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RENTAL HOME SWEET HOME: THE DISPARATE IMPACT SOLUTION FOR RENTERS EVICTED FROM RESIDENTIAL FORECLOSURES

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ABSTRACT—At the end of the last decade, a drastic spike in residential foreclosures brought unprecedented attention to the damage that mass foreclosure often brings to primarily low-income, minority–majority communities. Much of this attention—in both the media and in the legal arena—has been devoted to homeowners disadvantaged by predatory loans and other unsavory practices. However, a recent body of scholarship has shown that the brunt of mass foreclosure often falls on renters, who often have little or no procedural protection from speedy and unexpected eviction from their homes, regardless of lease status or tenure. This Note argues that the Supreme Court's recent decision to affirm disparate impact liability under the Fair Housing Act provides a promising but unexplored legal hook to challenge these mass eviction practices and ensure meaningful protections for tenants in foreclosed properties.

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INTRODUCTION

It is a common enough story: a family rents a home, has months left on the current lease, and pays every month's rent on time, yet they wake up one morning to find an eviction notice posted outside their home—or worse still, a sheriff knocking at the door. Unbeknownst to them, the landlord who owns the home fell behind on the mortgage, or paid too little in property taxes, and the home is now in foreclosure. They may have lived there for years as model tenants, doing everything asked of them by the lease, but these facts are not important. Nor, in many cases, is their lack of prior knowledge about the foreclosure or planned eviction.[1] The tenant family is only collateral damage.

This scenario plays out all over the country,[2] across jurisdictions with widely varying tenant protections. Its victims disproportionately live in

[1] Many states require, at the minimum, that tenants be notified of the foreclosure or given extra time before eviction. *See, e.g.*, 735 ILL. COMP. STAT. 5/15-1701(h) (2014) (requiring a supplemental petition to evict any occupants not personally named in the foreclosure, and mandating up to a 120-day delay before eviction). Other states have much less robust protection. *See, e.g.*, KY. REV. STAT. ANN. § 426.530 (West, Westlaw through 2016 sess.) (permitting the purchaser at a foreclosure sale to "receive an immediate writ of possession").

[2] *See, e.g.*, Creola Johnson, *Renters Evicted en Masse: Collateral Damage Arising from the Subprime Foreclosure Crisis*, 62 FLA. L. REV. 975, 975–76 (2010) (describing a case in Baltimore, where state and federal law ultimately helped the tenant delay the eviction); Henry Rose, *The Due Process Rights of Residential Tenants in Mortgage Foreclosure Cases*, 41 N.M. L. REV. 407, 407–08 (2011) (describing one such eviction in Chicago); Péralte C. Paul, *Law Helps Renters Forced Out When Landlord Defaults*, ATLANTA J. CONST. (Nov. 9, 2009, 6:37 AM),

low- and middle-income households, precisely the groups most likely to experience difficulty finding adequate and affordable new housing in an increasingly expensive national rental market[3]—especially if they cannot recoup the security deposit on their present home.[4] In many jurisdictions, they are also disproportionately minority households.[5] Foreclosure-related eviction of tenants, then, not only harms unsuspecting families and exacerbates housing instability within the neighborhoods most impacted by the foreclosure crisis, but also fits into a historical trajectory of housing practices whose effect is to economically disenfranchise families of color.[6] Scholars have advocated for additional anti-eviction protections through common law doctrines[7] or due process lawsuits,[8] but these approaches have had only incremental and intermittent success.[9]

One promising but unexplored avenue opened when, in March 2015, the Supreme Court released its decision in *Texas Department of Housing &*

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http://www.ajc.com/news/news/local/law-helps-renters-forced-out-when-landlord-default/nQY5Q/ [https://perma.cc/4ZRJ-B8WB] (describing a case in Sandy Springs, GA); Jim Piggott, *Undisclosed Foreclosure; Surprise Eviction*, NEWS4JAX (Jul. 15, 2013, 10:00 PM), http://www.news4jax.com/news/undisclosed-foreclosure-surprise-eviction/20986050 [https://perma.cc/4WN9-4492] (describing a case in Jacksonville, FL).

[3] *See* ALLISON CHARETTE ET AL., JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., PROJECTING TRENDS IN SEVERELY COST-BURDENED RENTERS: 2015–2025, at 6–7 (2015), https://s3.amazonaws.com/KSPProd/ERC_Upload/0100886.pdf [https://perma.cc/XN4B-FNLB].

[4] *See* Johnson, *supra* note 2, at 983 ("The overwhelming majority of renters are not refunded their security deposits or the remainder of the current month's rent previously paid to the landlord.").

[5] NAT'L COMM'N ON FAIR HOUS. & EQUAL OPPORTUNITY, THE FUTURE OF FAIR HOUSING: REPORT OF THE NATIONAL COMMISSION ON FAIR HOUSING AND EQUAL OPPORTUNITY 68 (2008), http://www.nationalfairhousing.org/Portals/33/reports/future_of_fair_Housing.pdf [https://perma.cc/2WFZ-GFCQ] ("African Americans and Latinos—and neighborhoods of color—will bear the harshest consequences of the foreclosure fallout.").

[6] For one of the most prominent recent discussions of the impact of historic American housing practices on black Americans, tracing from slavery through segregation and redlining, see Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC, June 2014, http://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631 [https://perma.cc/6X6K-UWGY].

[7] *See, e.g.*, Charles C. Cornelio, *The Effect of Anti-Eviction Statutes on Foreclosing Mortgagees*, 4 ANN. REV. BANKING L. 361, 368 (1985) (suggesting that the implied warranty of habitability should protect tenants from interference by foreclosing banks); Florence Wagman Roisman, *The Right to Remain: Common Law Protections for Security of Tenure: An Essay in Honor of John Otis Calmore*, 86 N.C. L. REV. 817, 819 (2008) (arguing that litigants should press for common law tenure security, which requires a landlord to have good cause to terminate a tenancy); *see also* Gerald Korngold, *Whatever Happened to Landlord-Tenant Law?*, 77 NEB. L. REV. 703, 708 (1998) (noting that the "shift to a legislatively dominated regime" starting in the late 1970s left "fewer opportunities for breakthrough judicial decisions").

[8] *See, e.g.*, Rose, *supra* note 2, at 409 (arguing that due process requires protections beyond those offered by the federal Protecting Tenants at Foreclosure Act, which expired following the article's publication).

[9] Some states have recognized, for example, that a writ of assistance, which would allow a foreclosing mortgagee to evict tenants not actually joined in the foreclosure, violates due process rights. *See, e.g.*, Gibbs v. Kinsey, 566 N.Y.S.2d 117, 117 (N.Y. App. Div. 1991).

Community Affairs v. Inclusive Communities Project, Inc.[10] In *Inclusive Communities*, the Supreme Court held that the Fair Housing Act[11] encompasses disparate impact liability for practices with discriminatory effects, regardless of whether the practice has discriminatory intent.[12] It was hardly a watershed decision, as all eleven federal circuits that had considered the question agreed on the viability of Fair Housing Act disparate impact claims,[13] but *Inclusive Communities* did serve several important functions: it silenced commentators who took the granting of the certiorari petition without a circuit split as a sign that the Fair Housing Act's disparate impact days were numbered, it clarified the applicable test, and it reinforced the Court's apparent hesitancy to apply the doctrine broadly due to concerns over racial quotas and equal protection issues.[14]

This Note will argue that Fair Housing Act disparate impact after *Inclusive Communities* can readily encompass tenants in foreclosure, even under a relatively conservative interpretation of the doctrine.[15] While the Court has signaled a reticence toward broad expansions of the doctrine, evictions of faultless tenants speak to the primary concerns of both disparate impact theory and the Fair Housing Act, while avoiding the Court's central concerns about expansive application of the doctrine.

This Note proceeds in three Parts. Part I traces the evolution of American renting habits and landlord–tenant law to accommodate modern housing realities—a process that has largely overlooked tenants in foreclosure. Part I also explores the foreclosure crisis and its aftermath, as well as the often wide-ranging economic and personal cost for tenants in foreclosed properties and their communities. In light of these trends, both legislative action and common law doctrines have proven inadequate to

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[10] 135 S. Ct. 2507 (2015).

[11] Pub. L. No. 90-284, 82 Stat. 81 (1968) (codified as amended at 42 U.S.C. §§ 3601–3619 (2012)). The Act made it illegal to deny or refuse housing based on protected categories, including race. 42 U.S.C. § 3604(a). For a more thorough discussion of the Act, see *infra* Section II.A.

[12] 135 S. Ct. at 2525.

[13] *See* ROBERT G. SCHWEMM & SARA K. PRATT, NAT'L FAIR HOUS. ALL., DISPARATE IMPACT UNDER THE FAIR HOUSING ACT: A PROPOSED APPROACH 6–7 (2009) (detailing the most important cases in all eleven numbered circuits endorsing disparate impact under the Fair Housing Act as of 2009, as well as relevant case law in the D.C. Circuit).

[14] 135 S. Ct. at 2522–25 (describing the applicable test and its limits); *id.* at 2523 (noting "serious constitutional concerns" with a too-broad application of disparate impact).

[15] With any argument for extending the disparate impact doctrine, there is some risk of straying into the realm of liberal wishful thinking. As noted by Professor Michael Selmi, "scholars have offered numerous proposals to extend the disparate impact theory to cure all manner of social ills; extending the disparate impact doctrine has long been one of the primary obsessions of liberal academics and advocates alike." Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 704 (2006). With such concerns in mind, this Note will attempt to justify tenant-in-foreclosure applicability even under a narrow view of the disparate impact doctrine.

bring tenant-in-foreclosure policies up to date with other important tenant protections, disproportionately harming tenants of color through reliance on outdated property principles.

Part II discusses the trajectory of disparate impact case law and its application to the Fair Housing Act, as well as the relevant Department of Housing and Urban Development (HUD) regulations, *Inclusive Communities*, and other important housing disparate impact cases. Part III then demonstrates that the Fair Housing Act, HUD regulations, and case law all support applying disparate impact liability to the foreclosure-related eviction of tenants with active leases. Part III shows that the Court's recent concerns about disparate impact suggest a first threshold step in establishing a disparate impact case, and demonstrates that the case for tenants in foreclosure satisfies both this initial step and the three-part burden-shifting test from *Inclusive Communities*. Because foreclosure laws and practices in many jurisdictions cause a statistical disparate impact, lack legally sufficient justification, and have less discriminatory alternatives, the Fair Housing Act provides a potentially powerful weapon against sudden displacement of renters in foreclosed properties.

I. RENTERS AND THE FORECLOSURE CRISIS

A. A Crisis in Tenant Security

In 2015, the U.S. homeownership rate fell to its lowest level since 1967.[16] Due to a combination of tightened financing for homebuyers,[17] lack of personal savings,[18] poor credit,[19] and changing demographics,[20] more and

[16] Kathleen M. Howley, *U.S. Homeownership Rate Falls to the Lowest Level Since the 1960s*, BLOOMBERG (July 28, 2015, 9:14 AM), http://www.bloomberg.com/news/articles/2015-07-28/u-s-homeownership-rate-falls-to-lowest-since-the-1960s [https://perma.cc/4KNA-LSQ3].

[17] *See, e.g.*, Dina ElBoghdady, *Is the Government Making It Harder for the Middle Class to Buy Homes?*, WASH. POST (Sept. 5, 2014), https://www.washingtonpost.com/news/storyline/wp/2014/09/05/when-the-government-makes-it-harder-for-the-middle-class-to-buy-houses [https://perma.cc/9UMK-LSHK] (noting that "lenders are turning away potential home buyers by demanding unusually high credit scores and other tough standards" beyond what the government requires).

[18] Andrew L. Yarrow, *Americans Low Savings Rate a Bad Sign for Good Economy*, FISCAL TIMES (Apr. 26, 2015), http://www.thefiscaltimes.com/2015/04/26/Americans-Low-Savings-Rate-Bad-Sign-Good-Economy [https://perma.cc/2A42-KZ9Y] ("Forty-four percent of Americans are either in debt, have no savings at all, or have only enough savings to tide them over for up to three months if they lose their jobs . . . .").

[19] *See, e.g.*, Dionne Searcey, *More Americans Are Renting, and Paying More, as Homeownership Falls*, N.Y. TIMES (June 24, 2015), http://www.nytimes.com/2015/06/24/business/economy/more-americans-are-renting-and-paying-more-as-homeownership-falls.html [https://perma.cc/3GUM-ELDQ] ("Many people living in rentals were once owners; they lost their homes to foreclosure and now have such damaged credit reports that they find it nearly impossible to qualify for a mortgage.").

[20] Immigration, geographic mobility (especially among millennials), and the growing income gap have all had significant impact on American rental trends. *See* JOINT CTR. FOR HOUS. STUDIES OF

more Americans are renting their homes.[21] This trend seems poised to continue, even as rental costs reach historic highs.[22] In short, renting is no longer—if it ever was—a temporary stepping stone to the American Dream of homeownership. It is a fixture of American life, particularly for lower income families and people of color.[23]

The rising cost of renting, coupled with a shortage of affordable rental stock in many cities,[24] make it increasingly difficult to locate affordable housing—particularly on short notice, as when a sudden eviction causes involuntary displacement. Beyond the logistics of securing new housing, this involuntary displacement takes a well-documented psychic and social toll on families and communities alike.[25] Thankfully for renters, various common law and statutory safeguards protect against invidious disruption of tenancies.

The nineteenth and early twentieth centuries saw some incremental expansion in tenants' rights, but courts and legislatures generally provided scant protection for tenants facing conditions or habitability issues,[26] and the common law in many jurisdictions still upheld the right of landlords to

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HARVARD UNIV., AMERICA'S RENTAL HOUSING: THE KEY TO A BALANCED NATIONAL POLICY 5–9 (2008), http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/rh08_americas_rental_housing.pdf [https://perma.cc/U8VM-6V4R].

[21] CHARETTE ET AL., *supra* note 3, at 6 ("We are now seeing more renters than at any other time in U.S. history.").

[22] *Id.* at 6 (observing that in 2013, nearly half of all renters were "cost burdened," paying more than 30% of their income on housing costs—roughly double the rate in 1960); *see also id.* at 9 ("Since 1982, with the exception of a five-year period in the late 1990s, rent growth has consistently outpaced inflation."); Emily Badger, *Why the Homeownership Rate Will Keep Falling—and Falling, and Falling*, WASH. POST: WONKBLOG (June 16, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/06/16/why-the-homeownership-rate-will-keep-falling-and-falling-and-falling/ [https://perma.cc/QY6T-Q58Z] (noting that the growth in rental households is expected to continue through 2030).

[23] JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., AMERICA'S RENTAL HOUSING: MEETING CHALLENGES, BUILDING ON OPPORTUNITIES 17 (2011), http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/ahr2011-3-demographics.pdf [https://perma.cc/D2P5-3JPR] ("By 2010, approximately 70 percent of renter households had incomes below the national median and more than 40 percent had incomes in the bottom quartile."); *id.* at 16 ("In 2000, 39 percent of renters were minorities. From 2001 to 2010, minorities contributed 81 percent of the 3.9 million growth in the number of renter households.").

[24] *See* JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., *supra* note 20, at 13.

[25] *See, e.g.*, Marc Fried, *Grieving for a Lost Home: Psychological Costs of Relocation*, *in* URBAN RENEWAL: THE RECORD AND THE CONTROVERSY 359, 359–61 (James Q. Wilson ed., 1966); Roisman, *supra* note 7, at 820–29.

[26] *See, e.g.*, Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV 503, 516 (1982) (describing nineteenth-century common law, which required rent payments even if the property was destroyed by fire or flood); Paul Sullivan, Note, *Security of Tenure for the Residential Tenant: An Analysis and Recommendations*, 21 VT. L. REV. 1015, 1029 (1997) (observing that the move toward housing condition-based tenant protections started in earnest after the Great Depression).

evict tenants through self-help.[27] The 1960s and 1970s saw significant shifts in landlord–tenant law,[28] particularly in the popularization of tenant-favorable common law doctrines,[29] the influence of the nonbinding Uniform Residential Landlord and Tenant Act,[30] increased recognition of tenants' due process rights against eviction,[31] and Congress's passage of the Fair Housing Act, which outlawed rental discrimination based on race, color, religion, sex, familial status, or national origin.[32]

This reevaluation of tenants' rights has not, however, been extended to the foreclosure context.[33] Under the traditional property regime, tenants in foreclosure generally landed on the short end of the "first in time, first in right" principle: if the mortgage on a home predated the lease—which is usually the case—the lease became subordinate to the mortgage, so the foreclosure extinguished the lease and the tenant had no remaining right to the property.[34] The national property regime has since seen a change toward

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[27] *See, e.g.*, Smith v. Reeder, 28 P. 890, 891 (Or. 1892) ("[A landlord] may enter and expel the tenant by force, without being liable to an action of tort for damages, either for his entry upon the premises, or for an assault in expelling the tenant, provided he uses no more force than is necessary and does no wanton damage.").

[28] This shift has often been interpreted as a move from traditional property principles to contract principles in the landlord–tenant relationship. *See, e.g.*, Cornelio, *supra* note 7, at 368 ("[C]ourts found contract law a more suitable model than property law for determining the rights and obligations of parties under residential leases."). *But see* Glendon, *supra* note 26, at 503–04 (arguing that the "revolution" in landlord–tenant law was in fact only a culmination of various general legal doctrines that began to gain popularity in the twentieth century).

[29] These doctrines include the implied warranty of habitability, which makes the tenant's obligation to pay rent conditional on the landlord's maintenance of the premises in habitable condition, and protection against retaliatory eviction. *See* Javins v. First Nat. Realty Corp., 428 F.2d 1071, 1082 (D.C. Cir. 1970) (reading an implied warranty of habitability into the housing code); Schweiger v. Superior Court, 476 P.2d 97, 103 (Cal. 1970) (finding an implied right against retaliatory eviction in California).

[30] UNIF. RESIDENTIAL LANDLORD & TENANT ACT (UNIF. LAW COMM'N 1974); *see State Adoptions of URLTA Provisions*, NAT'L CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/documents/environ/STURLTAprov.pdf [https://perma.cc/KA5X-43Q8] (summarizing the Model Act's major provisions and how many state legislatures adopted, modified, or rejected those provisions).

[31] *See, e.g.*, La. State Museum v. Mayberry, 348 So. 2d 1274, 1276 (La. Ct. App. 1977) (holding that improperly served termination notice violated a tenant's due process rights).

[32] Pub. L. No. 90-284, § 804, 82 Stat. 81, 83 (1968) (codified as amended at 42 U.S.C. § 3604 (2012)).

[33] *Cf.* Korngold, *supra* note 7, at 708 (noting that the tide of significant new developments in landlord–tenant law lost steam in the late 1970s).

[34] There is scant pre-1900s case law regarding tenants in foreclosure, but it was well established that a tenant's rights to property necessarily extinguished along with the landlord's. *See, e.g.*, McDermott v. Burke, 16 Cal. 580, 590 (Cal. 1860) ("The right of the lessor to the possession ends with the sale of the premises, or rather, with the deed by which the sale is consummated. The right of the tenant to such possession depends upon that of the lessor and goes with it."); Barclay v. Picker, 38 Mo. 143, 145 (1866) ("As a general rule, whenever the estate which the lessor had at the time of making the lease is defeated or determined, the lease is extinguished with it.").

embracing parties' contractual rights and duties[35] over archaic subordinate-interest principles, and several states' laws already affirm the right of leases to continue after foreclosure.[36] Nonetheless, some courts still hold to a strict interpretation of the "first in time, first in right" principle, which, in addition to extinguishing leases and allowing immediate eviction, also effectively strips tenants' due process rights by rendering them trespassers in their own homes once the foreclosure is completed.[37] Even if courts do not consider these tenants trespassers, many state laws still allow extremely short-notice evictions. According to the National Low Income Housing Coalition, as of 2015 thirty states had either no statutorily specified protection or required five or fewer days' notice before tenants in foreclosed properties may be evicted.[38] Despite the lease-destabilizing effect of the lease subordination rule and the inadequacy of other state laws, little effort was made on a national level to create updated protections for tenants in foreclosure until 2008, when a sudden boom in residential foreclosures brought foreclosure issues to the foreground of legal and policy debates.[39]

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[35] *See* Korngold, *supra* note 7, at 705; Sullivan, *supra* note 26, at 1028 (suggesting that this shift began in the nineteenth century when "the national economy shifted from farming to industry"). *But see* Priya S. Gupta, *The American Dream, Deferred: Contextualizing Property After the Foreclosure Crisis*, 73 MD. L. REV. 523, 525–29 (2014) (discussing how this modern tendency to "treat houses primarily as investments codified in contracts" can itself be dangerous).

[36] Various state laws directly contravene the lease-extinguishing power of foreclosure. *See* Vicki Been & Allegra Glashausser, *Tenants: Innocent Victims of the Nation's Foreclosure Crisis*, 2 ALB. GOV'T L. REV. 1, 16–19 (2009) (describing state regimes in New Jersey, New Hampshire, California, and Washington, D.C., which provide various levels of additional protection). As will be discussed in Section I.B, the federal Protecting Tenants at Foreclosure Act of 2009, which expired at the end of 2014, provided a national (though temporary) solution. Pub. L. No. 111-22, § 702, 123 Stat. 1660, 1660–61 (2009) (codified as amended at 12 U.S.C. § 5220 (2012)).

[37] *See, e.g.*, Mik v. Fed. Home Loan Mortg. Corp., 743 F.3d 149, 163 (6th Cir. 2014) (noting that, under Kentucky law, a purchaser of foreclosed properties "may treat persons who occupy the property pursuant to a pre-existing lease as tenants, in which case he may charge them rent, or as trespassers, in which case he may evict them" via writ of possession, without filing an eviction action); Mills v. County of Lapeer, 498 F. App'x 507, 514 (6th Cir. 2012) (holding that a tax deed foreclosure can convert into a trespasser a tenant who does not have a property interest, and that the tenant therefore lacks due process rights, such as a right to a pre-eviction hearing).

[38] NAT'L LOW INCOME HOUS. COAL., PROTECTING TENANTS AT FORECLOSURE ACT (2015), http://nlihc.org/sites/default/files/FactSheet_PTFA_2015.pdf [https://perma.cc/B9CG-ABKS] (citing data from the National Housing Law Project).

[39] *See* James H. Carr & Kate Davidoff, *Legislative and Regulatory Responses to the Foreclosure Crisis*, 17 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 283, 286–88 (2008) (describing the first wave of Federal Reserve and legislative responses, as they stood in early 2008).

B. A Foreclosure Epidemic, on Renters and Owners Alike

The United States subprime mortgage crisis saw mortgage foreclosure rates rise to historic levels.[40] Much of the attention given to the crisis has focused on its potential causes, and particularly on the predatory lending practices that led to many homeowners taking on loans they could not afford to pay.[41] These practices themselves have been found to single out and disproportionately affect minority neighborhoods,[42] and several efforts have been made to challenge lenders through litigation (including on the grounds that lending practices had a disparate impact on minorities).[43]

Less attention has been paid to the impact of the foreclosure crisis on renters, who by some estimations constitute 40% of all Americans displaced by foreclosure.[44] Some of this disparity in public attention may trace to class attitudes: middle- and upper-class Americans, in addition to renting less often and being less likely to face foreclosure themselves, are

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[40] *See* LAWRENCE H. WHITE, CATO INST., HOW DID WE GET INTO THIS FINANCIAL MESS? 2 (2008), http://object.cato.org/sites/cato.org/files/pubs/pdf/bp110.pdf [https://perma.cc/XU8W-TENC]. The subprime mortgage crisis was, of course, entwined with a larger global financial crisis, and there is disagreement over when the housing crisis started and ended, with some observers suggesting that it is still ongoing. *See, e.g.*, Paul Solman, *Why the Foreclosure Crisis Isn't Over Yet*, PBS NEWSHOUR (Sept. 24, 2015, 4:45 PM), http://www.pbs.org/newshour/making-sense/foreclosure-crisis-isnt-yet [https://perma.cc/K37E-4HUQ]; Diana Olick, *Repossessions Spike 66% as Foreclosure Crisis Lingers*, CNBC (Oct. 15, 2015, 12:01 AM), http://www.cnbc.com/2015/10/14/repossessions-spike-66-as-foreclosure-crisis-lingers.html [https://perma.cc/XJ2W-L75L].

[41] *See, e.g.*, Alex Kotlowitz, *All Boarded Up*, N.Y. TIMES MAG. (Mar. 4, 2009), http://www.nytimes.com/2009/03/08/magazine/08Foreclosure-t.html [https://perma.cc/6M54-MSLW]; Nelson D. Schwartz, *Can the Mortgage Crisis Swallow a Town?*, N.Y. TIMES (Sept. 2, 2007), http://www.nytimes.com/2007/09/02/business/yourmoney/02village.html [https://perma.cc/HT3J-5LGQ].

[42] The National Low Income Housing Coalition found in 2009 that renters in minority communities were disproportionately impacted by the foreclosure crisis. DANILO PELLETIERE, NAT'L LOW INCOME HOUS. COAL., RENTERS IN FORECLOSURE: DEFINING THE PROBLEM, IDENTIFYING SOLUTIONS 4 (2009), http://nlihc.org/sites/default/files/Renters-in-Foreclosure-2009.pdf [https://perma.cc/KR59-TEFA]. The Coalition confirmed this same trend again in 2012. SHAMBHAVI MANGLIK, NAT'L LOW INCOME HOUS. COAL., RENTERS IN FORECLOSURE: A FRESH LOOK AT AN ONGOING PROBLEM 7 (2012), http://nlihc.org/sites/default/files/Renters_in_Foreclosure_2012.pdf [https://perma.cc/T8MY-6MK5]; *see also* Nick Carey, *Racial Predatory Loans Fueled U.S. Housing Crisis: Study*, REUTERS (Oct. 4, 2010, 7:44 AM), http://www.reuters.com/article/2010/10/04/us-usa-foreclosures-race-idUSTRE6930K520101004#MuQo2XWmWS3e7Lpr.97 [https://perma.cc/F3S3-A6H8] (describing a study that found race to be a "powerful predictor[]" of subprime mortgage-related foreclosure).

[43] *See* Creola Johnson, *Fight Blight: Cities Sue to Hold Lenders Responsible for the Rise in Foreclosures and Abandoned Properties*, 2008 UTAH L. REV. 1169, 1187–232 (2008). Johnson's article discusses several cities' efforts to sue lenders, including a disparate impact case against Wells Fargo by the city of Baltimore. *Id.* at 1198–212. This suit later settled, along with several other concurrent suits against the bank. Charlie Savage, *Wells Fargo Will Settle Mortgage Bias Charges*, N.Y. TIMES (July 12, 2012), http://www.nytimes.com/2012/07/13/business/wells-fargo-to-settle-mortgage-discrimination-charges.html [https://perma.cc/JY2L-2WKB].

[44] *See* MANGLIK, *supra* note 42, at 1.

more financially capable of finding new rental housing,[45] so they may see loss of rental property as a less serious or pervasive problem than poorer tenants. This indifferent attitude reflects the last few decades of housing policy, which has increasingly prized the investment-asset value of homeownership over more holistic conceptions of "home."[46]

A sudden eviction from one's rented home poses a myriad of serious risks, particularly for lower income renters. Several scholars have documented at length the potential consequences of forced relocation on tenants, including school instability (which harms children's academic performance), division of families, and severe emotional distress.[47] Tenants evicted from foreclosed properties are unable to recoup their security deposits in as many as 80% of cases, and one study found that the "average family involved in a rental foreclosure filing faces $2,558 in costs."[48] Without savings or family members to stay with, they face a particularly high risk of homelessness.[49] Damage to neighborhoods from the resultant abandoned properties includes an increase in crime, elevated fire risk, a reduction in nearby property values, and a loss of local economic opportunity.[50] Properties taken over by foreclosing banks are often

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[45] *See* Johnson, *supra* note 2, at 983 (detailing the problems that lack of savings, a low credit rating, and high urban rental costs can pose).

[46] *See* Gupta, *supra* note 35, at 528–29.

[47] *See* Roisman, *supra* note 7, at 820–29; *see also* Fried, *supra* note 25, at 359–61 (describing the emotional impact of forced relocation on the residents of a West End Boston neighborhood, who reported a "moderate or extreme sense of loss and an accompanying affective reaction of grief").

[48] DAVID ROTHSTEIN, POLICY MATTERS OHIO, COLLATERAL DAMAGE: RENTERS IN THE FORECLOSURE CRISIS 10–11 (2008), http://www.policymattersohio.org/wp-content/uploads/2011/09/CollateralDamage2008_0619.pdf [https://perma.cc/3QX4-8MU3]. Professor Creola Johnson also explains the economic consequences of lower income renters losing their security deposits:

> Without such a refund, tenants will need to quickly find enough money to pay a new security deposit, along with the first and, sometimes, last month's rent. Besides security deposits, tenants need cash to cover moving expenses and utility deposits to obtain utility services at the new place. However, due to the current contraction of consumer credit, tenants may find reasonably priced credit unattainable and may resort to usurious credit such as payday loans in order to obtain cash to cover all of the relocation costs.

Johnson, *supra* note 2, at 983.

[49] *See* NAT'L COAL. FOR THE HOMELESS ET AL., FORECLOSURE TO HOMELESSNESS 2009: THE FORGOTTEN VICTIMS OF THE SUBPRIME CRISIS 14 (2009), http://www.nationalhomeless.org/advocacy/ForeclosuretoHomelessness0609.pdf [https://perma.cc/Q2UJ-DT4C] ("Those who have been living in foreclosed rental units are at particular risk, and have come to rank heavily among those who have become homeless.").

[50] *See* James J. Kelly, Jr., *Refreshing the Heart of the City: Vacant Building Receivership as a Tool for Neighborhood Revitalization and Community Empowerment*, 13 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 210, 210 (2004) ("[E]ach vacant building provides a haven for illegal activity, presents fire dangers to adjacent homes, and defames the surrounding neighborhood as an unfit place to live."); Anne B. Shlay & Gordon Whitman, *Research for Democracy: Linking Community Organizing and Research to Leverage Blight Policy*, 5 CITY & COMMUNITY 153, 162 (2006) ("[A]bandoned

inadequately maintained, particularly in minority communities.[51] Moreover, renters are not responsible for the default that causes foreclosure,[52] and due to their short notice and regular lack of inclusion in the foreclosure proceedings, they often have little or no time to prepare to relocate.[53]

In 2009, Congress responded to the mass eviction of tenants in foreclosure by enacting the Protecting Tenants at Foreclosure Act (PTFA), which provided a national standard of protection for tenants in foreclosed properties.[54] These protections included at least ninety days' advance notice before evicting tenants with bona fide leases and provisions for some tenants to live out the term of their leases.[55] The PTFA, however, included a sunset clause, rendering it only a stopgap measure at the height of the foreclosure crisis.[56] Congress allowed the PTFA to expire at the end of 2014, leaving many tenants again subject to inadequate state eviction laws.[57]

A potentially powerful solution to this legislative inattention arose a few months later, when the Supreme Court released its decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, affirming the viability of disparate impact litigation under the Fair Housing Act.[58] As this Note will demonstrate in Parts II and III, disparate impact under the Fair Housing Act, as interpreted and limited by

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housing within 450 feet of property (about the size of a typical city block) lowered sales prices in the range of $3,542–7,627, all else equal.").

[51] *See* NAT'L FAIR HOUS. ALL. ET AL., THE BANKS ARE BACK—OUR NEIGHBORHOODS ARE NOT: DISCRIMINATION IN THE MAINTENANCE AND MARKETING OF REO PROPERTIES 2 (2012), http://www.nationalfairhousing.org/portals/33/the_banks_are_back_web.pdf [https://perma.cc/4Q2A-B6YA].

[52] Foreclosed homeowners may certainly be the victims of predatory lending practices, but the fact remains that foreclosure necessarily has a direct connection to a homeowner's action or non-action: whether the terms of the loan are predatory or fair, the homeowner still "triggered" the risk of foreclosure by non-payment of the mortgage.

[53] *See* Been & Glashausser, *supra* note 36, at 15–16.

[54] Pub. L. No. 111-22, § 702, 123 Stat. 1660, 1660–61 (2009) (codified as amended at 12 U.S.C. § 5220 (2012)).

[55] *Id.* § 702(a)(1). The Act defines a "bona fide" tenancy as one negotiated between nonfamily members, at arms length, for fair market rent. *Id.* § 702(b). Bona fide leases entered into before the notice of foreclosure were protected, except when the purchasers planned to use the premises as a primary residence, in which case ninety-day notice was sufficient. *Id.* § 702(a).

[56] *Id.* § 704. The original sunset date was December 31, 2012, but in 2010 Congress extended the sunset date to December 31, 2014. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, § 1484, 124 Stat. 1376, 2204 (2010) (codified at 12 U.S.C. § 5201 (2012)).

[57] *See* Christopher A. Richardson, *Tenants Are Left in the Cold After the Sunset of the Protecting Tenants in Foreclosure Act*, NAT'L L. REV. (Apr. 9, 2015), http://www.natlawreview.com/article/tenants-are-left-cold-after-sunset-protecting-tenants-foreclosure-act [https://perma.cc/BTP7-XEF2]; Been & Glashausser, *supra* note 36, at 7 ("New owners have significant success in removing even tenants protected by federal or state laws.").

[58] 135 S. Ct. 2507, 2525 (2015).

Inclusive Communities, provides an important opportunity for minority tenants to claim meaningful protections against foreclosure-related eviction.

II. DISPARATE IMPACT AND THE FAIR HOUSING ACT

A. Disparate Impact: "Fair in Form, but Discriminatory in Operation"

The Supreme Court first endorsed the theory of disparate impact in 1971, with its seminal decision in *Griggs v. Duke Power Co*.[59] In *Griggs*, a group of black employees claimed that their employer's use of intelligence tests and high school diploma requirements to inform job placement violated Title VII of the Civil Rights Act of 1964,[60] because such practices "operate[d] to disqualify Negroes at a substantially higher rate than white applicants."[61] The Court unanimously found that both the diploma and testing requirements violated Title VII: "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited," regardless of whether the employer actually intended to disadvantage black employees.[62] This theory of liability stood in stark contrast to claims based on the Equal Protection Clause[63] or Title VII disparate treatment,[64] which both require proof of an intent to discriminate.

As interpreted by later cases, *Griggs* set out a three-step burden-shifting analysis.[65] First, the plaintiff bears the burden of establishing a prima facie case that a statistical disparate impact exists, and that the

[59] 401 U.S. 424, 431–32 (1971).

[60] Title VII made it illegal for an employer to discriminate against, segregate, or classify an employee or applicant "because of such individual's race, color, religion, sex, or national origin." Pub. L. No. 88-352, § 703, 78 Stat. 253, 255–57 (1964) (codified as amended at 42 U.S.C. § 2000e–2 (2012)).

[61] *Griggs*, 401 U.S. at 426.

[62] *Id.* at 431–32.

[63] *See, e.g.*, Washington v. Davis, 426 U.S. 229, 242 (1976) (noting that a law is not "invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another," but requires further proof of invidious discrimination).

[64] *See, e.g.*, International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (explaining that disparate treatment is a question of discriminatory motive). Other courts had previously found Title VII to outlaw employment practices with discriminatory effects, for example, *Local 189, United Papermakers v. United States*, 416 F.2d 980, 996–97 (5th Cir. 1969), but *Griggs* legitimized the rule.

[65] *See* Ricci v. DeStefano, 557 U.S. 557, 577–78 (2009); Town of Huntington v. Huntington Branch, NAACP, 488 U.S. 15, 17–18 (1988) (per curiam).

impact was caused by the challenged practice.[66] If this burden is met, the defendant bears the burden of production to show that the challenged practice is a "business necessity" and "related to job performance."[67] Finally, if the defendant successfully argues the business necessity of the practice, the burden shifts back to the plaintiff to demonstrate that nondiscriminatory alternatives are available to achieve the same end.[68]

The *Griggs* rule proscribes practices that are "fair in form, but discriminatory in operation" and lack a "genuine business need,"[69] but today its scope of applicability is debatable.[70] Scholars still regularly lament or applaud the doctrine's relatively limited impact (at least compared to what some have advocated),[71] as well as the Court's refusal, in *Washington v. Davis*, to endow the doctrine with constitutional significance through the Equal Protection Clause.[72]

The Rehnquist and Roberts Courts further limited the doctrine in several areas.[73] In *Alexander v. Sandoval*,[74] the Court held that Title VI of

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[66] *Griggs*, 401 U.S. at 430 & n.6; *see also* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (interpreting *Griggs* to require that a "complaining party or class has made out a prima facie case of discrimination" before the case can proceed).

[67] *Griggs*, 401 U.S. at 431.

[68] *See Albemarle Paper*, 422 U.S. at 425.

[69] *Griggs*, 401 U.S. at 431–32.

[70] *See* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 530 (2003) ("[T]he Court in cases after *Griggs* did not hold firmly to *Griggs*'s aggressive view of disparate impact doctrine."). Today there are widely varying interpretations of how broad disparate impact's reach is or should be. Section II.B and Part III will discuss these variations in the housing context and their implications for a potential tenants-in-foreclosure case.

[71] Notably, several major recent academic movements focus on the notion that, as forms of overt discrimination become less socially acceptable, it is increasingly important to recognize and address buried or unconscious forms of systemic discrimination. *See, e.g.*, Pat K. Chew, *Seeing Subtle Racism*, 6 STAN. J. C.R. & C.L. 183, 217–18 (2010) (arguing that implicit "modern racism" should be incorporated into employment discrimination models); Justin D. Cummins, *Refashioning the Disparate Treatment and Disparate Impact Doctrines in Theory and in Practice*, 41 HOW. L.J. 455, 457–58, 467–72 (1998) (suggesting that disparate impact should be reevaluated to include instances of white privilege, subtle injustices, and other systemic disparities); Jonathan Feingold & Karen Lorang, *Defusing Implicit Bias*, 59 UCLA L. REV. DISCOURSE 210, 228 (2012) (arguing that, due to implicit biases, blacks are more likely to be victims of violence than whites); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 973 (2006) (discussing the "possibility of using the law to 'debias' people in order to reduce implicit bias"). For other suggested disparate impact applications, see *infra* note 119.

[72] 426 U.S. 229, 242 (1976) ("Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the [Equal Protection Clause of the] Constitution."); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 319–20 (1987) (detailing common critical reactions to the "motive-centered doctrine" articulated in *Davis*).

[73] It is worth noting that the Roberts Court did extend the right to disparate impact liability under the Age Discrimination in Employment Act of 1967 (ADEA), *Smith v. City of Jackson*, 544 U.S. 228, 236–40 (2005) (plurality opinion), but denied recovery due to a reasonable "nonage factor" as provided under the statute. *Id.* at 239, 241; *see also* Age Discrimination in Employment Act of 1967 § 4, 29

the Civil Rights Act of 1964, which generally forbade "discrimination under any program or activity receiving Federal financial assistance,"[75] did not itself contemplate a private right of action for disparate impact claims, requiring separate statutory authorization.[76] More significantly for the doctrine itself, a series of cases suggested a growing concern that disparate impact might come into conflict with both the Equal Protection Clause and disparate treatment doctrine—effectively inverting the various pre-*Davis* calls to read disparate impact into the Equal Protection Clause itself.[77]

This series of cases culminated in *Ricci v. DeStefano*,[78] a Title VII disparate treatment case that nonetheless had significant implications for disparate impact doctrine. In that case, the City of New Haven, Connecticut, administered a test to determine which of the City's firefighters qualified for promotions.[79] White applicants outperformed minority applicants, and under threat of lawsuit from both sides,[80] the City decided to discard the test results.[81] In a 5–4 decision, the Court held that the City's decision to discard the test was a violation of Title VII's prohibition on disparate treatment.[82] Even though the decision was made to avoid disparate impact liability, it was based consciously on race (engaging in disparate treatment), and the employer lacked a "strong basis in evidence that the test was deficient and that discarding the results [was] necessary to avoid violating the disparate-impact provision."[83] While the Court declined to rule on equal protection grounds, many observers echoed Justice Scalia, who wrote separately that the majority was "merely postpon[ing] the evil

U.S.C. § 623(f) (2012) (making an exception for discrimination "based on reasonable factors other than age"). It is possible that the arguably lower bar to defend a policy with disparate impact under the ADEA gave the Court less pause than, for example, the strict business necessity requirement under employment discrimination case law.

[74] 532 U.S. 275 (2001).

[75] Pub. L. No. 833-352, § 601, 78 Stat. 252, 252 (1964) (codified at 42 U.S.C. § 2000d (2012)).

[76] *Sandoval*, 532 U.S. at 293.

[77] In *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988), a plurality of the Court expressed concern over the doctrine placing "undue pressure on employers to adopt inappropriate prophylactic measures," or requiring unconstitutional use of racial quotas. *Id.* at 992–93. Outside of disparate impact, the Court in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), rejected the use of a race-based "tiebreaker" to determine school placement, *id.* at 733–35, and yielded a memorable if tautological statement of principle from Chief Justice Roberts: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Id.* at 748.

[78] 557 U.S. 557 (2009).

[79] *Id.* at 562.

[80] If, on the one hand, the City kept the tests in place, it could face a *Griggs*-type disparate impact lawsuit. On the other hand, if it discarded the tests based on racial considerations, it could face disparate treatment or equal protection claims.

[81] *Ricci*, 557 U.S. at 562.

[82] *Id.* at 593.

[83] *Id.* at 584.

day" when equal protection concerns will collide with disparate impact doctrine.[84]

Ricci set a confusing precedent, seemingly limiting disparate impact liability without articulating a clear limiting principle. As Section II.B demonstrates, the Court's next major disparate impact decision, *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, incorporated some of *Ricci*'s concerns without fully clarifying their import.

B. Fair Housing Act Disparate Impact and Inclusive Communities

The Fair Housing Act, enacted as Title VIII of the Civil Rights Act of 1968,[85] makes it unlawful "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."[86] As early as 1974, federal circuit courts interpreted the Act to prohibit disparate impact in housing practices, as Title VII did in the employment sphere.[87] A Fair Housing Act disparate impact case did reach the Supreme Court in 1988, in *Town of Huntington. v. Huntington Branch, NAACP*, but both parties conceded to the applicability of the disparate impact test, so the Court did not address the question.[88]

The Court did not directly address disparate impact under the Fair Housing Act until 2015, in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*[89] In that case, a Texas-based nonprofit, the Inclusive Communities Project (ICP), claimed that Texas had disproportionally allocated federal low-income housing tax credits[90] to

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[84] *Id.* at 594 (Scalia, J., concurring). For a thorough analysis of the history of—and tension between—disparate impact and the Equal Protection Clause, see Primus, *supra* note 70. Primus describes three "rounds" of the relationship between the two doctrines: first, asking whether equal protection contemplates disparate impact liability; second, asking whether Section Five of the Fourteenth Amendment empowers Congress to enact laws prohibiting practices with disparate impact; and third, asking whether equal protection forbids Congress from enacting such laws. *Id.* at 494–96.

[85] Pub. L. No. 90-284, 82 Stat. 81 (1968) (codified as amended at 42 U.S.C. §§ 3601–3619 (2012)).

[86] *Id.* § 3604.

[87] The first major Fair Housing Act disparate impact decision came in *United States v. City of Black Jack*, which struck down a city ordinance that prohibited construction of any multifamily dwellings as having a disparate impact on black residents. 508 F.2d 1179, 1186–88 (8th Cir. 1974); *see also* Metro. Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1294–95 (7th Cir. 1977) (holding that a zoning decision with discriminatory effects is actionable under the Fair Housing Act, and remanding with instructions for factual findings about these effects).

[88] 488 U.S. 15, 18 (1988) (per curiam).

[89] 135 S. Ct. 2507 (2015).

[90] *See* 26 U.S.C. § 42 (2012).

predominantly black urban neighborhoods, with very few allocated to white suburban neighborhoods.[91] According to ICP, this practice had a disparate impact on black residents by perpetuating racial segregation.[92] The district court applied a two-step analysis taken from the Second Circuit's decision in *Huntington*: first, ICP had to make a prima facie case demonstrating statistical disparate impact, then the defendant needed to show that its actions furthered a legitimate governmental interest with no "less discriminatory alternative[]."[93]

The defendant Department appealed to the Fifth Circuit. Between the district and appellate court decisions, however, HUD released regulations reinforcing its embrace of disparate impact under the Fair Housing Act, and articulating a three-part test that split the second "step" of the district court's analysis into two parts.[94] In HUD's regulation, which roughly mirrored the three-step burden-shifting framework from the *Griggs* line of cases, the plaintiff bore the burden of demonstrating less-discriminatory alternative practices once the defendant proved a legitimate interest[95] (whereas in the district court the Department carried that burden). The Fifth Circuit followed the 2013 HUD regulations, and reversed and remanded for the district court to apply the HUD-sanctioned test.[96] The Department appealed the Fifth Circuit's decision, and the Supreme Court granted certiorari limited to the question whether disparate impact claims are cognizable under the Fair Housing Act.[97]

In the five years before *Inclusive Communities*, the Roberts Court had granted certiorari in two other disparate impact cases brought under the Fair Housing Act, one in 2011 and one in 2013, but both cases settled

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[91] 135 S. Ct. at 2514.

[92] *Id.*

[93] Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, 860 F. Supp. 2d 312, 322–23 & n.17 (N.D. Tex. 2012); *see also* Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 939 (2d Cir.), *aff'd*, 488 U.S. 15 (1988) (per curiam).

[94] HUD's regulations proscribe practices that "actually or predictably result[] in a disparate impact," unless the practices are "necessary to achieve one or more substantial, legitimate, nondiscriminatory interests" that "could not be served by another practice that has a less discriminatory effect." 24 C.F.R. § 100.500(a)–(b) (2016). It is worth noting that HUD officially supported disparate impact liability in the lending context as early as 1994. *See* Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18,266, 18,269 (Apr. 15, 1994). For a more thorough history of HUD's recent approach to disparate impact, see SCHWEMM & PRATT, *supra* note 13, at 4–6.

[95] 24 C.F.R. § 100.500.

[96] Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, 747 F.3d 275, 282–83 (5th Cir. 2014).

[97] Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2513 (2015); Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 46 (2014) (granting certiorari).

before any decision.[98] By granting certiorari a third time in five years, the Court seemed to suggest it was eager to weigh in on the issue. Moreover, by this point all eleven numbered federal circuits that had addressed the question agreed that the Fair Housing Act allowed disparate impact claims,[99] and HUD had recently promulgated its regulation explicitly interpreting the Act to envision disparate impact liability.[100] The repeated certiorari grants, the lack of a circuit split, and the 2013 HUD regulations led many observers to conclude that disparate impact liability under the Fair Housing Act was doomed.[101]

Ultimately, the Supreme Court defied these expectations by holding—albeit by a one-vote margin[102]—that the Act's statutory language envisioned disparate impact liability.[103] The Court affirmed the Fifth Circuit, and agreed with its incorporation of the HUD-approved burden-shifting test:

> [A] plaintiff first must make a prima facie showing of disparate impact. . . . If a statistical discrepancy is caused by factors other than the defendant's policy, a plaintiff cannot establish a prima facie case, and there is no liability. After a plaintiff does establish a prima facie showing of disparate impact, the burden shifts to the defendant to "prov[e] that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests. . . ." Once a defendant has satisfied its burden at step two, a plaintiff may "prevail upon proving that the substantial,

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[98] Gallagher v. Magner, 619 F.3d 823 (8th Cir. 2010), *cert. granted*, 132 S. Ct. 548 (2011), *and cert. dismissed*, 132 S. Ct. 1306 (2012); Mt. Holly Gardens Citizens in Action, Inc. v. Township of Mount Holly, 658 F.3d 375 (3d Cir. 2011), *cert. granted*, 133 S. Ct. 2824 (2013), *and cert. dismissed*, 134 S. Ct 636 (2013).

[99] *See* SCHWEMM & PRATT, *supra* note 13, at 6–7.

[100] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,482 (Feb. 15, 2013) (codified at 24 C.F.R. § 100.500 (2016)) ("Liability may be established under the Fair Housing Act based on a practice's discriminatory effect . . . .").

[101] *See, e.g.*, Cornelius J. Murray IV, *Promoting "*Inclusive Communities*": A Modified Approach to Disparate Impact Under the Fair Housing Act*, 75 LA. L. REV. 213, 216–17 (2014) ("[T]he Supreme Court appears destined to read disparate impact theory out of the FHA."); Emily Badger, *The Supreme Court May Soon Disarm the Single Best Weapon for Desegregating U.S. Housing*, WASH. POST: WONKBLOG (Jan. 21, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/01/21/the-supreme-court-may-soon-disarm-the-single-best-weapon-for-desegregating-u-s-housing/ [https://perma.cc/U8FF-5BLQ].

[102] In dissent, Justice Alito argued that the Act categorically does not create disparate impact liability. *Inclusive Communities*, 135 S. Ct. at 2532 (Alito, J., dissenting). Justice Thomas wrote a separate dissent contending that the *Griggs* holding, and the disparate impact doctrine in general, should be dismantled. *Id.* at 2526–32 (Thomas, J., dissenting).

[103] *Id.* at 2525 (majority opinion). As justification, the Court reasoned that the "results-oriented" phrase "otherwise make unavailable" in 42 U.S.C.A. § 3604(a), included both intentional discrimination and actions that have disparate impact on protected groups, since the phrase "refers to the consequences of an action rather than the actor's intent." *Id.* at 2518.

> legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect."[104]

Despite endorsing disparate impact under the Fair Housing Act, Justice Kennedy's majority opinion is suffused with caveats and cautionary language about straying from what he called the "heartland of disparate-impact liability"[105]: disparate impact should not be used to "adopt racial quotas—a circumstance that itself raises serious constitutional concerns";[106] "to impose onerous costs . . . merely because some other priority might seem preferable";[107] to mandate "displacement of valid governmental policies";[108] to interfere with anyone's right to "make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system";[109] or to create a "double bind of liability" where defendants risk disparate impact or disparate treatment liability on both ends of a decision.[110] Justice Kennedy did not, however, make clear how these general concerns fit within the three-step framework, either in the particular case or in disparate impact doctrine generally.

Analysts differ widely on how to interpret the Court's decision in *Inclusive Communities*. In light of the 5–4 opinion, Justice Kennedy's various caveats, and the Roberts Court's other major disparate impact decisions, some fair housing advocates viewed the decision as only a minor solace,[111] while other commentators welcomed it as a major progressive victory.[112] The most reasonable interpretation is that *Inclusive Communities* falls somewhere between those two extremes, embracing disparate impact as a viable tool against racial imbalances while also signaling—albeit somewhat vaguely—that there are limits to what the Court will entertain.

What *Inclusive Communities* does provide, however, is a three-step test, accompanied by a sense for what red flags might lead the Court to

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[104] *Id.* at 2514–15 (citing and quoting 24 C.F.R. § 100.500(c) (2014)).

[105] *Id.* at 2522.

[106] *Id.* at 2523.

[107] *Id.*

[108] *Id.* at 2522.

[109] *Id.* at 2518.

[110] *Id.* at 2523.

[111] *See* Garrett Epps, *The U.S. Supreme Court Barely Saves the Fair Housing Act*, ATLANTIC (June 25, 2015), http://www.theatlantic.com/politics/archive/2015/06/the-supreme-court-barely-saves-the-fair-housing-act/396902/ [https://perma.cc/MGA6-8DW2] ("[I]t would be a mistake to read *Inclusive Communities* as a 'liberal' decision. . . . This was no ringing victory for civil rights; it was a near-death experience that may produce health problems for the Act down the road.").

[112] *See, e.g.*, Emily Badger, *The Supreme Court's Housing Decision Is a Warning Against Subtle Discrimination Everywhere*, WASH. POST: WONKBLOG (June 25, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/06/25/the-supreme-courts-housing-decision-is-a-warning-against-subtle-segregation-everywhere/ [http://perma.cc/8KNK-E5DX].

reject an otherwise meritorious claim. As Part III of this Note discusses, the case for tenants in foreclosure speaks to the primary interests behind disparate impact, avoids the equal protection and racial quota issues that preoccupied the Court in *Ricci v. Stefano*,[113] and satisfies the burden-shifting framework.

III. THE DISPARATE IMPACT CASE FOR TENANTS IN FORECLOSURE

The case for tenants in foreclosure will differ depending on how the eviction process works in a jurisdiction, what entity sought to evict, and what law is controlling. In theory, a case could arise against a foreclosing mortgagee or against a local body or sheriff's department; could challenge the actual eviction practice (the mortgagee's, the sheriff's, or some other participant's) or a state or local law;[114] could take the form of a private lawsuit, appeal of the eviction judgment itself (if the tenant is made a party to the eviction action or is allowed to intervene), or enforcement action by the Secretary of HUD or Attorney General;[115] and could be heard by federal, state, or HUD administrative judges.[116] Because the exact claim will differ across localities and individual circumstances, this Part will discuss the applicability of disparate impact analysis within a typical hypothetical locality with demonstrable racial disparities in foreclosure-related tenant evictions (which existing research suggests apply quite broadly),[117] rather than detailing a specific challenge to a particular state actor, mortgagee, or other party. This Part will also assume black renters as the disparately impacted group, but the same reasoning should support a case for any protected group that can demonstrate a significant statistical disparity caused by applicable foreclosure laws, mortgagee practices, or local government policies.

Before *Inclusive Communities*, lower courts that embraced Fair Housing Act disparate impact applied liability fairly conservatively. Plaintiffs prevailed in as little as 20% of cases in lower courts, and even those victories were regularly reversed.[118] As noted in Part II, the Court's

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[113] 557 U.S. 557, 581–85 (2009).

[114] *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,474 (Feb. 15, 2013) (interpreting disparate impact under the Fair Housing Act to apply to both private and public actors).

[115] *See* 42 U.S.C. §§ 3612–3614 (2012).

[116] *See id.*

[117] *See* PELLETIERE, *supra* note 42, at 3–4.

[118] *See* 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, 399 (2013) (detailing low rates for plaintiff-favoring outcomes, and high reversal rates for those outcomes on appeal). Professor Seicshnaydre does note, however, that the lesser financial resources of many

cautious language suggests a more limited approach to housing disparate impact than some advocates had hoped.[119] This Part argues that the Court's various concerns about disparate impact are best seen as a threshold "step zero" test, inquiring into the nature of the case and requested remedy before moving on to the three-part burden-shifting analysis. The case for tenants in foreclosure satisfies this threshold test, and should prevail on the three-step disparate impact framework in any area with significant demonstrable racial disparities in foreclosure-related eviction.

A. Disparate Impact "Step Zero": Constitutional Avoidance and the Fair Housing Act "Heartland"

As discussed in Section II.B, the Court in *Inclusive Communities* repeatedly expressed concerns about overly broad application of disparate impact, without clearly articulating a limiting principle. The Court's embrace of disparate impact under the Fair Housing Act, however, indicates its concerns are not fatal to the doctrine. Since some of the Court's preoccupations in *Inclusive Communities* do not fit readily into any of the three steps of the burden-shifting framework, the most coherent and practicable interpretation of these preoccupations is that they constitute a kind of "disparate impact step zero," an initial threshold step akin to the so-called "Step Zero" test in *Chevron* agency deference cases.[120] Detailing the parameters and full import of this threshold step for disparate impact likely warrants a more thorough treatment than will be given here, but the essential components of "step zero" are fairly straightforward: Courts should (1) identify the likely disparate impact remedy in a given case, (2) ask whether the remedy involves imposition of a racial quota or differential treatment (what this Note calls "disparate impact vs. disparate treatment"),

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plaintiffs, as well as the tendency to tack disparate impact claims onto disparate treatment cases, may influence these results. *Id.* at 392–93. One study has shown similar affirmance rates for defendants in civil appeals generally, but a higher affirmance rate for plaintiffs. Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947, 947 (finding that defendants succeed in around 88% of plaintiff appeals, while plaintiffs succeed in around 67% of defendant appeals).

[119] For examples of advocacy for potential disparate impact cases in a variety of contexts, see Eric Dunn & Merf Ehman, *The Probable Disparate Impact of Unlawful Detainer Records*, WASH. ST. B. NEWS, July 2011, at 35 (use of detainer record in housing admissions); Allan G. King & Rod M. Fliegel, *Conviction Records and Disparate Impact*, 26 A.B.A. J. LAB. & EMP. L. 405 (2011) (employing felons); Diane Piché et al., *Remedying Disparate Impact in Education*, HUM. RTS., Fall 2011, at 15 (the school achievement gap); Jimmy White, Comment, *Environmental Justice: Is Disparate Impact Enough?*, 50 MERCER L. REV. 1155 (1999) (siting of hazardous waste facilities). For a more exhaustive list of further articles in the same vein, see Selmi, *supra* note 15, at 703 n.12.

[120] *See* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 190–91 (2006) (describing this "Step Zero" in the agency deference context (citing Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833 (2001)).

and (3) ask whether the remedy risks causing a different kind of disparate impact ("disparate impact vs. disparate impact"). If neither of the last two concerns are implicated, the claim can proceed to the prima facie case.

The first of the Court's primary concerns is the possibility that disparate impact remedies might conflict with equal protection and disparate treatment protections by mandating racial quotas or other policies that "perpetuate race-based considerations rather than move beyond them."[121] Justice Scalia's warning in *Ricci v. DeStefano* of an "evil day on which the Court will have to confront"[122] this question seems overstated as a broadside against disparate impact, since not all disparate impact cases raise these "disparate impact vs. disparate treatment" risks.[123] Assuming such scenarios do raise serious constitutional ambiguity concerns centered on the Equal Protection Clause, courts can separate at "step zero" which individual cases do and do not create constitutional ambiguity. Courts can ask to what extent the requested change in practice is race neutral, and either use the constitutional avoidance doctrine to eschew particularly problematic cases,[124] or rely on the Equal Protection Clause or disparate treatment to impute the need for a race-neutral remedy as a prerequisite for disparate impact cases. In the case of tenants in foreclosure, providing tenancy security after foreclosure does not require giving any advantage to black renters or neutralizing any advantage of white renters, so Justice Scalia's warning need not interfere with the disparate impact analysis.[125]

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[121] Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2523–24 (2015).

[122] 557 U.S. 557, 594 (2009) (Scalia, J., concurring).

[123] These concerns seem to be more acute in the employment testing context, where competition for positions is closer to a zero-sum scenario: neutralizing black workers' advantage necessarily involves neutralizing white workers' advantage. Similar concerns may cloud situations involving competitive application for loans or apartments. Many disparate impact remedies, however, do not involve applying counterweights to competitive processes. As Professor Richard Primus argues, even those that do involve reallocation of benefits may be unproblematic if helping the disadvantaged group is only a "motivating factor," rather than the "predominant motive" behind the disparate impact-avoiding adjustment. Primus, *supra* note 70, at 548.

[124] The constitutional avoidance canon provides that a potentially unconstitutional interpretation of a statute should be avoided where another interpretation is plausible. *See* LARRY M. EIG, CONG. RESEARCH SERV., STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 23 (2011), https://www.fas.org/sgp/crs/misc/97-589.pdf [https://perma.cc/7K95-RRPB] (summarizing various articulations of the canon).

[125] One can plausibly make the more radical argument that there is some constitutional risk in the fact that disparate impact encourages actors to consider racial effects before making decisions, but such a position implies that disparate impact itself is unsalvageable. *Inclusive Communities* suggests that, while the Court is concerned about imposing liability "so expansive as to inject racial considerations into every housing decision," 135 S. Ct. at 2524, at least five Justices do not consider this risk fatal to the doctrine. The "step zero" this Note advocates, then, takes a more moderate approach to these constitutional and doctrinal concerns.

The Court's second major concern is the risk of penalizing good faith actors for making rational choices.[126] Unlike "disparate impact vs. disparate treatment" issues, this concern can partially be dealt with in the "legally sufficient justification" prong of the disparate impact framework.[127] The framework does not, however, address the "double bind of liability" scenario the Court mentioned in *Inclusive Communities*, where the defendant risks disparate impact or disparate treatment liability whichever way it decides an issue.[128] If, for example, a minority-concentrated neighborhood has a large quantity of housing in a particularly poor condition, the municipality must either choose to condemn the poorly maintained properties and disproportionately evict minorities, or refuse to condemn and leave the minority neighborhood with disproportionately below-code housing.[129] These "disparate impact vs. disparate impact" scenarios pose practical and judicial-competence problems, but like disparate treatment conflicts, they are not present in all cases. Allowing tenants to stay in their homes after foreclosure perpetuates some tenancies in segregated neighborhoods or poorly maintained buildings, but there is no liability double bind, because honoring a lease contract does not create liability for those disparities.[130] In sum, the case for tenants in foreclosure avoids the Court's recent doctrinal and constitutional concerns about disparate impact, so it survives the likeliest "step zero" limitations and should proceed to the prima facie case.

Before discussing the prima facie case, however, it will be useful to briefly dispense with a few other arguable Fair Housing Act-specific "step zero" limitations, in light of Justice Kennedy's somewhat puzzling language about the "heartland" of disparate impact doctrine. *Inclusive Communities* and prior case law suggest three axes of liability that might bear on this "heartland": the statutory interest at issue (segregation or housing deprivation), the timing of the deprivation (front-end or back-end deprivations), and the type of practice or policy being challenged (housing barrier or housing improvement). First, it may be argued that the implied

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[126] *Id.* at 2522–23 (reasoning that disparate impact does not require "displacement of valid governmental policies," should not "force housing authorities to reorder their priorities," and must give entrepreneurs "latitude to consider market factors").

[127] *See infra* Section III.C.

[128] *See Inclusive Communities*, 135 S. Ct. at 2523.

[129] *See id.* at 2532 (Alito, J., dissenting) (noting that in the Eighth Circuit's decision in *Gallagher v. Magner*, 619 F.3d 823 (8th Cir. 2010), "even St. Paul's good-faith attempt to ensure minimally acceptable housing for its poorest residents could not ward off a disparate-impact lawsuit").

[130] There may be other potential disparate impact claims if, for example, the mortgagee in possession does not adequately maintain the property, but that result is not mandated by the court-ordered continuation of the lease, so it is a wholly separate issue and does not raise double-bind problems.

"step zero" in *Inclusive Communities* limited this heartland of liability to "zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification"[131]—that is, to segregation cases. It is true that allowing renters to remain in foreclosed homes, particularly in already-segregated neighborhoods, does not directly serve the Fair Housing Act's integration purposes the way zoning remedies do. The Act, however, serves both antidiscriminatory and integrationist purposes,[132] and nothing in *Inclusive Communities* suggests that segregation should occupy a higher tier of liability than direct deprivation of housing. Direct deprivation actually adheres more closely to the Fair Housing Act's plain language, which forbids "refus[al] to sell or rent . . . to any person because of race,"[133] while zoning rules only circuitously "make unavailable or deny"[134] any definable housing opportunity by creating a barrier to relocation.

Second, the Court points to "the heartland of disparate-impact suits targeting artificial barriers to housing,"[135] which may be taken as a sign that Fair Housing Act disparate impact applies more readily to practices that prevent a protected group from obtaining housing, as opposed to deprivations of existing housing. *Inclusive Communities* and standard refusal-to-rent cases (where a landlord's policies keep out minority renters) are both examples of what might be called "front-end" housing discrimination, which limits the available housing options or denies the right to obtain a particular housing. The Act, however, also clearly contemplates "back-end" housing discrimination, which disproportionately *deprives* a protected group of *already-obtained* housing. The phrase "otherwise make unavailable"[136] applies equally to "back-end" housing deprivation as to "front-end" housing denial, and HUD's regulations explicitly reinforce that the statutory prohibition extends to "[e]victing tenants because of their race."[137]

Third, the Court in *Inclusive Communities* approvingly cited an article by Professor Stacy E. Seicshnaydre,[138] which found that "housing barrier" cases—those that "deny minority households freedom of movement in a

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[131] *Inclusive Communities*, 135 S. Ct. at 2521–22.

[132] *See, e.g.*, Seicshnaydre, *supra* note 118, at 361 (noting the Act's "twin purposes" of nondiscrimination and integration).

[133] 42 U.S.C. § 3604(a) (2012).

[134] *Id.*

[135] *Inclusive Communities*, 135 S. Ct. at 2522.

[136] 42 U.S.C. § 3604(a).

[137] 24 C.F.R. § 100.60(b)(5) (2016).

[138] 135 S. Ct. at 2522.

wider housing marketplace"—have had markedly greater success in federal courts than "housing improvement" cases involving demolition, replacement, or condition improvement.[139] This distinction maps uneasily onto back-end discrimination, seemingly relegating it to the "housing improvement" category even when the eviction is unrelated to improvement plans. In Professor Seicshnaydre's view, the liability discrepancy exists because "housing barrier" cases almost always implicate both the integration and antidiscrimination purposes behind the Fair Housing Act, while "housing improvement" cases often lack a clear nexus with the Act's integration purpose.[140] A purpose-based explanation, however, seems inadequate to explain which cases in each camp succeed or fail, or how the twin-purpose analysis fits the disparate impact framework: either of Professor Seicshnaydre's "purposes" should be an independent and sufficient basis for liability, and racially disparate deprivation in particular is arguably more plainly prohibited by the Act than are segregation-perpetuating practices.[141]

The discrepancy in liability between housing barrier and housing improvement cases finds a more principled explanation in the "disparate impact vs. disparate impact" situation described above. Housing improvement-based cases often involve challenges to resident displacement as part of local revitalization or redevelopment plans,[142] situations where the Fair Housing Act's integration and nondiscrimination interests may actually work at cross-purposes. The foreclosure-related eviction of residential tenants is not part of any cognizable neighborhood development plan,[143] and does not directly implicate the thornier questions that arise when resident displacement is balanced against attempts to otherwise improve those residents' quality of life.[144] Thus, a tenants-in-foreclosure

[139] Seicshnaydre, *supra* note 118, at 360–61, 363.

[140] *Id.* at 420–21.

[141] *See* SCHWEMM & PRATT, *supra* note 13, at 14–15 (describing the "perpetuation of segregation" theory as an offshoot of traditional, discrimination-focused disparate impact cases, and noting that either or both can be a basis for liability).

[142] *See, e.g.*, Charleston Hous. Auth. v. U.S. Dep't of Agric., 419 F.3d 729, 733–34 (8th Cir. 2005) (demolition of a low-income apartment complex as part of a redevelopment plan); Mt. Holly Gardens Citizens in Action, Inc. v. Township of Mount Holly, 658 F.3d 375, 377 (3d Cir. 2011) (replacement of low-income housing with higher end homes).

[143] For evidence supporting the insufficiency of the economic improvement rationale here, see *infra* note 176.

[144] Disparate impact claims may be more difficult when residents are displaced through plans to ultimately improve their quality of life. Notably, in recent years there has been voluminous debate among scholars and in the popular press about the effects of gentrification and similar phenomena and the extent to which they disadvantage poor and minority residents. *Compare* Vivian Yee, *Gentrification in a Brooklyn Neighborhood Forces Residents to Move on*, N.Y. TIMES (Nov. 27, 2015), http://www.nytimes.com/2015/11/29/nyregion/gentrification-in-a-brooklyn-neighborhood-forces-

case does not fall within the problematic "housing improvement" category, and any concerns about straying from the "heartland of disparate-impact liability"[145] are adequately addressed by disparate impact "step zero."

B. The Prima Facie Case: Statistical Discriminatory Effect and Causation

Plaintiffs in disparate impact litigation must make a prima facie case that a statistical disparate impact exists, and that the challenged policy or practice caused that disparity.[146] It is often difficult to obtain exact statistics on foreclosure-related evictions because tenants are frequently not even parties to the foreclosure.[147] However, courts have allowed reasonable inferences and conclusions to be drawn at the prima facie stage where there are some gaps in the available data.[148] Neither the Court nor HUD has endorsed a particular statistical threshold for housing disparate impact,[149] but disparities in foreclosure-related tenant eviction (accounting for some level of imprecision) should clear a reasonably restrictive threshold in many jurisdictions. The statistical showings likely surpass, for example, the Equal Employment Opportunity Commission's (EEOC) "four-fifths rule" for Title VII claims, requiring a "selection rate for any race, sex, or ethnic group which is less than four-fifths . . . of the rate for the group with the highest rate" to demonstrate an "adverse impact."[150] Taking the EEOC's somewhat arbitrary threshold as a rough statistical guideline, and assuming that its applicability to a *negative* housing outcome would involve the inverse ratio, foreclosure-related eviction in many jurisdictions would have to demonstrate only that the practice or policy affects black renters at more

residents-to-move-on.html?_r=0 [https://perma.cc/9NYM-N4J3] (documenting the multitudes of tenants leaving the neighborhood of Crown Heights due to increased rent and poor conditions), *with* Lance Freeman & Frank Braconi, *Gentrification and Displacement: New York City in the 1990s*, 70 J. AM. PLAN. ASS'N 39, 51 (2004) (finding that gentrification in New York City actually led to slower resident displacement), *and* Laura Sullivan, *Gentrification May Actually Be Boon to Longtime Residents*, NPR (Jan. 22, 2014), http://www.npr.org/2014/01/22/264528139/long-a-dirty-word-gentrification-may-be-losing-its-stigma [https://perma.cc/LNX9-VJ65] (discussing two studies which suggest gentrification may be beneficial for long-term residents). Wherever one falls in this debate, the differences of opinion support some judicial wariness about invalidating policies that displace some minority households as part of plans to improve life in that neighborhood.

[145] Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2522 (2015).

[146] *Id.* at 2514.

[147] *See* Johnson, *supra* note 2, at 980–81.

[148] *See, e.g.*, Gallagher v. Magner, 619 F.3d 823, 835–36 (8th Cir. 2010) (allowing reasonable inferences and noting several other circuits that have done the same).

[149] *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,468–69 (Feb. 15, 2013).

[150] 29 C.F.R. § 1607.4 (2015). For a more detailed discussion of the four-fifths rule's history, implementation, and potential drawbacks, see STEPHANIE R. THOMAS, STATISTICAL ANALYSIS OF ADVERSE IMPACT: A PRACTITIONER'S GUIDE 30–39 (2011).

than 125% the rate of white renters.[151] The statistical proof will obviously differ depending on the locality, but several studies indicate that a high percentage of urban localities are likely to reveal racial disparities in residents facing tenant foreclosure well above a 125% threshold.[152]

The more onerous half of the prima facie case is its "robust causality requirement,"[153] the claimant's "burden of proving that a challenged practice *caused or predictably will cause*" the statistical effect.[154] The Court in *Inclusive Communities* reinforced its relatively conservative approach to disparate impact causality: for example, "[i]f a real-estate appraiser took into account a neighborhood's schools, one could not say the appraiser acted because of race."[155] There is a measure of compromise and perhaps oversimplification inherent in such analysis, since any disparate impact causation, however immediate, implicates background social conditions and "factors other than the defendant's policy"[156] to a degree that typical tortious and criminal causation analyses do not. The Court asserted that the causality requirement "protects defendants from being held liable for racial disparities they did not create."[157]

Policies and practices that result in foreclosure-related eviction should satisfy even a rigorous causation requirement. It is true that mortgagees and other actors in the foreclosure crisis did not "cause" the relative prevalence of black renters, or the broad social disparities that disproportionately placed black renters in more vulnerable housing,[158] but direct causation of the deprivation at issue is sufficient for the prima facie burden. After all, in *Griggs* the plaintiff satisfied its prima facie burden[159] even though Duke Power Company did not cause disparities in black employees' high school diploma attainment. Likewise, the plaintiff in *Inclusive Communities*

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[151] The most likely form for this analysis would be to first compute the rates of foreclosure-related eviction for both black and white renters over a particular period of time. The rate for black renters would then be divided by the rate for white renters, and if the result is higher than 1.25 or some other court-set measure, then a statistical disparate impact has been shown. *See generally* THOMAS, *supra* note 150, at 33–34.

[152] For example, one study of four New England states found that the foreclosure rate in poorer, largely nonwhite neighborhoods was over five times the rate in white, low-poverty neighborhoods, and that over 30% of those impacted were renters. PELLETIERE, *supra* note 42, at 3–4.

[153] Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2523 (2015).

[154] *Id.* at 2514 (emphasis added) (quoting 24 C.F.R. § 100.500(c)(1) (2014)).

[155] *Id.* at 2521.

[156] *Id.* at 2514 ("If a statistical discrepancy is caused by factors other than the defendant's policy, a plaintiff cannot establish a prima facie case, and there is no liability.").

[157] *Id.* at 2523.

[158] At least, predatory lending practices that underlay the foreclosure crisis are likely too attenuated from the renters to qualify as persuasive causation evidence.

[159] Griggs v. Duke Power Co., 401 U.S. 424, 430–32 (1971).

survived summary judgment[160] even though the zoning decision did not cause the wealth disparities underlying blacks' disproportionate need for affordable housing. Moreover, unlike situations where group preferences or personal decisions play a role in causing the disparity, there is also no meaningful intervening choice on the part of the renters that could prevent the deprivation.[161]

As noted in Section III.A, some of Justice Kennedy's language in *Inclusive Communities* might be read to suggest that policy and other considerations might complicate strict application of the prima facie case. After all, under a test like the EEOC's "four-fifths" rule, large numbers of housing policies and actions will potentially clear the bar for statistical disparity and causation. Ultimately, though, the most logical course for preserving neutral application of the three-part test is to embrace the prima facie case as requiring only what it claims to: statistical disparity and a demonstrated causal connection.[162] Indeed, in *Ricci v. DeStefano*, the Court's strongest recent criticism of racial quotas, the majority conceded "that a prima facie case of disparate-impact liability [is] essentially[] a threshold showing of a significant statistical disparity and nothing more."[163] A plaintiff who makes such a threshold showing and seeks a race-neutral remedy satisfies the prima facie requirement, shifting the burden to the defendant to justify its practice.

C. Legally Sufficient Justification

HUD's regulations state that a statistical discriminatory practice "may still be lawful if supported by a legally sufficient justification."[164] Once the charging party makes its prima facie case, "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

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[160] Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, 749 F. Supp. 2d 486, 500 (N.D. Tex. 2010).

[161] Group preferences may warrant a weaker causal inference than the systemic economic duress that leads to differences in educational and housing opportunities. If, for example, black residents of a racially integrated community disproportionately preferred—for aesthetic reasons, and at the same price as other homes—a building material that turned out to be hazardous, causation analysis for the developer who sold the homes would likely require more than the mere agreement to sell to those (disproportionately black) buyers. Similarly, the existence of other causal factors relating to the plaintiff's individual choices could cause courts to be wary of, for example, a disparate impact claim based on the correlation between race and criminal history, *but see* Dunn & Ehman, *supra* note 119, at 37, though this could also be dealt with at the "sufficient justification" stage.

[162] *Inclusive Communities*, 135 S. Ct. at 2523.

[163] 557 U.S. 557, 587 (2009) (internal citation omitted).

[164] 24 C.F.R. § 100.500 (2016).

respondent or defendant."[165] Various courts and academics, however, have historically differed on how high a burden the defendant bears,[166] and *Inclusive Communities* did not give detailed treatment to the operative HUD language. The Court did note that this step is "analogous to the business necessity standard under Title VII."[167] But while Title VII cases yield a larger volume of precedent,[168] they do not necessarily provide clearer guidance as to the level of scrutiny courts should apply.[169] The standard is best understood as "impos[ing] a significant but manageable burden,"[170] somewhere above a mere "legitimate business justification,"[171] but lower than "essential to the continued viability" of the enterprise, as some have advocated.[172]

Beyond these general calibrations as to the onerousness of proving "sufficient justification," it will be useful to unpack the HUD standard piece by piece. Breaking HUD's language into three concrete action steps, the defendant is required to (1) identify one or more potential interests, (2) prove that they are substantial, legitimate, and nondiscriminatory, and (3)

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[165] *Id.* § 100.500(c)(2).

[166] *See* Marcus B. Chandler, Comment, *The Business Necessity Defense to Disparate-Impact Liability Under Title VII*, 46 U. CHI. L. REV. 911, 934 (1979) (considering the defense sufficient "[i]f an employer believes that his employment practices serve his business needs . . . whether or not his belief is factually correct"); Susan S. Grover, *The Business Necessity Defense in Disparate Impact Discrimination Cases*, 30 GA. L. REV. 387, 388, 399 (1996) (preferring an "absolute necessity" requirement and setting out a four-element test); George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297, 1312–16 (1987) (advocating an intermediate standard, greater than a "legitimate nondiscriminatory reason" but short of "scientific standards of validity" (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).

[167] *Inclusive Communities*, 135 S. Ct. at 2522; *see also* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,470 (Feb. 15, 2013) ("The requirement that an entity's interest be substantial is analogous to the Title VII requirement that an employer's interest in an employment practice with a disparate impact be job related.").

[168] *Compare* Seicshnaydre, *supra* note 118, at 363 (finding ninety-two total Fair Housing Act disparate impact cases considered on appeal over a forty-year period), *with* Selmi, *supra* note 15, at 734 (finding 130 reported appellate Title VII disparate impact cases in just six combined years).

[169] *See* Grover, *supra* note 166, at 387 (noting that the strictness of this stage is an "overarching issue" of Title VII jurisprudence).

[170] Rutherglen, *supra* note 166, at 1312. This is seemingly higher than the standard the Court articulated in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 660 (1989), but multiple sources have interpreted the Civil Rights Act of 1991 as superseding *Wards Cove*'s more defendant-friendly interpretation. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074 (codified at 42 U.S.C. § 2000e-2(k) (2012)) (placing the burden on the employer to show the challenged practices are "consistent with business necessity"); *Inclusive Communities*, 135 S. Ct. at 2523 (recognizing *Wards Cove* as superseded by statute); *see also* Primus, *supra* note 70, at 522 ("Congress in 1991 sided with the *Wards Cove* dissenters, placing the burden of persuasion on the business necessity issue squarely on defendants.").

[171] See *Wards Cove*, 490 U.S. at 660.

[172] *See* Grover, *supra* note 166, at 387.

prove that the challenged practice is necessary to those interests.[173] The interest at issue for foreclosure-related tenant eviction may differ depending on whether the defendant is a mortgagee or state actor. Broadly speaking, though, there are three plausible and potentially overlapping interests common to public and private actors alike: conveying free and clear title to facilitate efficient resale of the property unburdened by ongoing leaseholds; keeping mortgagees and other foreclosure-sale purchasers from becoming unintentional landlords after foreclosure; and passing on savings to consumers through reduced interest rates and mortgage costs.[174] Notably, the desire to avoiding declining property values—a common rationale behind both housing-improvement and segregation-perpetuating practices[175]—actually works against the defenders of foreclosure-related eviction, because the mass evictions have left a blight of abandoned properties, often significantly harming neighborhood property values.[176]

None of these interests are themselves inherently discriminatory, so this Section will focus on whether they are substantial and legitimate, and whether the challenged eviction practice is necessary to achieve them. To qualify as "substantial," the proffered justification must be a "core interest of the organization that has a direct relationship to the function of that organization."[177] Broadly speaking, all three of the above interests are directly related to mortgagee practices and housing market regulation, so the importance of the interest will likely depend on evidence of a tangible benefit.[178] The justification "must be supported by evidence and may not be hypothetical or speculative,"[179] so it is not enough for a defendant to say,

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[173] *See* 24 C.F.R. § 100.500 (2016).

[174] These three interests may overlap where, for example, efficient resale keeps mortgagees from operating as long-term landlords, or increased revenue from a sale or upkeep avoidance is passed on to consumers.

[175] *See, e.g.*, Affordable Hous. Dev. Corp. v. City of Fresno, 433 F.3d 1182, 1196 (9th Cir. 2006) (allowing the refusal of a construction bond despite statistical disparate impact, based on a property value protection argument). Zoning in particular is rooted in desire to protect property values. *See* William A. Fischel, *An Economic History of Zoning and a Cure for Its Exclusionary Effects*, 41 URB. STUD. 317, 318 (2004) ("[Z]oning is best understood as an alternative to currently non-existent home-value insurance.").

[176] *See* Dan Immergluck & Geoff Smith, *The External Costs of Foreclosure: The Impact of Single-Family Mortgage Foreclosures on Property Values*, 17 HOUSING POL'Y DEBATE 57, 58 (2006) (finding an average cumulative harm of $159,000 of each foreclosed building on nearby properties in Chicago); Shlay & Whitman, *supra* note 50, at 162 (finding that "small amounts of abandonment had large, deleterious consequences for house sales prices" in surrounding Philadelphia neighborhoods).

[177] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,470 (Feb. 15, 2013).

[178] *See id.* (stating that a substantial interest analysis "requires a case-specific, fact-based inquiry").

[179] 24 C.F.R. § 100.500(b)(ii)(2) (2016).

for instance, that free and clear title makes it *possible* to resell at a higher price, unless that result demonstrably and regularly follows. Defining the line for "substantiality" may also involve some level of (at least implicit) interest balancing, since an interest and benefit may seem less substantial if it is significantly outweighed by the severity of the racial disparity and disparately applied harm.[180]

Assuming the demonstrated interests are substantial, their legitimacy depends on the state or municipal eviction policy at issue, as well as the nature of the evidence offered. HUD defines "legitimate" to require "objective facts establishing that the proffered justification is genuine, and not fabricated or pretextual."[181] For all three proffered interests, state actors' justifications may fail if the applicable laws that allow summary eviction of tenants in foreclosure are holdovers from old, agrarian policy principles or otherwise fail to consider foreclosure as a unique situation for tenants.[182] Post hoc justifications for laws and policies that simply overlook tenants should be less able to survive the "legitimacy" requirement, both because they are pretextual and because they do not respond to current housing realities.[183]

Distinct problems also arise for each of the interests detailed above. The free-and-clear title interest is legitimate if the defendant can show demonstrable benefits to property value, but it may be pretextual or violate the "nondiscriminatory" requirement if there is a suggestion that the *real* interest is to replace minority tenants with white tenants. For the unwitting-landlord justification, to the extent that disposing of tenants saves on maintenance and other property management costs, avoiding the basic building upkeep and supervision of one's property mandated by many localities' building codes[184] and the common law[185] is hardly a "legitimate" interest—particularly given extensive evidence that mortgagees regularly

[180] *See* Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 940 (2d Cir.) (engaging in "balancing the showing of discriminatory effect against the import of the Town's justifications"), *aff'd*, 488 U.S. 15 (1988) (per curiam).

[181] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11,471.

[182] *See* NAT'L LOW INCOME HOUS. COAL., *supra* note 38 (summarizing various states' limited eviction protections for tenants in foreclosure).

[183] *See* Johnson, *supra* note 2, at 978 ("Even if a lender's eviction of an innocent tenant is arguably grounded in the law, a blanket policy of evicting tenants is irrational given the current market realities.").

[184] *See, e.g.*, CHI., ILL., MUN. CODE § 13-12-126 (2016) (describing a mortgagee's maintenance duties for vacant buildings).

[185] *See* Nadav Shoked, *The Duty to Maintain*, 64 DUKE L.J. 437, 489–91 (2014) (summarizing various existing common law maintenance duties imposed on landowners).

fail to maintain abandoned properties in minority neighborhoods.[186] The consumer-savings justification is legitimate facially, but only inasmuch as the defendant has proof independent of any savings accrued from the *illegitimate* interest of avoiding landlord and upkeep responsibilities. Proving legitimate savings may therefore depend largely on evidence that foreclosed buildings unburdened by tenants regularly and quickly yield higher sale prices, counter to documented effects of the evictions on the mass-vacancy and abandoned-property epidemic.[187]

Finally, many mortgagees and state actors will have difficulty showing that prompt summary eviction of tenants is a "necessary" practice. The fact that several states and municipalities have enacted protections for tenants in foreclosure without disastrous results for banks or local governments weighs against a provable claim of real necessity.[188] The inadequacy of the "necessity" argument becomes still more apparent when held against the tenants' blamelessness in foreclosure scenarios, as well as the often startling racial disparity statistics and onerous social costs to both tenants and communities. While HUD does not require that a "necessary" practice have some nexus with the people it affects, it is natural to assume that a practice will be scrutinized more skeptically when the disparately impacted group has no fault or stake in the challenged practice. Homeowners impacted by foreclosure, for example, are disproportionately black and Latino,[189] but while discriminatory practices may have contributed to this disparity, each homeowner signed onto a mortgage that he or she later could not pay. By contrast, tenants in foreclosure are collateral damage, lacking any culpability in the foreclosure, so a practice

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[186] *See* NAT'L FAIR HOUS. ALL., *supra* note 51, at 2 (finding that real estate-owned "properties in communities of color generally appeared vacant, abandoned, blighted and unappealing" while those in "[w]hite communities generally appeared inhabited, well-maintained and attractive to real estate agents and homebuyers"). It is true that that tenants sometimes cause additional costs by damaging and degrading the property, but this is hardly a justification for owners' failure to perform routine maintenance, and tenants can still be charged for some damages to the property.

[187] *See* WILLIAM C. APGAR, HOMEOWNERSHIP PRESERVATION FOUNDATION, THE MUNICIPAL COST OF FORECLOSURES: A CHICAGO CASE STUDY 2 (2005), http://www.issuelab.org/resources/1772/1772.pdf [https://perma.cc/RLP4-EK9V]; Johnson, *supra* note 2, at 987; NAT'L COMM'N ON FAIR HOUS. & EQUAL OPPORTUNITY, *supra* note 5, at 34.

[188] *See* Been & Glashausser, *supra* note 36, at 16–19 (detailing stronger protections in several states); Cornelio, *supra* note 7, at 380 (concluding that the effect of strong state laws on foreclosing mortgagees' use value and investment-backed expectations is "not large"). *But see* Ryan K. Lighty, *Landlord Mortgage Defaults and Statutory Tenant Protections in U.S. Foreclosure and U.K. Repossession Actions: A Comparative Analysis*, 21 IND. INT'L & COMP. L. REV. 291, 305–06 (2011) (suggesting that the Massachusetts law requiring "just cause" to evict a tenant in a foreclosed property may be overly detrimental to stakeholders in the property). It is possible that necessity will be more easily proved by smaller lenders or other entities that can show substantial actual or likely pecuniary loss.

[189] *See* NAT'L COMM'N ON FAIR HOUS. & EQUAL OPPORTUNITY, *supra* note 5, at 68.

that displaces tenants and abrogates their bargained-for leases warrants higher scrutiny.

Similarly, the magnitude of the deprivation at issue should tip the scales of "necessity." As discussed in Section I.B, sudden loss of home is a private tragedy in itself, destabilizing families and causing dignitary harm in addition to the unexpected expense.[190] For many low-income residents, moreover, short-notice eviction means more than a loss of one housing option. Finding equivalent housing may not be feasible in a short timeframe, particularly if the eviction becomes part of the tenant's record.[191] Even after locating housing, the same tenants disproportionately affected by foreclosure-related evictions are often those least able to take paid time off work, hire movers, or pay a new home's security deposit, particularly if the last security deposit could not be recouped.[192] Even free contract principles, normally a touchstone for opponents of fair housing regulations, do not speak strongly in the defendants' favor: tenants cannot bargain for mortgage health in any practical sense, as it is much less apparent than physical conditions or neighborhood quality,[193] yet there is no eviction-related common law analogue to the implied warranty of habitability's minimum-conditions guarantee.[194]

Even if courts decide that the actual magnitude of harm to plaintiffs is irrelevant doctrinally, harm to the surrounding communities and municipalities is surely relevant to the persuasiveness of the defendant's necessity justifications. General expediency, dubious cost savings, and adherence to archaic property law absolutisms are insufficient to show the "necessity" of a practice that leaves vacant and unsupervised buildings, hurts surrounding property values, causes an increase in crime in and

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[190] *See* Fried, *supra* note 25, at 359–61 (discussing the psychological effects of resident displacement); Gupta, *supra* note 35, at 556 (suggesting that "losses of homes during the Crisis were emotionally traumatic because people felt like they were losing parts of themselves"); Johnson, *supra* note 2, at 983 (describing costs incidental to unexpected eviction).

[191] *See* Dunn and Ehman, *supra* note 119, at 35–36 (describing the difficulty of finding new housing with an unexpected eviction on one's record).

[192] *See* Johnson, *supra* note 2, at 983; ROTHSTEIN, *supra* note 48, at 11.

[193] In many jurisdictions, tenants may be able to track down a *lis pendens* indicating the start of the foreclosure process, but even sophisticated renters are unlikely to do so. *See, e.g.*, *How to Check Your Deed*, COOK CTY. RECORDER OF DEEDS, http://cookrecorder.com/how-to-check-your-deed [https://perma.cc/N5H4-K4V6] (giving instructions for online *lis pendens* lookup in Cook County, Illinois). It may be argued that the sheer prevalence of foreclosure in certain lower income communities means that foreclosure risk is part of the lower rent bargain, but this ultimately becomes a perverse argument, using disparate impact itself as a defense against disparate impact.

[194] There are certainly eviction-related common law prohibitions—for example, forbidding retaliatory eviction—but nothing that directly proscribes unexpected tenancy termination, beyond the general notice requirements involving due process. *See, e.g.*, Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 799–800 (1983). Even these basic notice requirements are limited or nonexistent in some states. *See* Mik v. Fed. Home Loan Mortg. Corp., 743 F.3d 149, 159 (6th Cir. 2014).

around abandoned buildings, slows local economic opportunity, burdens sheriffs' departments, and generally allocates the cost and risk from the foreclosing party to the municipality.[195]

D. Alternative Available Practice

If the defendant shows a legally sufficient justification for its policy or practice, HUD's regulation shifts the burden back to the disparate impact plaintiff to demonstrate "that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect."[196] The interest that the alternative practice must serve will differ slightly depending on whether the particular plaintiff chooses to challenge mortgagee practices, local ordinances, state laws, or other policies implicated in foreclosure eviction, as discussed in Section III.C. Assuming the challenged practice survives the sufficient-justification stage, the interest behind that practice can be served by an alternate practice allowing for adequate time and notice allowances for renters, thereby avoiding racially disparate evictions.

The *ideal* alternative practice for tenants facing foreclosure is not immediately apparent, as adequate tenant-protection measures have proven elusive to legislators, courts, and academics alike.[197] The now-expired Protecting Tenants at Foreclosure Act gives a reasonable model for basic timing-and-notice standards, though the typical truncated process for eviction cases results in even enacted notice requirements being regularly ignored.[198] That said, it may be unrealistic to expect courts to resolve pervasive summary-process iniquities or coin broad new tenure-security doctrines,[199] especially as part of a disparate impact remedy. For tenants evicted during standard one-year leases, a compromise alternate practice based on sufficient advanced notice and the right to maintain bona fide one-year leases has the advantage of being proven practicable, without

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[195] *See* Johnson, *supra* note 2, at 984–85 ("[A]id to innocent renters evicted by lenders unduly strains public and private resources."); *supra* Section I.B.

[196] 24 C.F.R § 100.500(c)(3) (2016).

[197] Recent literature has seen calls for security of tenure and "good faith" eviction limitations, *see* Deborah Hodges Bell, *Providing Security of Tenure for Residential Tenants: Good Faith as a Limitation on the Landlord's Right to Terminate*, 19 GA. L. REV. 483, 484 (1985); Roisman, *supra* note 7, at 819, allowing tenants to bring a "summary preliminary injunction" against eviction, Lauren A. Lindsey, Comment, *Protecting the Good-Faith Tenant: Enforcing Retaliatory Eviction Laws by Broadening the Residential Tenant's Options in Summary Eviction Courts*, 63 OKLA. L. REV. 101, 101 (2010), and expanded due process protections, Rose, *supra* note 2, at 409.

[198] *See* Rose, *supra* note 2, at 408–09; MARK SWARTZ & RACHEL BLAKE, LAWYERS' COMM. FOR BETTER HOUS., LCBH 2009 REPORT: CHICAGO APARTMENT BUILDING FORECLOSURES: IMPACT ON TENANTS 11–12 (2010).

[199] *But see* Roisman, *supra* note 7, at 840–56 (advocating new common law doctrines for renters).

asking too much by way of judicial-procedural change. Such a solution could resemble the admittedly imperfect protections in the PTFA,[200] but a disparate impact remedy has the advantage of yielding both injunctive relief and the possibility of damages (at least in particularly culpable or repeat-offender cases);[201] by contrast, the PTFA was generally understood not to provide a private right of action,[202] precluding a separate remedy for violations beyond dismissal of the eviction action, and state laws often do not provide penalties for notice-procedure violations.[203]

The alternate practice is less clear for those living, as many lower income tenants do, with oral or shorter term leases. Tenants without leases were generally entitled to ninety-day notice under the PTFA,[204] but it may be argued that any judicially ordained protection beyond the applicable state notice period[205] warrants greater wariness, because it would actively entitle tenants with oral leases—which are generally construed as monthly or less[206]—to *more* tenancy security than they had under the pre-foreclosure landlord. Nonetheless, universal ninety-day (or greater) notice would provide protection against foreclosing mortgagees bringing mass eviction actions and forcing tenants to prove their leases' validity in court, rather than first learning information about the tenants and their leases and using good faith efforts to collect rent. Additional notice requirements integrating tenants into the foreclosure process[207] are also reasonable to protect tenants who lack long-term leases but have had a long, stable tenure.

Even if defendants can provide a legally sufficient justification, existing state laws and the PTFA give clear and practicable models for less

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[200] *See* Lighty, *supra* note 188, at 302–04; Rose, *supra* note 2, at 412–13.

[201] *See* 42 U.S.C. §§ 3612(g)(3), 3614(d) (2012) (listing increased penalties for repeat offenders); Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,474 (Feb. 15, 2013) (affirming HUD's interpretation that disparate impact liability includes the possibility of damages and penalties).

[202] *See, e.g.*, Mik v. Fed. Home Loan Mortg. Corp., 743 F.3d 149, 159 (6th Cir. 2014); Logan v. U.S. Bank Nat'l Ass'n, 722 F.3d 1163, 1169 (9th Cir. 2013); Gullatt v. Aurora Loan Servs., LLC, No. 1:10–cv–01109–AWI–SKO, 2010 WL 4070379, at *6 (E.D. Cal. Oct. 18, 2010).

[203] For instance, in Illinois a landlord who brings an eviction action without appropriate prior notice simply has her case dismissed, and may bring a new action after properly notifying the tenant. No further remedy is provided for a landlord's failure to give notice prior to filing an eviction action. *See* 735 ILL. COMP. STAT. 5/9-104 (2014) (detailing the notice requirement, but providing no additional consequences for noncompliance).

[204] Pub. L. No. 111-22, § 702(a)(2)(B), 123 Stat. 1660, 1661 (codified as amended at 12 U.S.C. § 5220 (2012)).

[205] *See* NAT'L LOW INCOME HOUS. COAL., *supra* note 38.

[206] *See, e.g.*, 735 ILL. COMP. STAT. ANN. 5/15-1224 (2014); MO. ANN. STAT. § 441.060 (West, Westlaw through 2016 Sess.).

[207] These notice requirements would resemble what Professor Henry Rose argues are necessary for due process. Rose, *supra* note 2, at 419 (arguing that due process requires that tenants have notice of, and opportunity to contest, a foreclosure).

discriminatory alternatives. Because these alternate practices do not cause significant harm to mortgagees and may actually be better for housing markets than a lease-extinguishing foreclosure regime, tenants in foreclosure have a convincing case that judicially ordered protections are both appropriate and necessary to avoid widespread racially weighted eviction of innocent renters.

CONCLUSION

Mass eviction of tenants in foreclosure has a demonstrable disparate impact on minority communities and families, without a legally sufficient justification. Policy interests in maximally efficient use of property are better served by alternate practices that protect tenants from unexpected displacement and keep buildings from sitting vacant. Of course, the most likely alternative practices could always be enacted by Congress through a renewal of the PTFA or another PTFA-like law. Even if Congress eventually passes such a law, achievement of a disparate impact remedy through the courts would not be a hollow or purely stopgap victory. This is both because the Fair Housing Act offers advantageous remedies that the PTFA and many existing state laws do not, and because a court victory for tenants in foreclosure would signal an increasing judicial cognizance of renters' vital yet vulnerable role in the modern housing marketplace.

More Americans are renting than ever, but renters are historically a politically disempowered group, often lacking a meaningful democratic influence when pitted against the preferences of landowners or politically influential mortgagees; this at least partially explains the uniquely outsized role courts have played in advancing tenants' basic protections through various common law doctrines. Among those who rent, a disproportionate number are lower income black and Latino individuals and families, for whom the security of rented homes is particularly imperative. Against this backdrop, a disparate impact victory for tenants in foreclosure would be a new shield against sudden displacement of families: it would signal that even longstanding housing policies are not outside the reach of the Fair Housing Act if they displace families and disregard the basic security of the home along racial lines, without a pressing justification. Such policies lie at the "heartland" of disparate impact.