because of such individual's race, color,' etc., that he was denied a desired employment opportunity.").

176. *See id.* at 651–52 (noting that "[i]f the absence of minorities holding such skilled positions is due to a *dearth of qualified nonwhite applicants*") (emphasis added).

177. *See* Cummins & Belle Isle, *supra* note 24, at 117–20 ("*Wards Cove* effectively rolled back the gains in civil rights achieved through progressive application of the disparate impact doctrine in the 1960s and 1970s. The courts' subsequent and increasingly regressive approach has thwarted application of the doctrine to areas beyond employment discrimination.").

178. *See Wards Cove Packing Co.*, 490 U.S. at 655 ("Since the statistical disparity relied on by the Court of Appeals did not suffice to make out a prima facie case, any inquiry by us into whether the specific challenged employment practices of petitioners caused that disparity is pretermitted, as is any inquiry into whether the disparate impact that any employment practice may have had was justified by business consideration.").

purpose" for its discriminatory policies and much harder for plaintiffs to show that defendants had viable, less-discriminatory alternatives.[179]

3. *Disparate Impact Under the Fair Housing Act:* Inclusive Communities

The Court's most recent ruling on the disparate impact doctrine was in *Inclusive Communities*.[180] In *Inclusive Communities*, a nonprofit organization, The Inclusive Communities Project (ICP), brought suit against the Texas Department of Housing and Community Affairs (TDHCA), alleging that its system for allocating low-income tax credits had a disproportionately negative impact on minority neighborhoods.[181] The ICP alleged that statistical evidence showed that TDHCA allocated its low-income tax credits almost exclusively to Dallas's minority neighborhoods, which perpetuated racial segregation in the city by denying minorities, who live in low-income housing at higher rates than whites, the opportunity to live in mostly white neighborhoods.[182] The issue on appeal was whether disparate impact claims were cognizable under the Fair Housing Act.[183] The Court held that these claims were cognizable, saying that the Court's precedents in *Griggs* and *Smith v. City of Jackson* allowed for such a ruling.[184] Additionally, the Court stated that the legislative

179. *Id.* at 659 ("Though we have phrased the query differently in different cases, it is generally well established that at the justification stage of such a disparate-impact case, the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer.").

180. 135 S. Ct. 2507 (2015) (holding that disparate impact claims are cognizable under the Fair Housing Act).

181. *Id.* at 2513 ("The underlying dispute in this case concerns where housing for low-income persons should be constructed in Dallas, Texas—that is, whether the housing should be built in the inner city or in the suburbs. This dispute comes to the Court on a disparate-impact theory of liability. In contrast to a disparate-treatment case, where a 'plaintiff must establish that the defendant had a discriminatory intent or motive,' a plaintiff bringing a disparate-impact claim challenges practices that have a 'disproportionately adverse effect on minorities' and are otherwise unjustified by a legitimate rationale.").

182. *See id.* at 2514 (describing Inclusive Communities Project's allegation that statistical evidence showed that the TDCHA was allocating low-income tax credits unfairly).

183. *Id.* at 2513 ("The question presented for the Court's determination is whether disparate-impact claims are cognizable under the Fair Housing Act.").

184. *See id.* at 2518–19; *see also Fair Housing Act—Disparate Impact and Racial Equality*—Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc., 129 HARV. L. REV. 321, 323–34 (2015) (discussing how the Court used its precedent in *Griggs* to shape its ruling in *Inclusive Communities*).

purpose and history of the Fair Housing Act supported its ruling.[185] Fair Housing advocates, who welcomed the Court's formal recognition of disparate impact claims under the Fair Housing Act, cautiously celebrated the *Inclusive Communities* ruling.[186]

In addition to formally recognizing that disparate impact claims are cognizable under the Fair Housing Act, *Inclusive Communities* represents the Court's most recent interpretation of the regulations HUD codified in 2013.[187] In the opinion, Justice Kennedy interpreted HUD's codification of the disparate impact rule and outlined the three-prong burden-shifting test for finding disparate impact liability under the Fair Housing Act.[188] First, like in the employment discrimination cases the Court considered in *Griggs* and *Wards Cove*, the plaintiff must make a prima facie showing of disparate impact discrimination.[189] In doing so, the plaintiff must meet a "robust causality" requirement by pointing to a specific policy, as opposed to a general practice, that causes the disparate impact.[190] Next, the burden shifts to the defendant to show that the policy supports a "valid

185. *See Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2519–20 ("It is true that Congress did not reiterate Title VII's exact language in the FHA, but that is because to do so would have made the relevant sentence awkward and unclear. A provision making it unlawful to 'refuse to sell [,] ... or otherwise [adversely affect], a dwelling to any person' because of a protected trait would be grammatically obtuse, difficult to interpret, and far more expansive in scope than Congress likely intended. Congress thus chose words that serve the same purpose and bear the same basic meaning but are consistent with the structure and objectives of the FHA.").

186. *See* Sheehan, *supra* note 151, at 392 ("[W]hen the *Inclusive Communities* decision was handed down, it was hailed as a surprising and decisive victory for advocates of civil rights and residential integration and as a decisive defeat for private developers in the housing market.").

187. *See Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2522–24 (holding that disparate impact claims are cognizable under the Fair Housing Act and laying out the most recent iteration of the three-part disparate impact test).

188. *See id.* (articulating the three-prong test); *see also* Sheehan, *supra* note 151, at 395–98 (discussing the three-prong test and its changes from previous iterations of the disparate impact liability test).

189. *See Inclusive Cmtys. Project, Inc.*, 135 S. Ct. at 2523 ("Courts must . . . examine with care whether a plaintiff has made out a prima facie case of disparate impact and prompt resolution of these cases is important. A plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact.").

190. *See id.* ("For instance, 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.").

interest."[191] While there will likely be further interpretation needed as to what constitutes a valid interest for the purposes of this test, defendants will likely be able to meet that standard relatively easily.[192] If the defendant can show that the policy in question furthers a valid interest, the burden shifts back to the plaintiff to show that there is an alternative policy that still serves the defendant's business needs.[193] This prong of the test puts plaintiffs in the difficult position of having to determine if there is a viable policy alternative that the defendant could reasonably enact.[194]

B. The Trump Administration's Hostility Toward the Disparate Impact Doctrine

Despite the Supreme Court's recognition that disparate impact claims are cognizable under the Fair Housing Act, the Trump administration has voiced its desire to significantly roll back use of the doctrine.[195] Internal Justice Department memoranda directed civil rights personnel to examine the impact of limiting or removing the use

191. *Id.* at 2522 ("An important and appropriate means of ensuring that disparate-impact liability is properly limited is to give housing authorities and private developers leeway to state and explain the valid interest served by their policies. This step of the analysis is analogous to the business necessity standard under Title VII and provides a defense against disparate-impact liability.").

192. *See id.* The Black's Law Dictionary definition of "valid" is "legally sufficient; binding" or "meritorious." *Valid*, BLACK'S LAW DICTIONARY (11th ed. 2019). Interpretation of the world "valid" has varied across courts but is generally thought to give broad deference to the body whose policy or interpretation is under scrutiny. *See., e.g.*, MacMaster v. United States, 731 F.3d 881, 889–90 (9th Cir. 2013) (acknowledging the ambiguity inherent in the word "valid," but noting that the word allowed for deference to agency actors).

193. *See Inclusive Cmtys. Project, Inc*., 135 S. Ct. at 2518 ("[B]efore rejecting a business justification—or, in the case of a governmental entity, an analogous public interest—a court must determine that a plaintiff has shown that there is 'an available alternative . . . practice that has less disparate impact and serves the [entity's] legitimate needs.'") (quoting Ricci v. DeStefano, 557 U.S. 403, 578 (2009)).

194. Sheehan, *supra* note 151, at 397 ("[T]he shift in language from requiring plaintiffs to identify a 'practice' to requiring plaintiffs to identify a 'policy' may be significant. Moreover, the 'robust causality' requirement had not appeared before in FHA disparate impact cases.").

195. *See* P.R. Lockhart, *The Trump Administration is Considering a Major Rollback of Civil Rights Regulation*, VOX (Jan. 7, 2018), https://www.vox.com/policy-and-politics/2019/1/7/18167275/disparate-impact-civil-rights-trump-administration [https://perma.cc/WS8B-LNXE] (discussing a report from the Washington Post reporting that the Trump administration was considering rolling back anti-discrimination regulation).

of the disparate impact doctrine.[196] Additionally, in June 2018, HUD publicly stated that it intended to revise its 2013 regulations outlining the use of disparate impact claims in response to the *Inclusive Communities* ruling, and in August 2019 it proposed a new disparate impact rule based off of the *Inclusive Communities* test.[197] Because the disparate impact doctrine is incorporated through regulations as opposed to being codified in the Civil Rights Act, the Trump administration could make changes to the doctrine relatively easily.[198] Given the Trump administration's approach toward disparate impact and the change in the political makeup of the Supreme Court with the departure of Anthony Kennedy, the future of the disparate impact doctrine and the *Inclusive Communities* ruling remains uncertain.[199]

Since its first recognition of the disparate impact theory in *Griggs*, the Supreme Court's analysis of disparate impact claims has evolved from placing a higher burden on defendants to placing a

196. *See id.* ("The Justice Department memo explicitly targets federal civil rights guidance that focus on mitigating 'disparate impact'—the concept that a practice or system can be discriminatory if it is found to disproportionately affect minorities, even if the policy itself is not rooted in intentional discrimination.").

197. *See id.* ("Last summer, the Department of Housing and Urban Development filed a notice that it was revisiting its disparate impact rule, and HUD has also stepped back from investigating housing discrimination cases."). In August 2019, HUD released its proposed rule on disparate impact. HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 42854 (proposed Aug. 19, 2019). Like in Inclusive Communities, the proposed rule places a higher burden on plaintiffs by requiring them to meet a five-part test to make a prima facie showing of discrimination. *Id.* The five-part test requires plaintiffs to show (1) "that the challenged policy or practice is arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective"; (2) "that there is "a robust causal link between the challenged policy or practice and a disparate impact on members of a protected class"; (3) "that the challenged policy or practice has an adverse effect on members of a protected class"; (4) "that the disparity caused by the policy or practice is significant"; and (5) "that the complaining party's alleged injury is directly caused by the challenge [sic] policy or practice." *Id.* The proposed rule also added a number of new defenses for disparate impact defendants, including the ability to use certain types of data to show that its practices are not racially discriminatory. *Id.*

198. See Lockhart, *supra* note 195 ("[P]rotecting minority groups from disparate impact has been enshrined in a number of regulations enacted by the executive branch, and many of these efforts could be undone at the agency level.").

199. *See id.* ("It's possible that the changes under consideration won't ultimately materialize. But even if the moves to rescind disparate impact guidance do not play out . . . , the report suggests that the administration is eager to launch new fronts in a multi-pronged effort to roll back federal civil rights protections implemented to help marginalized communities across the country.").

higher burden on plaintiffs.[200] The appointment of many Reagan-era judges weakened the doctrine in the 1980s, and the Trump administration has voiced its opposition to the use of the disparate impact.[201] Even in the wake of the *Inclusive Communities* ruling, how the use of the disparate impact doctrine will fit into the modern legal landscape is unclear.[202]

III. THE VIABILITY OF CHALLENGING THE DISCRIMINATORY PRACTICE OF LAND CONTRACTING UNDER THE FAIR HOUSING ACT POST-*INCLUSIVE COMMUNITIES*

Many advocates for land contract reform suggest that legislative reforms at the federal and state level, like implementing mandatory inspections, will have the greatest positive impact on land contract buyers.[203] Proposed solutions to the problems associated with land contracts include implementing mandatory inspections and appraisals, providing protections for early termination, and implementing other legislative reforms aimed at increasing regulation for land contract sales.[204] However, presuming that these kinds of reforms will have a

200. *See generally* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (describing the Court's first iteration of the disparate impact doctrine); *see also* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys., Inc., 135 S. Ct. 2507 (2015) (holding that disparate impact claims were cognizable under the Fair Housing Act); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (holding that showing that a lesser percentage of minorities were hired by a company than whites was not enough to show that a hiring practice had a disparate impact on non-white applicants).

201. *See* Cummins & Belle Isle, *supra* note 24, at 110 (discussing how a more conservative political and judicial climate weakened the disparate impact doctrine).

202. *See* Sheehan, *supra* note 151, at 392 ("In trying to preserve disparate impact liability for policies that perpetuate segregation while limiting liability for policies that aim to revitalize poor communities, Justice Kennedy constructed a framework that will make it difficult for courts to evaluate policies in which the promotion of integration trades off against the revitalization of poor communities. In such cases—like the fact pattern at issue in *Inclusive Communities*—the new framework is likely to favor policies that promote revitalization over integration as a strategy for addressing poverty.").

203. *See* BATTLE, JR. ET AL., *supra* note 37, at 9–11 (discussing various reforms that could help remedy the problems that plague land contract buyers); Purcell, *supra* note 20, at 1782–84. *But see* Wright, *supra* note 46, at 127 (arguing that state law reforms will be ineffective unless contract buyers know that they exist and have the resources to bring enforcement actions).

204. *See* BATTLE, JR. ET AL., *supra* note 37, at 12 ("States have full authority to address all of the problems with land contracts. But as land contracts are a growing nationwide problem, especially for households of color, a nation- wide solution is preferable. Fortunately, the CFPB has the authority to issue a comprehensive regulation under section 129(p) of the Truth in Lending Act (TILA), 15 U.S.C. §

positive effect assumes that individual contract buyers will be aware of these legislative solutions and know how to enforce them, which they may not.[205] Most importantly, these kinds of reforms do little to address the widespread discriminatory nature of land contracts.[206]

For that reason, land contracts would be an ideal device to challenge on disparate impact grounds.[207] Fair Housing nonprofits or governmental actors could bring suit against property management companies that sell homes via land contract and allege that their practices have a disparate impact on low-income, minority buyers.[208] An enormous amount of data, both historical and from the present day, shows how land contracts disparately impact people of color and minority communities.[209] Furthermore, there is significant evidence of how the government itself created the environment that allowed land contracts to flourish during the post-Civil Rights Era.[210] This kind of evidence is vital to showing how land contracts have had disproportionately negative effects on low-income minorities, given

1639(p), which mandates that the CFPB issue regulations addressing practices which are either: 1) unfair or deceptive in the mortgage marketplace, or 2) seek to evade TILA's regulation.").

205. *See* Wright, *supra* note 46, at 118–19 (discussing how legislative reforms may not help low-income land contract buyers, who may be unaware such regulations exist). Wright argues that state law causes of action do not effectively address the problems of land contracts; she suggests that land contracts should be "presumptively unconscionable." *See id.* at 100.

206. *See id.* at 119 ("[S]tatutory reform to installment housing contracts, in the absence of other changes such as community organizing and access to counsel, is unlikely to help large numbers of buyers who are disproportionately non-white and poor."). According to Wright, the targeting of African Americans and other minorities is what facilitates the unconscionability of these contracts. *See id.*

207. *See id.* at 119–20 (citing data discussing the racially discriminatory nature of land contracting).

208. *See* Sheehan, *supra* note 151, at 413–14 (discussing the mechanics of bringing a disparate impact claim after the Court's ruling in *Inclusive Communities*).

209. *See, e.g.*, BATTLE, JR. ET AL., *supra* note 37, at 4–5 ("Searching the county property tax records for six metro-Atlanta counties, Atlanta Legal Aid found 94 properties held by Harbour Portfolio or related entities. It is highly likely that all of these properties are being sold through land installment contracts since that is Harbour's business model. Mapping these properties revealed that nearly all of Harbour's properties in the Atlanta metro area are concentrated in Census blocks that are primarily African-American.").

210. *See* BERYL SATTER, FAMILY PROPERTIES: RACE, REAL ESTATE, AND THE EXPLOITATION OF BLACK URBAN AMERICA 45 (2009) ("In the FHA's view, the presence of a single [B]lack family was reason enough to refuse to insure mortgage or home improvement loans to an entire block. The redlining of a block could spell its doom, since property owners there could neither obtain loans to improve their homes nor sell them to the typical buyer who used a mortgage to purchase property.").

that proving that modern-day contract sellers have racially discriminatory motivations is nearly impossible.[211] This consideration is especially relevant given today's practices, where a contract seller and a contract buyer may never meet in person.[212]

The new burden-shifting test set forth in *Inclusive Communities*, however, would make winning difficult for plaintiffs challenging the practice of land contracting on disparate impact grounds, despite this strategy being a viable way to stop its discriminatory effects.[213] To make challenging land contracts on a disparate impact basis viable, the Court should adopt a different balancing test or return to the burden-shifting test outlined in *Albemarle*, which placed a hefty burden on defendants.[214] Court decisions holding that these types of contracts are discriminatory could set a precedent that would hopefully chill the practice of large-scale discriminatory land contracting to the point of extinction.[215]

A. The Application of the *Inclusive Communities* and *Albemarle* Disparate Impact Frameworks to a Hypothetical Land Contract Case

While various state and nonprofit actors around the country are bringing suit against large property management companies that peddle land contracts, as of May 2020, none are challenging the

211. *See* Sheehan, *supra* note 151, at 410–11 (discussing how plaintiffs need to point to a statistical disparity, among other factors, in order to make a prima facie showing of discrimination).

212. *See* Semuels, *supra* note 7 (discussing how, when buying his home on contract, Zachary Anderson never met an employee of Harbor Portfolios in-person).

213. *See* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys., Inc., 135 S. Ct. 2507, 2514–15 (2015) (creating a new iteration of the disparate impact test); *see also* Sheehan, *supra* note 151, at 412 ("[T]hese new requirements will make it more difficult to hold entities liable for disparate impact violations in cases in which policies involve trade-offs between promoting integration and revitalization.").

214. *See* Cummins & Belle Isle, *supra* note 24, at 108–09 (explaining how the *Albemarle* holding strengthened the disparate impact doctrine by placing a greater burden of proof on the defendant).

215. *See* Wright, *supra* note 46, at 126 ("If we care about protecting the poor from exploitative capitalists, however, we must use the tools of the system we currently have in order to strive for equality because dismantling the entire legal system is unrealistic. Furthermore, there is no evidence that the defenses to breach of contract are not sufficient to protect those with fewer resources from those with more, assuming that those with fewer resources still have access to adequate legal services. The critical question is whether judges will correctly apply legal doctrine to do equity when necessary.").

practice on disparate impact grounds.[216] Some of these actors include the Fair Housing Center of Central Indiana, the City of Cincinnati, and Atlanta Legal Aid.[217] By choosing to litigate against contract sellers based on state law claims—like unjust enrichment, common law unconscionability, or state landlord-tenant law—or by making Fair Housing Act claims outside of disparate impact, these plaintiffs avoid the pitfalls of the *Inclusive Communities* test.[218] By doing so, however, they also miss an opportunity to see this modern land contracting practice struck down on disparate impact grounds, which could have broader ramifications for housing and income inequality.[219] Challenging the practice on the basis of disparate impact would acknowledge and help to remedy the lasting effects land contracting has on minority wealth building and income inequality.[220] As an example, consider the following hypothetical factual scenario based off of allegations set forth in a complaint the Fair Housing Center of Central Indiana filed in a pending case against a predatory land contract seller:

> There are thousands of vacant, dilapidated housed in Spartan City, Sparta. These homes, many of which were vacated during the foreclosure crisis, are located almost exclusively in neighborhoods where most residents are low-income and non-white. Empire Realty Corporation, a large property management company that operates nationwide, has purchased more than

216. *See, e.g.*, Third Amended Complaint at 5–7, Fair Hous. Center of Cent. Ind., Inc. v. Rainbow Realty Grp., Inc., No. 1:17-cv-1782-RLM-TAB (S.D. Ind. Mar. 13, 2019). The Fair Housing Center of Central Indiana (Fair Housing Center) brought suit against a company called Rainbow Realty Group in 2017, alleging that its land contract practices violated the Fair Housing Act. *See id.* In its complaint, the Fair Housing Center alleged that this practice constituted "reverse redlining." *See id.*at 7.

217. *See, e.g.*, Leggate, *supra* note 106. Cincinnati recently settled a case against Vision Property Management, a holdings company that purchased thousands of homes post-foreclosure crisis and then re-sold them to Ohio residents who would not have been able to qualify for a traditional mortgage. *See id.* In its complaint, the City alleged that Vision Property Management's practices violated state landlord-tenant law because it required contract buyers, who do not have title to a property, to maintain the property's habitability. *See id.* The City recently settled this lawsuit with Vision and a similar lawsuit against Harbor Portfolios. *See id.* The settlement agreement required both property management companies to pay the City damages and stop conducting business within the city limits. *See id.*

218. *See* Sheehan, *supra* note 151, at 418–19 (describing the pitfalls of the disparate impact test as set forth in *Inclusive Communities*).

219. *See* Wright, *supra* note 46, at 119–20 (showing statistical data demonstrating the racially discriminatory nature of land contracting).

220. *See id.* at 118–19 (discussing the importance of ensuring that judges are interpreting contract law correctly when adjudicating land contract cases to ensure that judicial precedent exists showing that these types of contracts are discriminatory).

> 1,000 of these homes in Spartan City for low prices from Fannie Mae. After it purchases these homes, Empire sells the homes on contract to buyers who agree to make monthly payments on the homes and address the home's numerous building code issues. Because of the location of these homes in areas that were already segregated, contract buyers are often low-income people of color. The neighborhoods where Empire houses are located are 63.4% minority, but the neighborhoods where Empire does not offer homes on land contract are only 33.8% minority. In one neighborhood that is more than 80% minority, Empire has purchased 35 out of 36 foreclosed and dilapidated properties. Empire also advertises through two storefront offices, each of which are in neighborhoods that are more than 60% minority. Buyers who purchase land on contract from Empire all sign land contracts with similar terms. For example, some contract buyers pay monthly interest rates of up to 18%. Furthermore, the contracts also require that contract buyers remedy the home's many code issues within a ninety days. Additionally, Empire sells these homes to contract buyers at inflated prices. For example, Empire might sell a home it purchased from Fannie Mae for $4,000 on contract for $39,000.[221]

In this hypothetical scenario, a claimant looking to challenge Empire Realty Corporation's land contracting practices could choose to do so on disparate impact grounds.[222] For instance, after discovering how this practice impacts minority homebuyers, a hypothetical housing non-profit, the Fair Housing Alliance of Sparta, could decide to file suit on disparate impact basis.[223] The Fair Housing Alliance of Sparta would allege that the result of Empire's land contracting scheme is that low-income, minority homebuyers disproportionately suffer the negative economic consequences of land contracts.[224] Furthermore, the Fair Housing Alliance of Sparta would allege that these effects on minority home buyers and neighborhoods perpetuate

221. For the basis of this hypothetical, see Third Amended Complaint, *supra* note 216, at 2–7. The Fair Housing Center of Central Indiana (FHCCI) sued Rainbow Realty Company, a large property management company and contract seller, in 2017. *See id.* In addition to citing multiple Fair Housing Act and state law claims, the FHCCI said, "[t]his scheme revives predatory land contract practices that during much of the twentieth century were targeted at African-American neighborhoods and denied African Americans the same opportunity as whites to accumulate wealth through housing." *See id.* While the FHCCI did not bring suit on disparate impact basis, the facts of this case are helpful in illustrating the modern nature of land contracts. *See id.*

222. *See supra* Section III.A; *see also* Third Amended Complaint, *supra* note 216, at 2–7 (discussing the facts of the FHCCI's case challenging land contracting).

223. *See supra* Section III.A (detailing a hypothetical case challenging land contracting on a disparate impact basis).

224. *See id.* (discussing hypothetical statistical disparities in land contracting in the fictional city of Sparta); *see also* Third Amended Complaint, *supra* note 216, at 5–6 (showing statistical data that land contracts disproportionately affected minority homebuyers).

the racial and economic segregation of Spartan City.[225] For that reason, the Fair Housing Alliance of Sparta would allege that its practice of land contracting has a disparate discriminatory impact on non-whites in violation of the Fair Housing Act.[226]

Applying the hypothetical to the respective disparate impact frameworks in *Albemarle* and *Inclusive Communities* illustrates how, depending on the test, a disparate impact claim could be a successful way to challenge modern land contracting.[227] While the current *Inclusive Communities* framework makes winning difficult for plaintiffs challenging land contracting on disparate impact grounds, a return to the *Albemarle* framework could allow disparate impact claims against land contract sellers the possibility to succeed.[228]

1. *The* Inclusive Communities *Framework Applied to The Fair Housing Alliance of Sparta's Disparate Impact Claim*

In *Inclusive Communities*, Justice Kennedy outlined a three-prong test for finding disparate impact liability under the Fair Housing Act following HUD's 2013 regulations defining disparate impact claims.[229] First, the plaintiff must make a prima facie showing of disparate impact discrimination, and in doing so meet a "robust causality" requirement by pointing to specific discriminatory policies.[230] Next, the burden shifts to the defendant to show that the policy supports a valid interest.[231] If the defendant can show that the

225. *See id.*; *see also* Coates, *supra* note 1 (discussing the long-term effects of housing discrimination on African American wealth-building in the United States).

226. *See supra* Section III.A (showing hypothetical statistical disparities between whites and minorities in contract buying).

227. *See* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2522–25 (2015) (discussing the test to be used to evaluate disparate impact claims under the Fair Housing Act); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (articulating a more plaintiff-friendly version of the disparate impact test).

228. *See* Sheehan, *supra* note 151, at 418–19 (describing the pitfalls of the disparate impact test as set forth in *Inclusive Communities*).

229. 135 S. Ct. at 2522–25 (discussing the test to be used to evaluate disparate impact claims under the Fair Housing Act).

230. *See id.* at 2523 (stating that plaintiffs must make a prima facie showing of discrimination based on more than just statistical disparities).

231. *See id.* at 2522 ("An important and appropriate means of ensuring that disparate-impact liability is properly limited is to give housing authorities and private developers leeway to state and explain the valid interest served by their policies. This step of the analysis is analogous to the business necessity standard under Title VII and provides a defense against disparate-impact liability.").

policy in question furthers a valid interest, the burden shifts back to the plaintiff to show that there is a viable alternative that does not have a disparate impact but also meets the defendant's legitimate business needs.[232]

a. The Prima Facie Showing of Disparate Impact Discrimination

The Fair Housing Alliance of Sparta would likely have a difficult time satisfying certain aspects of the first prong of the *Inclusive Communities* framework.[233] To make a prima facie showing of a disparate impact under *Inclusive Communities*, a plaintiff must show a statistical disparity and point to one of the defendant's policies causing the disparity.[234] Furthermore, plaintiffs must show causality so as to protect defendants from being punished for racial disparities their policies did not create.[235] The Fair Housing Alliance of Sparta could point to the sizable disparity between the number of land contracts entered into in white and non-white neighborhoods as evidence of a disparate impact, as well as disproportionate economic effects low-income minorities suffer as a result of the practice.[236] Furthermore, there is evidence that the disproportionate negative effects of this practice suffered by low-income minorities are a direct result of Empire's purchasing of homes in minority neighborhoods.[237] This

232. *See id.* at 2511 (stating that there must be "an available alternative . . . practice that has less disparate impact and serves the [entity's] legitimate needs.").

233. *See id.* at 2523. Even with the "robust causality requirement" set forth in *Inclusive Communities*, the hypothetical plaintiff in this case could likely satisfy this requirement. *See id.* Indeed, even if the Court asked The Fair Housing Alliance of Sparta to show some sort of deliberate action on the part of Empire that caused the racial disparity, Empire's purchasing homes in mostly minority neighborhoods would likely fill that requirement. *See id.*; *see also* United States v. City of Black Jack, 508 F.2d 1179, 1184 (8th Cir. 1974) (noting that "[j]ust as Congress requires the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification, such barriers must also give way in the field of housing").

234. 135 S. Ct. at 2523 (stating that a plaintiff must show "a defendant's policy or policies causing that disparity").

235. *See id.* (stating that plaintiffs must meet a "robust causality requirement" that "protects defendants from being held liable for racial disparities they did not create").

236. *See supra* Section III.A (presenting a hypothetical); *see also* Third Amended Complaint, *supra* note 216, at 5–6 (discussing statistical disparities between whites and non-whites in contract buying).

237. *See supra* Section III.A (discussing a hypothetical disparity in neighborhoods with high concentrations of homes bought on land contract).

showing that Empire's practice of land contracting in minority neighborhoods has a disparate statistical impact on minority buyers could satisfy the first prong of the test if the court held that this showing met the "robust causality" requirement.[238]

b. The Defendant's Burden to Show a Valid Interest

Once the Fair Housing Alliance of Sparta makes a prima facie showing of disparate impact, the burden would then shift to Empire to show that its policies relating to land contracting further a valid interest.[239] Empire would likely meet this prong of the test relatively easily because virtually any race-neutral reason for the land contracting policy could constitute a valid interest for Empire's business.[240] Empire could point to the economic advantages of purchasing low-priced homes in certain neighborhoods and argue that its land contracting policies further its valid interest in profiting from its sale of the homes.[241] Given that the term "valid" could be interpreted to encompass nearly any reasonable business purpose, Empire could likely meet the second prong of the test.[242]

238. *See* Sheehan, *supra* note 151, at 418 ("The new layers in the plaintiff's prima facie burden—the requirement that plaintiffs specifically identify 'policy or policies' and meet a 'robust causality' requirement—provide new channels for courts to dismiss claims earlier in proceedings and will require plaintiffs to do more work up front.").

239. *See Inclusive Cmtys. Project, Inc*., 135 S. Ct. at 2514–15 (discussing the burden shift in the disparate impact test once a plaintiff makes a prima facie showing of discrimination).

240. *See* Sheehan, *supra* note 151, at 397–98 ("[A] defendant can rebut the prima facie case by establishing that the policy in question was necessary to achieve a 'valid interest.' Justice Kennedy asserts that this standard is analogous to Title VII's 'business necessity' standard. However, courts will likely interpret a 'validity' inquiry as being more deferential to the decisions of a housing authority than a 'necessity' inquiry is to the decisions of an employer. The 'validity' standard echoes the standard that the Court established for defeating a prima facie disparate impact case set out in *Wards Cove Packing Co. v. Atonio*.").

241. *See supra* Section III.A (presenting a hypothetical); *see also* Third Amended Complaint, *supra* note 216, at 2–3 (discussing the Fair Housing Center of Central Indiana's claims of discriminatory land contracting).

242. *See* Sheehan, *supra* note 151, at 413 ("By prohibiting 'second-guess[ing]' of government policies, Justice Kennedy recognizes that a showing that a practice is 'reasonable' can serve as a final defense to disparate impact liability. Recognition of 'reasonableness' as a defense to liability will likely make it more difficult to impose disparate impact liability on defendants than it was prior to the *Inclusive Communities* decision, when defendants would have to establish not only that a practice was reasonable, but that it was also the least discriminatory means for achieving a legitimate objective.").

c. The Plaintiff's Burden to Show a Viable Alternative

If Empire could show that the policy furthered a valid interest, the burden would then shift back to the Fair Housing Alliance of Sparta to show that there was a viable alternative that does not have a disparate impact but also meets the defendant's legitimate business needs.[243] This prong of the test would put the Fair Housing Alliance of Sparta in the difficult position of having to determine if there was a viable policy alternative that Empire could reasonably enact and that would allow Empire to profit similarly from its land contracting policies.[244] The Fair Housing Alliance of Sparta would likely be in a poor position to propose a non-discriminatory alternative to Empire's policy of land contracting in minority neighborhoods because it is not privy to information about the inner workings of Empire's business.[245] For that reason, the Fair Housing Alliance would likely fail to meet this prong of the test.[246]

As it stands, the disparate impact framework set forth in *Inclusive Communities* would likely not provide a viable framework for plaintiffs to challenge land contracting on disparate impact grounds.[247] Justice Kennedy's burden-shifting test gives too much deference to disparate impact defendants—and places too high a burden on plaintiffs—to effectively allow for the use of this test to challenge this type of discriminatory housing policy.[248] However, a

243. *See Inclusive Cmtys. Project, Inc*., 135 S. Ct. at 2514–15 (discussing the burden shift in the disparate impact test once a plaintiff makes a prima facie showing of discrimination).

244. *See* Sheehan, *supra* note 151, at 413 (noting that this prong of the test is difficult for plaintiffs to meet and makes it easier for defendants to show that their discriminatory policy furthered a valid interest).

245. *See id.*; *see also* Cummins & Belle Isle, *supra* note 24, at 132–33 (discussing situations in the employment law context where "[t]he result for plaintiffs is 'a difficult, if not impossible, burden of proof,' because they have to prove that the 'employer's proffered rationalization of the allegedly discriminatory practice or policy is unreasonable, either in the prima facie case or in rebuttal to an affirmative defense'").

246. *See supra* Section III.A (presenting a hypothetical); *see also* Third Amended Complaint, *supra* note 216, at 5–6.

247. *See* Sheehan, *supra* note 151, at 416 ("The new formulation of the disparate impact framework in Justice Kennedy's *Inclusive Communities* opinion will make it more difficult for plaintiffs to prove disparate impact claims in both housing barrier cases and housing improvement cases."); *see also* Thompson, *supra* note 25, at 439 ("The strict burden-shifting test used in disparate impact claims by some courts has, over the years, resulted in a trap door . . . .")

248. *See* Sheehan, *supra* note 151, at 416 (discussing the difficulties plaintiffs may face under the burden-shifting test as articulated in *Inclusive Communities*).

return to the framework set forth in *Albemarle* could allow a disparate impact challenge to land contracting to survive.[249]

2. *The Fair Housing Alliance of Sparta's Disparate Impact Claim Applied to the* Albemarle *Framework*

Under the burden-shifting framework outlined in *Albemarle*, the disparate impact plaintiff must first present evidence showing that a prima facie case of disparate impact discrimination exists.[250] Then, the burden shifts to the defendant to show that the policy causing the disparate impact was necessary to achieve its goals.[251] Lastly, if the defendant can successfully show that the policy causing the disparate impact was necessary, the burden shifts back to the plaintiff to show that the justification the defendant offered is merely a pretext for discrimination, which the plaintiff can do by showing a less discriminatory alternative to the challenged practice.[252] This framework made disparate impact cases easier for the plaintiff to win because it placed a greater burden of proof—the burden of persuasion—on the defendant.[253]

a. The Prima Facie Showing of Disparate Impact Discrimination

Unlike in the *Inclusive Communities* framework, the Fair Housing Alliance of Sparta would likely have an easier time satisfying

249. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (articulating a three-prong disparate impact test more favorable to plaintiffs).

250. *Id.* (quoting Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971)) ("Title VII [of the Civil Rights Act] forbids the use of employment tests that are discriminatory in effect unless the employer meets 'the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question.'").

251. *See id.* ("This burden arises, of course, only after the complaining party or class has made out a prima facie case of discrimination, i.e. has shown that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants.").

252. *See id.* ("If an employer does then meet the burden of proving that its tests are 'job related,' it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.' Such a showing would be evidence that the employer was using its tests merely as a 'pretext' for discrimination.").

253. *See* Cummins & Belle Isle, *supra* note 24, at 108–09 (explaining how the *Albemarle* holding strengthened the disparate impact doctrine by placing a greater burden of proof on the defendant).

the first prong of the *Albemarle* framework because it lacks the "robust causality" requirement present in the *Inclusive Communities* test.[254] To make a prima facie showing of a disparate impact under *Albemarle*, a plaintiff must present statistical evidence that a disparate impact exists based on the defendant's practices or policies.[255] The Fair Housing Alliance of Sparta could point to the sizable disparity between the number of land contracts entered into in white and non-white neighborhoods as evidence of a disparate impact, as well as disproportionate economic effects low-income minorities suffer as a result of the practice.[256] Furthermore, there is evidence that the disproportionate negative effects of this practice that low-income minorities suffer is a direct result of Empire's purchasing of homes in minority neighborhoods.[257] The compelling statistical evidence of the disparate impact that Empire's land contracting practice has on low-income and minority homebuyer would likely meet this prong of the test.[258]

b. The Defendant's Burden to Show the "Necessity" of the Practice

If the Fair Housing Alliance of Sparta made a prima facie showing that Empire's practices had a disparate impact on low-income minority people, then the burden would shift to Empire to show that the practice was necessary to achieve its business goals.[259] This standard would be harder for Empire to meet than the standard in *Inclusive Communities* because this test places a substantial burden of persuasion on the defendant to show that the practice in question was

254. *See supra* Section III.A (presenting a hypothetical disparate impact case); *see also* Third Amended Complaint, *supra* note 216, at 5–6 (discussing the statistical evidence of discrimination caused by land contracting in Indiana).

255. *See Albemarle Paper Co.*, 422 U.S. at 425 (stating that the first prong the disparate impact test requires plaintiffs to make a prima facie showing of discrimination).

256. *See supra* Section III.A (discussing a hypothetical statistical disparity between white and non-white contract buyers in the fictional city of Sparta); *see also* Third Amended Complaint, *supra* note 216, at 2–3.

257. *See supra* Section III.A (further discussing a hypothetical statistical disparity between white and non-white contract buyers in the fictional city of Sparta).

258. *See id.*

259. *See Albemarle Paper Co.*, 422 U.S. at 425 (explaining that a necessary business interest meant one that was essential to a business's profitability and survival).

a "business necessity."[260] It would be difficult for Empire to justify its practice of land contracting as a "necessity," especially if there were alternative neighborhoods where Empire could engage in land contracting or if it had other areas of business, such as retail development, that it could rely on to be profitable.[261] For that reason, the Fair Housing Alliance of Sparta could likely meet this prong.[262]

c. The Burden Shift Back to the Plaintiff

If Empire could show that the practice of land contracting was in fact a business necessity, the burden would then shift back to the Fair Housing Alliance of Sparta to show that the justification the defendant offered was merely a pretext for discrimination.[263] While this prong of the test would present a more difficult burden for the Fair Housing Alliance of Sparta, it would still be more feasible for it to meet than the one set forth in *Inclusive Communities*.[264] Here, if necessary, the Fair Housing Alliance of Sparta could allege that Empire's purposeful purchasing of homes in minority neighborhoods is not because of economic convenience but because of the neighborhood's high concentration of people of color and point to other neighborhoods where Empire could use land contracting as "less discriminatory alternatives."[265] On that basis, the Fair Housing

260. *See* Sheehan, *supra* note 151, at 397–98 (arguing that the evidentiary burden set forth in *Inclusive Communities*, which echoes the test in *Wards Packing Co*., affords defendants a higher level of protection than it should and makes it difficult for disparate impact claims to survive). Furthermore, "[t]he shift in language from requiring plaintiffs to identify a 'practice' to requiring plaintiffs to identify a 'policy' may be significant." *Id.* at 397.

261. *See supra* Section III.A (discussing a hypothetical statistical disparity between white and non-white contract buyers in the fictional city of Sparta); *see also* Third Amended Complaint, *supra* note 216, at 2–3.

262. *See* Third Amended Complaint, *supra* note 216, at 2–3.

263. *See Albemarle Paper Co*., 422 U.S. at 425 ("If an employer does then meet the burden of proving that its tests are 'job related,' it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.' Such a showing would be evidence that the employer was using its tests merely as a 'pretext' for discrimination.") (citations omitted).

264. *See* Sheehan, *supra* note 151, at 420 ("The workings of the new disparate impact framework—from the extra requirements in the plaintiff's prima facie burden to the ease with which defendants can use 'reasonableness' as a defense to liability—will substantially relieve the pressure to promote integration.").

265. *See supra* Section III.A (further discussing a hypothetical statistical disparity between white and non-white contract buyers in the fictional city of Sparta).

Alliance of Sparta could show that Empire's facially neutral land contracting practice was merely a pretext for discrimination.[266]

B. Why Is the *Albemarle* Test the Right Test?

A progressive application of the disparate impact doctrine, particularly in the Fair Housing context, is an important part of rectifying the economic inequality resulting from the systematic exclusion of minorities from the legitimate, government-backed housing market.[267] Courts must address the economic and social impact of housing discrimination using discrimination doctrines that take the modern, less-overt nature of discrimination into account.[268] By weakening the disparate impact doctrine through its interpretation of the burden-shifting framework in *Inclusive Communities*, the Court paved the way for covert forms of housing segregation and economic inequality to continue.[269]

Furthermore, a progressive interpretation of the disparate impact doctrine better complies with the spirit of the Fair Housing Act and the rules codified by HUD in 2013, which were meant to rectify both overt and covert forms of housing discrimination.[270] When Congress enacted the Fair Housing Act in 1968, it did so with the intent of ensuring that all Americans had an equal opportunity to participate in the housing market.[271] Additionally, HUD's interpretation of the disparate impact doctrine in as codified in 2013 showed the agency's

266. *See id.*

267. *See* Cummins & Belle Isle, *supra* note 24, at 133–35 (discussing the implications of the burden-shifting test on economic and social inequality).

268. *See id.* at 134 ("The widespread presence of these disparities within a large number of systems of opportunity demonstrates the pervasiveness of unconscious and institutionalized discrimination, which requires a systematic approach to fully remedy past and ongoing harm. The disparate treatment theory, which relies on the evidence of overt discrimination to prove explicit intent, is not an effective tool for addressing the persistent and intensifying disparities experienced by members of protected classes.").

269. *See id.* at 135 ("Robust enforcement of civil rights statutes via a meaningful and progressive application of the disparate impact doctrine is crucial to avert the potential political, social, and economic repercussions that evidently will flow from refusal to change the status quo in furtherance of equalizing opportunity.").

270. *See* Seicshnaydre, *supra* note 28, at 393 (discussing how the Court began weakening the disparate impact doctrine by finding reasons *not* to apply the Act).

271. *See* Jean Eberhardt Dubofsky, *Fair Housing: A Legislative History and Perspective*, 8 WASHBURN L.J. 149, 151 (1968) (discussing how the authors of the bill specifically included the term "race" in the bill to ensure that the Act would directly address housing discrimination based on race).

commitment, at least at that time, to ensuring that both overt and covert housing discrimination are eventually eliminated.[272] A progressive interpretation of the disparate impact doctrine would help further these goals.[273]

The *Albemarle* framework for disparate impact cases would provide a much more viable option for claimants challenging land contracting on disparate impact grounds.[274] The heightened burden placed on disparate impact defendants under the *Albemarle* framework would make a disparate impact claim much more likely to survive.[275] Furthermore, a return to the *Albemarle* test would help courts address the continuing economic disparities between whites and minorities in the housing discrimination context.[276] Because land contracting functions as a modern segregation device, reinvigorating the disparate impact doctrine by returning to the *Albemarle* test would allow the judicial branch to effectively address modern housing discrimination.[277]

CONCLUSION

Land contracting is a racially charged housing practice that has a disparate negative impact on low-income people of color.[278] While many state and non-profit actors are challenging the practice in court on state law grounds, successful cases on those theories will not address the widespread racially discriminatory nature of land contracting.[279] Furthermore, allowing this practice to continue in its

272. *See* Fair Housing Act–Discriminatory Effect Prohibited, 24 C.F.R. § 100.500 (2013) (HUD's codification of the disparate impact doctrine as amended in 2013).

273. *See* Cummins & Belle Isle, *supra* note 24, at 108–09 (explaining how the *Albemarle* holding strengthened the disparate impact doctrine by placing a greater burden of proof on the defendant).

274. *See id.* (discussing how the *Albemarle* framework provides a path forward for plaintiffs).

275. *See id.* (discussing how the *Albemarle* framework created a burden shift for defendants).

276. *See id.* at 133–35 (discussing the need to address systemic inequality, not just overt racism).

277. *See id.* at 133 ("The seemingly abstract issues about burdens of proof have concrete consequences. Statistics reflect ongoing and intensifying disparities in the context of the anemic application of the disparate impact doctrine.").

278. *See* Wright, *supra* note 46, at 119–20 (discussing the statistical disparity between White and minority land contract buyers).

279. *See id.* at 118–19 (discussing how legislative and state-level reforms may not adequately protect contract buyers).

modern state will perpetuate wealth inequality between white people and people of color.[280] Challenging land contracting on disparate impact grounds would better serve the goals of stopping segregation and wealth inequality.[281] However, the disparate impact framework set forth in *Inclusive Communities* would make it difficult for a disparate impact claim of this nature to survive.[282] A return to the *Albemarle* framework and an application of that framework to a disparate impact claim under the Fair Housing Act could be successful in combating the discriminatory nature of the practice.[283] Furthermore, using the *Albemarle* framework could set a precedent that would stop land contracting from continuing in its modern discriminatory form.[284]

280. *See* Semuels, *supra* note 7 (discussing potential negative economic effects of land contracting).

281. *See* Wright, *supra* note 46, at 119–20 (showing the racial disparities between White and minority contract buyers).

282. *See* Sheehan, *supra* note 151, at 392, 397–98 ("Justice Kennedy fashioned a framework for evaluating such claims that will make it more difficult to challenge policies that perpetuate segregation in the future.").

283. *See* Cummins & Belle Isle, *supra* note 24, at 108–09 (explaining how the *Albemarle* holding strengthened the disparate impact framework).

284. *See* Wright, *supra* note 46, at 118–19 (discussing the importance of setting judicial precedent that land contracts are discriminatory).