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# THE CURRENT PREDATORY NATURE OF LAND CONTRACTS AND HOW TO IMPLEMENT REFORMS

*Stacy Purcell\**

## INTRODUCTION

When James R. Williams bought a home in Cincinnati from Harbour Portfolio Advisors using a land contract, he “thought he had found a great deal on a home.”<sup>1</sup> His monthly payments to Harbour were lower than his previous rent payments, and the money would go towards the \$40,000 purchase price of the home.<sup>2</sup> At the end of the thirty-year contract period, Mr. Williams would own the home.<sup>3</sup> Unfortunately, he soon discovered that he faced “around \$10,000 in critical repairs to the plumbing system” and his grandson suffered lead poisoning.<sup>4</sup> Instead of being a great deal, the home turned out to be a “money trap[.]”<sup>5</sup> Mr. Williams’s situation is not uncommon.<sup>6</sup> Unlike a traditional bank-financed mortgage, land contracts are directly financed by the seller, and thus give low-income individuals who would not qualify for a bank-financed mortgage a chance to own their own

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\* Candidate for Juris Doctor, Notre Dame Law School, 2019; Bachelor of Arts in Political Economy, Williams College, 2015. I would like to thank James Kelly for his helpful guidance throughout the writing process, my friends and family for their unwavering support, and the staff of the *Notre Dame Law Review* for their skillful editing. All errors are my own.

1 Matthew Goldstein & Alexandra Stevenson, *How a Home Bargain Became a ‘Pain in the Butt,’ and Worse*, N.Y. TIMES (July 7, 2017), <https://www.nytimes.com/2017/07/07/business/dealbook/how-a-home-bargain-became-a-pain-in-the-butt-and-worse.html>.

2 *See id.*

3 *See id.*

4 *Id.*

5 *Id.*

6 *See* Sarah Mancini & Margot Saunders, *Land Installment Contracts: The Newest Wave of Predatory Home Lending Threatening Communities of Color*, 28 COMMUNITIES & BANKING 9, 10 (2017) (“Land contract buyers are typically obligated to make substantial repairs, which often include overhauls of essential systems like plumbing and heating or adding a new roof.”); Heather K. Way, *Informal Homeownership in the United States and the Law*, 29 ST. LOUIS U. PUB. L. REV. 113, 129 (2009) (“[Land] contracts have a long and widespread history in the United States and have been common in many places where there has been an ample supply of affordable land or homes (often in substandard condition) and a pool of interested buyers ineligible for bank financing.”); Goldstein & Stevenson, *supra* note 1.

home. However, land contracts often come with unexpected and hidden costs for buyers.<sup>7</sup> In many states, land-contract buyers end up spending thousands on basic repairs to make their homes habitable.<sup>8</sup> What a buyer originally saw as a great deal becomes a toxic transaction.<sup>9</sup>

A land contract, also known as an “installment land contract” or “contract for deed,” is a “contract for the purchase and sale of real estate under which the purchaser acquires the immediate right to possession of the real estate and the vendor defers delivery of a deed until a later time to secure all or part of the purchase price.”<sup>10</sup> Unlike traditional bank-financed mortgages, the seller and the buyer contract together directly, and the seller retains legal title until the buyer has paid in full.<sup>11</sup> While the structure of land contracts varies by state, normally the buyer pays the seller an initial down payment and then makes monthly payments toward the purchase price plus interest for the duration of the contract term.<sup>12</sup>

A land contract typically favors the seller at the expense of the buyer. Like a traditional homeowner, the buyer must pay for property repairs, taxes, and insurance.<sup>13</sup> Yet foreclosure laws typically do not protect contract buyers and, if they miss a payment, they can be forced out of their home, losing any equity they had built up in the property.<sup>14</sup> As one real estate investor

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7 See Genevieve Hébert Fajardo, “*Owner Finance! No Banks Needed!*” *Consumer Protection Analysis of Seller-Financed Home Sales: A Texas Case Study*, 20 GEO. J. ON POVERTY L. & POL’Y 429, 429 (2013); Matthew Goldstein & Alexandra Stevenson, *Market for Fixer-Uppers Traps Low-Income Buyers*, N.Y. TIMES (Feb. 20, 2016), [https://www.nytimes.com/2016/02/21/business/dealbook/market-for-fixer-uppers-traps-low-income-buyers.html?\\_r=0](https://www.nytimes.com/2016/02/21/business/dealbook/market-for-fixer-uppers-traps-low-income-buyers.html?_r=0); Crystal Mys-lajek, *Risks and Realities of the Contract for Deed*, COMMUNITY DIVIDED, Jan. 1, 2009, at 2–3.

8 See, e.g., Rebecca Burns, *The Infamous Practice of Contract Selling Is Back in Chicago*, CHI. READER (Mar. 1, 2017), <https://www.chicagoreader.com/chicago/contract-selling-redlining-housing-discrimination/Content?oid=25705647> (describing the experience of Carolyn Smith who within months of purchasing her home in Illinois through a land contract spent “more than \$4,000 just to get the heat and running water working properly” and “another \$2,000 to replace the chimney”); Alexandra Stevenson & Matthew Goldstein, *Rent-to-Own Homes: A Win-Win for Landlords, a Risk for Struggling Tenants*, N.Y. TIMES (Aug. 21, 2016), <https://www.nytimes.com/2016/08/22/business/dealbook/rent-to-own-homes-a-win-win-for-landlords-a-risk-for-struggling-tenants.html> (telling the story of Samuel Rankin who bought a home in Arkansas which “had no heat, no water and major problems with its sewage system that led to nearly \$10,000 in repairs”).

9 See generally JEREMIAH BATTLE, JR. ET AL., NAT’L CONSUMER LAW CTR., INC., TOXIC TRANSACTIONS: HOW LAND INSTALLMENT CONTRACTS ONCE AGAIN THREATEN COMMUNITIES OF COLOR (2016).

10 RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 3.4A(a) (AM. LAW INST. 1997).

11 Way, *supra* note 6, at 129.

12 See *id.* at 128–29.

13 *Id.* at 129.

14 Much has been written about the forfeiture clauses in land contracts and contract buyers’ lack of foreclosure protections. See, e.g., Grant S. Nelson, *The Contract for Deed as a Mortgage: The Case for the Restatement Approach*, 1998 BYU L. REV. 1111; Mark F. Conway, Note, “*Equitable Adjustment*” in *Real Estate Contract Foreclosures: Victory for the Contract Vendee or Death of Installment Land Contract Financing?*, 35 S.D. L. REV. 402 (1990); Joel Rebecca Donelson, Comment, *The Bond for Title: A Modern Look at Alabama’s Land Installment Con-*

described it, in land contracts buyers “have all the responsibilities of a homeowner but none of the rights.”<sup>15</sup>

Because land contracts tend to favor sellers, buyers must protect themselves. Many buyers, however, lack the information needed to make responsible decisions.<sup>16</sup> Buyers often enter into land contracts without getting an independent inspection<sup>17</sup> and appraisal<sup>18</sup> of the property. As a result, buyers are often unaware of the true costs of the property they are purchasing. Contract buyers tend to be low-income individuals with less education and often are confused about the terms of the contract itself.<sup>19</sup> Their lack of information makes it difficult for buyers to protect themselves against unscrupulous sellers and is one of the reasons why some advocates consider land contracts predatory.<sup>20</sup>

Because land contracts are frequently inequitable, advocates and legislators have called for enhanced regulation.<sup>21</sup> This Note examines the imbalance of power between sellers and buyers during the formation of land contracts, the ways the law has attempted to lessen the inequality, and how to implement potential reforms. Part II discusses the history of land contracts and their recent resurgence since the 2008 housing crash. Part III explains that while current land contracts are often predatory, land contracts could potentially be a useful way for low-income individuals to become homeowners. Part IV outlines proposed national and state reforms. Part V makes recommendation for future reform and discusses potential obstacles to the implementation of two of the most promising reforms: mandatory independent inspections and mandatory independent appraisals.

## I. BACKGROUND

When land contracts first came into use in the late nineteenth century, they were “accepted as an innovative and efficient new land financing tech-

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*tract*, 46 ALA. L. REV. 137 (1994). State legislatures have taken various approaches to address the inequity of forfeiture clauses. Compare OKLA. STAT. ANN. tit. 16, § 11A (West 2017) (holding that all land contracts shall be subject to foreclosure proceedings), with OHIO REV. CODE ANN. § 5313.07 (West 2017) (holding that land contracts are subject to foreclosure proceedings when the buyer has made on time payments for five years or when the buyer has paid off twenty percent of the total price). While forfeiture remedies will be an important piece of land contract reform, this Note will leave that discussion to other scholars and will instead focus on the issues and potential legal reform concerning the creation of land contracts.

15 Heather Perlberg, *Apollo's Push into a Lending Business That Others Call Predatory*, NAT'L REAL ESTATE INVESTOR (Apr. 7, 2016), <http://www.nreionline.com/finance-investment/apollos-push-lending-business-others-call-predatory>.

16 See *infra* notes 70–72 and accompanying text.

17 See *infra* subsection III.B.1.

18 See *infra* subsection III.B.2.

19 See *infra* note 71 and accompanying text.

20 See, e.g., BATTLE ET AL., *supra* note 9, at 3–4; Mancini & Saunders, *supra* note 6, at 9.

21 See *infra* Part IV.

nique.”<sup>22</sup> At the time, courts favored individuals’ freedom to contract and the laissez-faire nature of land contracts, which let buyers and sellers negotiate a purchase without the involvement of third parties.<sup>23</sup> But in recent years, land contracts have become increasingly predatory as sellers take advantage of land contracts’ unregulated nature.

#### A. *The 1950s and 1960s*

In the first half of the twentieth century, land contracts were largely used by members of minority groups who were shut out of the traditional home-buying market. Racist lending practices prevented African Americans from receiving bank-financed mortgages, so they turned to land contracts.<sup>24</sup> For example, in Chicago an estimated eighty-five percent of African-American homeowners purchased their home with a land contract.<sup>25</sup> These sales heavily favored the sellers and were often unjust.<sup>26</sup> As is still the case, buyers rarely completed the contract term and obtained legal title.<sup>27</sup> Instead, they fell behind on payments and lost their homes.<sup>28</sup> The practice “stripped wealth from African-American communities and led to ‘debt peonage or impoverishment for many black contract buyers, and . . . decay of the communities in which such sales were concentrated.’”<sup>29</sup> While civil rights activism and the 1968 Fair Housing Act decreased direct housing discrimination, “[t]he legacy of credit discrimination from the early part of the 20th Century created fertile ground for the predatory lending practices” low-income buyers face today.<sup>30</sup>

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22 Nelson, *supra* note 14, at 1114–15.

23 *Id.*

24 See Way, *supra* note 6, at 129–30; Megan S. Wright, *Installment Housing Contracts: Presumptively Unconscionable*, 18 BERKELEY J. AFR.-AM. L. & POL’Y 97, 100 (2016); see also Burns, *supra* note 8 (attributing the prevalence of land contracts to “banks’ refusal to make mortgage loans in black communities—a policy known as redlining”).

25 BATTLE ET AL., *supra* note 9; Wright, *supra* note 24, at 99; Burns, *supra* note 8.

26 See Mancini & Saunders, *supra* note 6, at 10 (telling how land contracts “with inflated prices and harsh terms [were sold] to residents of credit-starved communities of color, and in impoverished rural areas”); Wright, *supra* note 24, at 100–04 (describing how homes were often sold at inflated prices, included hidden repair costs, and included forfeiture clauses that meant that a buyer could be evicted after missing just one payment).

27 See BATTLE ET AL., *supra* note 9, at 3 (“Then, as now, homeownership through these deals was often a mirage, and buyers lost their homes, their down payments, their sweat equity, and the money they paid for repairs, maintenance, insurance, and interest.”).

28 See *id.*

29 *Id.* at 4 (quoting BERYL SATTER, *FAMILY PROPERTIES: RACE, REAL ESTATE, AND THE EXPLOITATION OF BLACK URBAN AMERICA* 6 (2009)).

30 *Id.*; see also Wright, *supra* note 24, at 107; Burns, *supra* note 8.

### B. *Resurgence After the Great Recession*

Land contract use persisted through the twentieth century and into the early 2000s,<sup>31</sup> but it was not until after the 2008 subprime mortgage crisis and the Great Recession that land contracts saw an increase in popularity. The real estate market collapse left many foreclosed and vacant homes that had the potential to be converted into affordable housing, but banks were wary of making loans for lower-priced homes.<sup>32</sup> Furthermore, even if banks were willing to finance affordable home sales, many individuals came out of the housing crash with poor credit and thus were ineligible for bank mortgages.<sup>33</sup> With the traditional home-buying path inaccessible, potential homebuyers turned to land contracts.

Collecting reliable data on the prevalence of land contracts in America is difficult because the contracts often are not recorded,<sup>34</sup> but research shows that the use of land contracts has increased since the Great Recession. In Minneapolis, land contract sales increased fifty percent from 2008 to 2013.<sup>35</sup> In the Southeast, sales increased from 2008 to 2013 and then have remained steady or slightly declined.<sup>36</sup> In 2015, there were more land contract sales in

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31 See generally Robert M. Curry & James Geoffrey Durham, *Ohio Land Contract Law*, 19 U. DAYTON L. REV. 563 (1994); Eric T. Freyfogle, *The Installment Land Contract as Lease: Habitability Protections and the Low-Income Purchaser*, 62 N.Y.U. L. REV. 293 (1987); Nelson, *supra* note 14; Way, *supra* note 6; Donelson, *supra* note 14; Mike Lee, Comment, *Contracts for Deed: Extinction Long Overdue*, 37 TEX. TECH. L. REV. 1231 (2005).

32 See Christopher Barron, *Are Land Contracts Preying on Low-Income Buyers or Do They Offer a Different Avenue for Home Ownership?*, 6 U. BALT. J. LAND & DEV. 1, 5 (2016) (“The foreclosure crisis of 2008, flooded the housing market with a multitude of foreclosed homes.”); Goldstein & Stevenson, *supra* note 7 (describing how from 2010 to 2014 Fannie Mae sold over 20,000 foreclosed homes); Stevenson & Goldstein, *supra* note 8 (“[B]anks have all but stopped making loans for homes worth less than \$100,000, leaving millions of people with few options.”).

33 See BATTLE ET AL., *supra* note 9, at 4 (“Families that lost their homes also often lost their savings in trying to save the home, and are now left with impaired credit records that exclude them from conventional mortgage financing.”).

34 See Myslajek, *supra* note 7, at 2 (“[I]t is difficult to know exactly how prevalent contracts for deed are. . . . [T]he sales often go unrecorded due to a lack of financial and legal sophistication on the part of both parties involved in the agreement.”); Ann Carpenter et al., *Informal Homeownership Issues: Tracking Contract for Deed Sales in the Southeast* 6 (Fed. Reserve Bank of Atlanta Cmty. & Econ. Dev. Dep’t, Discussion Paper No. 02-17, 2017), <https://www.frbatlanta.org/-/media/documents/community-development/publications/discussion-papers/2017/02-informal-homeownership-issues-tracking-contract-for-deed-sales-in-the-southeast-2017-06-14.pdf>.

35 Jeffery Meitrodt, *Contract for Deed Can Be House of Horror for Buyers*, STAR TRIB. (July 5, 2013), <http://www.startribune.com/jan-14-contract-for-deed-can-be-house-of-horror-for-buyers/185756982/>.

36 See Carpenter et al., *supra* note 34, at 2. One notable exception is Atlanta, where corporate land contracts significantly decreased between 2013 and 2014. *Id.* at 10–13. However, the decrease may be due to sales between corporate sellers and a rise in missing data points in the sample. See *id.* at 11.

Detroit than traditional home mortgage sales.<sup>37</sup> At least three million people nationwide have purchased their homes with a land contract,<sup>38</sup> with sales concentrated in minority communities.<sup>39</sup>

There has also been a significant shift in who sells land contracts. Before 2008, land contracts normally involved individual sellers who owned a small number of properties.<sup>40</sup> Since then, investment firms have become key players in the market. Private investment firms took advantage of the large stock of foreclosed homes after the Great Recession and bought many houses at low prices.<sup>41</sup> The biggest firms in the business have bought thousands of homes in multiple states. For example, Harbour Portfolio Advisors purchased more than 6700 foreclosed homes and sold them to homebuyers through land contracts.<sup>42</sup> Another company, Vision Property Management, “owns more than 6,000 homes in two dozen states.”<sup>43</sup> Apollo Global Management is investing millions into land contracts.<sup>44</sup> Compared to the highly regulated home-mortgage market, land contracts give these investors the freedom to structure deals to their advantage and allow them to sell to peo-

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37 Joel Kurth, *Land Contracts Trip Up Would-Be Homeowners*, DETROIT NEWS (Feb. 29, 2016), <http://www.detroitnews.com/story/news/local/detroit-city/2016/02/29/land-contracts-detroit-tax-foreclosure-joel-kurth/81081186/> (reporting 2177 land-contract sales compared to 2023 home mortgage sales).

38 See Barron, *supra* note 32, at 2–3; Goldstein & Stevenson, *supra* note 7.

39 See BATTLE ET AL., *supra* note 9, at 4 (“Almost universally, the advocates reported that the land contract buyers were largely or exclusively families of color: African-American or Latino homebuyers.”); Wright, *supra* note 24, at 119–22 (describing how in cities across the country land contracts were consistently higher among African Americans and Hispanics).

40 See Mancini & Saunders, *supra* note 6, at 10 (“Until recently, the sellers of land installment contracts were primarily individuals with one or two investment properties.”).

41 See Alexandra Stevenson & Matthew Goldstein, *Federal Watchdog Agency Steps Up Inquiry into Home Contracts*, N.Y. TIMES (Nov. 14, 2016), <https://www.nytimes.com/2016/11/15/business/dealbook/federal-watchdog-agency-steps-up-inquiry-into-home-contracts.html>.

42 *Id.*

43 Matthew Goldstein & Alexandra Stevenson, *Vision, Operator of Rent-to-Own Homes, Gets Legislative Scrutiny*, N.Y. TIMES (Mar. 13, 2017), <https://www.nytimes.com/2017/03/13/business/dealbook/rent-to-own-firm-real-estate-vision-property.html>. While Vision Property Management says it sells homes using a lease-to-own program, its methods are more akin to a land contract sale than traditional lease purchase options. A traditional lease purchase option “involves two contracts: A lease (with attendant landlord-tenant protections) and an option contract giving the tenant the right to buy the property for a certain price within a fixed time period.” BATTLE ET AL., *supra* note 9, at 9. Several of Vision’s practices—such as requiring the renter/buyer to assume overdue taxes and to make the property habitable—violate landlord-tenant law and are the same predatory practices used in land contracts. *Frequently Asked Questions*, VISION PROPERTY MANAGEMENT (last visited Mar. 11, 2018), <https://vpm3.com/faq>. Thus, at least one scholar has advocated for Vision’s lease-to-own program to be governed by the same regulations that apply to land contracts. See Stevenson & Goldstein, *supra* note 8.

44 See Perlberg, *supra* note 15.

ple who may be eager to own a home, but are unable to get a bank-financed mortgage.

## II. PREDATORY NATURE OF MODERN LAND CONTRACTS

### A. *The Conflicting Interests of the Seller and Buyer*

In a traditional home sale, the interests of the seller and the buyer are aligned: both parties want to transfer ownership of the home from the seller to the buyer.<sup>45</sup> In a land contract sale, however, the interest of sellers can be “exactly opposite to those of the buyers.”<sup>46</sup> Similar to a traditional home sale, contract buyers generally want to obtain fee simple title of the property. In contrast, contract sellers, especially private investment firms, are primarily interested in making as much profit from each property as possible.<sup>47</sup> Often, the seller can make more money if the buyer fails to complete the monthly payments of the contract period because then the house is turned back over to the seller, who can market it to another buyer.<sup>48</sup>

Land contracts become predatory when sellers pursue their profit margin at the expense of buyers’ interests, and the lack of an independent financier exacerbates the problem. In most traditional home purchases, the bank financing the transaction and the buyer have similar interests: to ensure that the buyer will be successful in purchasing the home and paying back the financier’s loan. A traditional financier may require or provide certain measures “such as a title search, title insurance, and a property survey and appraisal” which would help protect the buyer.<sup>49</sup> But in a land contract, the seller is also the financier. Thus, instead of the financier’s interest aligning with the buyer, in a land contract the financier’s interest is the seller’s interest. Without an independent financier, buyers must rely on themselves to evaluate a seller’s offer and can easily fall victim to contract sellers’ traps.

### B. *Predatory Nature of Land Contracts*

The conflicting interest between the contract seller and contract buyer incentivizes the seller to remain silent in two major elements of a home sale: the physical condition of the house and the reasonableness of the total price being paid. While there is often no legal problem with the seller remaining silent in an arm’s length transaction, in a land contract sale, the failure to

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45 See BATTLE ET AL., *supra* note 9, at 2 (explaining that in “the mainstream home purchase market . . . generally the buyer and the seller both have the incentive to see the transaction succeed”).

46 *Id.*

47 See *id.* at 8 (“Sellers profit by churning a house through one land contract buyer after another.”).

48 See *id.* (“Sellers take whatever down payment the would-be owner can afford, pull in their payments and sweat equity for as long as possible, and then evict them and cycle another buyer into the property.”).

49 See Lisa A. Danielson, Note, *Installment Land Contracts: The Illinois Experience and the Difficulties of Incremental Judicial Reform*, 1986 U. ILL. L. REV. 91, 109.

disclose contributes to the information asymmetry between the seller and buyer. Contract buyers when “left to [their] own devices . . . quite often fail [ ] to do what is necessary to protect [themselves],” which can lead to predatory practices.<sup>50</sup>

## 1. The Physical Condition of the House

Because land contracts are concentrated in poor neighborhoods with deteriorating housing stock,<sup>51</sup> having an independent inspection should be an important part of the home-buying process. Land contracts, however, rarely involve an independent inspection.<sup>52</sup> The buyer often does not know that it would be a good idea to request an inspection, and it is often to the seller’s advantage to remain silent because the house may need serious repairs.<sup>53</sup> Even in states where sellers are required to conduct inspections, some do not provide them.<sup>54</sup> If the seller does conduct an inspection, it may not be independent. For example, in Akron, Ohio, Harbour Portfolio sold a home through a land contract “after a private inspection firm [Harbour] hired prepared a report that said the home was not in need of repairs. . . . A few months later, the house was condemned by Akron officials . . . .”<sup>55</sup>

The result is that “homes are sold ‘as-is’ . . . and most wouldn’t pass inspections required of rentals or through traditional mortgages.”<sup>56</sup> For example, in 2014, Vision Property Management sold Tiffany Bennett a home in Baltimore through a rent-to-own contract.<sup>57</sup> After Ms. Bennett and two young children moved in, she discovered that the home had “chipping, peeling lead paint,” and the children “were found to have dangerous levels of

50 Way, *supra* note 6, at 136 (quoting 14 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 84D.01(4) (Michael Allan Wolf ed., 2010)).

51 Heather K. Way & Lucy Wood, *Contracts for Deed: Chartering Risks and New Paths for Advocacy*, 23 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 37, 39 (2014) (“[Land contracts] are most popular in places where there is a limited supply of affordable rental housing, an ample supply of affordable land or homes (typically in substandard condition), and a pool of interested buyers ineligible for bank financing.”).

52 See BATTLE ET AL., *supra* note 9, at 8. *But see* Goldstein & Stevenson, *supra* note 7.

53 While there is typically not a problem under contract law when the seller is silent, it contributes to land contract’s predatory nature when combined with the other characteristics of land contracts.

54 See Meitrodt, *supra* note 35 (“In hundreds of cases, records show, sellers failed to provide mandated home inspections that would have revealed code violations and safety hazards.”).

55 Goldstein & Stevenson, *supra* note 7.

56 Kurth, *supra* note 37.

57 See Alexandra Stevenson & Matthew Goldstein, *Seller-Financed Deals Are Putting Poor People in Lead-Tainted Homes*, N.Y. TIMES (Dec. 26, 2016), <https://www.nytimes.com/2016/12/26/business/dealbook/seller-financed-home-sales-poor-people-lead-paint.html>. While Ms. Bennett purchased her home through a rent-to-own contract, the problem of lead-tainted homes is prevalent in both land contracts and rent-to-own contracts. *Id.* Furthermore, Vision Property Management’s practices are more akin to a land contract sale than traditional lease purchase options. *See supra* note 43.

lead in their blood.”<sup>58</sup> Ms. Bennett learned that “they should never have been in the house at all. City officials had declared the house ‘unfit for human habitation’ in 2013.”<sup>59</sup> Unfortunately, because title does not transfer from the seller to the buyer in most states until the buyer has paid off at least a substantial part of the purchase price, contract buyers may be ineligible for types of public assistance that would help them make the necessary repairs.<sup>60</sup>

Without an inspection, buyers often encounter unexpected repairs for which they are responsible and that can cost upward of a thousand dollars.<sup>61</sup> Considering that many contract buyers are low income, the cost of repairs combined with the monthly payments is often insurmountable, and many buyers fall behind on their payments.<sup>62</sup> Once a buyer falls behind, the seller can evict the buyer and market the house all over again.

## 2. The Reasonableness of the Total Price Being Paid

In addition to physical problems with the house, “[t]he purchase price in a land contract often, although not always, greatly exceeds the fair market value of the home.”<sup>63</sup> Because most buyers do not get an independent appraisal of the house, they “enter these deals blind to the gap between the purchase price and actual value of the home.”<sup>64</sup> While sellers stand to make a substantial profit from the inflated purchase price,<sup>65</sup> the high price makes it more difficult for the buyer to build equity in the home.<sup>66</sup> Furthermore, unless the home substantially appreciates and the market value rises above the purchase price, “buyers won’t be able to refinance . . . because banks won’t lend for more than a property’s market appraisal.”<sup>67</sup> The inflated “purchase price may be masked by the fact that the monthly installment payments may be equal to or less than fair market rent for a comparable property.”<sup>68</sup> A first-time homebuyer more accustomed to rental prices than

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58 *Id.*

59 *Id.*

60 *See id.* (“Because [buyers] do not technically own their house, they are ineligible for any state or local grants to help defray the cost of removing lead paint.”).

61 *See supra* notes 4, 6, 8 and accompanying text.

62 *See* Barton, *supra* note 32, at 6.

63 BATTLE ET AL., *supra* note 9, at 8; *see also* Meitrodt, *supra* note 35 (finding that one seller prices his homes an average of “40 percent more than the county’s assessed value”).

64 BATTLE ET AL., *supra* note 9, at 8.

65 *See* Matthew Goldstein & Alexandra Stevenson, *Cincinnati Sues Seller of Foreclosed Homes, Claiming Predatory Behavior*, N.Y. TIMES (Apr. 20, 2017), <https://www.nytimes.com/2017/04/20/business/dealbook/cincinnati-sues-harbour-seller-foreclosed-homes.html> (reporting that based on one professor’s estimates, Harbour Portfolio Advisors, a prominent land-contract firm, “could generate an annual return of at least 28 percent based on the way it prices homes”).

66 Because of the inflated purchase price, the property would have to substantially appreciate for the buyer to break even let alone build equity. *See* Meitrodt, *supra* note 35.

67 *Id.*

68 BATTLE ET AL., *supra* note 9, at 8; *see also id.* at 3 (“Although monthly payments charged in these agreements may appear similar to the typical rental price, or even lower,

housing prices may not recognize when a home is overpriced. Without an independent appraisal, the contract buyer will not know the bank-value of the home and could end up overpaying a significant amount.<sup>69</sup>

The information gap created by the failure to conduct an independent inspection and appraisal could be resolved if contract buyers were to request accurate and up-to-date information before signing a land contract. However, many land-contract buyers do not know enough about the home-buying process to get an inspection and appraisal on their own.<sup>70</sup> Most land-contract buyers are low income and may not understand the nature of the land contract they are signing,<sup>71</sup> especially when some sellers mislead buyers.<sup>72</sup>

### C. *Benefits of Land Contracts*

Given the problems surrounding land contracts, some have questioned whether they should exist at all.<sup>73</sup> Despite widespread problems, however, land contracts have the potential to be practical avenues to affordable homeownership. The desire to own a home is an essential part of the American dream.<sup>74</sup> Land contracts can help low-income individuals who are shut out of the traditional home-buying economy accomplish their goal of owning

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the actual costs are often much higher because the land installment contracts shift the repair and maintenance cost to the unsuspecting buyers.”).

69 See *id.* at 8 (“The buyer typically does not realize that the amount she will pay over several decades greatly exceeds what she would have paid with conventional financing of a fairly priced home.”).

70 See Fajardo, *supra* note 7, at 435 (“Since low income is one of the main reasons to enter into a contract for deed in the first place, buyers seldom request (nor do they know about) many of the safeguards banks require, such as inspections, appraisals, and title policies.”).

71 See *id.*; see also Meitrodt, *supra* note 35 (“[Some buyers] thought they were signing a lease.”); Stevenson & Goldstein, *supra* note 8; Jacob Wascalus, *Contract for Deed Emerges as a Tool for Affordable Housing Organizations*, COMMUNITY DIVIDEND (Apr. 1, 2013), (“One of the biggest issues around contracts for deed is simply ignorance about what they are and how they work, so more and better information is needed.”).

72 Meitrodt, *supra* note 35 (“[B]uyers said they were misled about outstanding debts attached to the properties.”).

73 See Alexandra Stevenson & Matthew Goldstein, *Housing Regulator Is Pushed to Crack Down on Sales of Foreclosed Properties*, N.Y. TIMES (May 11, 2017), <https://www.nytimes.com/2017/05/11/business/dealbook/foreclosed-houses-investment-firms-predatory-practices.html> (citing Senator Sherrod Brown, who wanted government-backed mortgage finance companies like Fannie Mae & Freddie Mac to stop selling foreclosed homes to investment firms who would resell them as land contracts). See generally Wright, *supra* note 24 (arguing that land contracts should be seen as presumptively unconscionable); Lee, *supra* note 31 (arguing that land contracts need to be significantly modified or eliminated completely). In addition to prohibiting beneficial land contracts, banning them outright might raise legal questions as to whether the law can restrict two parties’ freedom to contract in such a drastic way.

74 See MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* 349 n.3 (2016) (“Since the pioneer days, freedom and citizenship and landholding have advanced in lockstep in the American mind. To be American was to be a homeowner.”); Way, *supra* note 6, at 126 (“Since the founding of the American colonies, homeownership has been a

their own home.<sup>75</sup> Land contracts allow people who may not be able to afford a large down payment to still purchase a home. For example, Marie Simpson purchased her three-bedroom home with a down payment of only \$2000.<sup>76</sup> Ms. Simpson used a land contract because she “didn’t think [her] credit was up to par” to obtain a bank-financed mortgage.<sup>77</sup> As the supply of affordable housing decreases<sup>78</sup> and bank loans become harder to obtain, land contracts could become an important tool for low-income individuals.

The successes of nonprofits that use land contracts to provide affordable housing demonstrate the potential benefits. Unlike private investors,<sup>79</sup> nonprofit sellers want to help buyers achieve homeownership. Nonprofits focus on providing affordable housing and increasing neighborhood stabilization by ensuring that contract buyers complete the payment period and gain legal title of their homes.<sup>80</sup> For example, Greater Metropolitan Housing Corporation (GMHC) in Minnesota targets “areas of the Twin Cities that are in moderate to high need of stabilization” and sells affordable housing; 80% of their buyers earn less than 115% of the median household income.<sup>81</sup>

However, there are significant differences between the successful GMHC model and land contracts executed by private investors. GMHC attempts to set their buyers up for success and structure their transactions like traditional home sales.<sup>82</sup> They have independent appraisals<sup>83</sup> and individualized finan-

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predominant feature of the national psyche. Owning a home is the American Dream, the predominant symbol of family prosperity and success.”)

75 See DESMOND, *supra* note 74, at 349 n.3 (“The distinctly American desire to own a home is just as pronounced among the poor as it is among the middle class.”); Barron, *supra* note 32, at 9 (“Land contracts can be useful vehicles for traditionally unqualified buyers to acquire home ownership and improve their credit ratings.”); Fajardo, *supra* note 7, at 432 (“Despite the lack of credit, low-income people still have a strong desire to own homes even if traditional financing is not available.”).

76 See Perlberg, *supra* note 15.

77 *Id.* Ms. Simpson’s case is an example of the complexities of contract sales. Even though her interest rate was almost double the going rate for prime mortgages, she said that “[she] knew what [she was] getting into” and did not regret her purchase. *Id.* However, she also admitted that she would have to go back and finish reading the contract to know “what options she and her husband would have if they wanted to move before the 30 years were up, and whether they’d be able to hold on to any equity they’d accrue by making monthly payments,” suggesting she did not fully understand the contract she signed. *Id.*

78 See JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., THE STATE OF THE NATION’S HOUSING 2017 9 (2017), [http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/harvard\\_jchs\\_state\\_of\\_the\\_nations\\_housing\\_2017.pdf](http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/harvard_jchs_state_of_the_nations_housing_2017.pdf) (showing that the housing shortage was most concentrated in the lower-income market).

79 See *supra* Section III.A.

80 See Wascalus, *supra* note 71.

81 *Id.* While GMHC houses are affordable for low- and middle-income families, nonprofits tend to sell higher-priced houses than private investors. Compare *id.* (finding that the average GMHC house price is \$126,000), with Stevenson & Goldstein, *supra* note 8 (giving examples of several buyers who purchase homes on a land contract from private investors for much lower prices such as \$27,000 and \$38,000).

82 See Meitrodt, *supra* note 35.

cial counseling for each buyer.<sup>84</sup> They also ensure that “[b]uyers are screened to make sure they can afford the homes. Also, the nonprofit group makes sure monthly payments are reported to credit agencies, which helps buyers improve their chance of refinancing . . . .”<sup>85</sup> GMHC helped Betty Jo Zepeda go from being homeless and “sleeping in cars and on friends’ couches” to owning her own home.<sup>86</sup> While it is unrealistic to expect private sellers to provide the same type of support, the success of nonprofit sellers shows that land contracts “are not intrinsically bad.”<sup>87</sup> With a few reforms to address the current asymmetrical information between buyers and private sellers, land contracts “can be a tool for building credit, promoting homeownership, and stabilizing neighborhoods.”<sup>88</sup>

### III. CURRENT REFORM PROPOSALS

#### A. State Level

As publicity around the predatory nature of land contracts has increased, the call for reforms and pressure on investment sellers have grown at both the state and the national level. One state that is taking an aggressive approach is Ohio—which has been hit hard by predatory land contracts<sup>89</sup> and is working toward reform at both the local and state level. The City of Cincinnati, Ohio, is using litigation to curtail predatory practices. On April, 11, 2017, the City of Cincinnati filed a lawsuit against Harbour Portfolio Advisors, one of the largest investment sellers, who the City claims “entered into predatory land contracts for many of its properties.”<sup>90</sup> The complaint alleges that “the firm owes more the \$360,000 in unpaid fines, fees and violation notices” and claims that the “firm failed to properly maintain dozens of homes . . . leading in one case to a child’s testing positive for lead poisoning.”<sup>91</sup> The City says that Harbour buys homes for very little and “summarily sells them in their sub-standard conditions through land sale contract for up to five times their purchase price . . . [and] enters into such agreements with vulnerable residents, but intentionally fails to disclose known defects about the properties, including building code orders and other violations.”<sup>92</sup> Cincinnati is asking to collect the “outstanding fees, fines, and other costs owed to it by Harbour” as well as the injunctive and declaratory relief, including requiring Harbour “to disclose known property defect to purchasers . . . or

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83 *See id.*

84 *See* Goldstein & Stevenson, *supra* note 7.

85 Meitrodt, *supra* note 35.

86 Goldstein & Stevenson, *supra* note 7.

87 Myslajek, *supra* note 7, at 3.

88 *Id.*

89 *See* Goldstein & Stevenson, *supra* note 7; Stevenson & Goldstein, *supra* note 41.

90 Amended Complaint for Injunctive and Declaratory Relief and Damages at 9, *City of Cincinnati v. Harbour Portfolio Advisors LLC*, No. A1702044 (Ohio Ct. Com. Pl. July 20, 2017).

91 Goldstein & Stevenson, *supra* note 65.

92 Amended Complaint, *supra* note 90, at 13.

. . . take responsibility for repairs at properties.”<sup>93</sup> Cincinnati’s city solicitor has said that “she hope[s] the litigation w[ill] prompt legislators to pass new laws.”<sup>94</sup>

On October 4, 2017, Ohio State Representative Michele Lepore-Hagan introduced the Fair Lending Through Land Contracts Act, which would dramatically alter Ohio’s land contract law.<sup>95</sup> Among other changes, the bill declares that before a land contract is signed, the seller is required to “provide evidence of title,” “verify that the property . . . complies with the requirements of the applicable building code,” and “obtain and pay for an appraisal of the property by an appraiser listed on the department of commerce web site.”<sup>96</sup> After the contract is signed, the seller must record a copy of the contract, and the seller remains responsible for “[t]he payment of taxes, assessments, and other charges against the property from the date of the contract,” “[t]he payment of homeowner’s insurance premiums,” and “[a]ll repairs and maintenance on the property.”<sup>97</sup> If enacted, the bill would transform the traditional balance of power in land contracts and require the contract seller to assume responsibilities typically regarded as duties of a landlord, not a home seller. While such drastic change may be an overcorrection,<sup>98</sup> the new bill demonstrates that there is a political will to reform land contracts.

### B. Federal Level

Federal agencies and lawmakers are also calling on investment sellers to justify their practices. In January 2017, Representative Elijah Cummings, the ranking member of the House Committee on Oversight and Government Reform, sent a letter to the head of Fannie Mae accusing Vision Property Management of “churn[ing] unsuspecting tenants through ever-deepening money pits.”<sup>99</sup> In a letter to Vision Property Management, Congressman Cummings demanded that Vision provide detailed information including the sale price of each home, the number of buyers that have defaulted, and the number of homes that had code violations at the time the contract went into effect.<sup>100</sup> The Consumer Financial Protection Bureau (CFPB), the federal

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93 *Id.* at 4–5.

94 Goldstein & Stevenson, *supra* note 65.

95 See Lepore-Hagan Proposes “Fair Lending Through Land Contract” Bill Targeting Unfair Lending Practices by Out-of-State Investment Firms, MINORITY CAUCUS BLOG (Oct. 4, 2017), <http://www.ohiohouse.gov/democrats/press/lepore-hagan-proposes-fair-lending-through-land-contracts-bill-targeting-unfair-lending-practices-by-out-of-state-investment-firms>.

96 H.B. 368, 132nd Gen. Assemb., Reg. Sess. (Ohio 2017).

97 *Id.*

98 For further discussion on why forcing contract sellers to assume duties traditionally reserved for landlords is ill advised, see *infra* notes 120–21 and accompanying text.

99 Letter from Elijah E. Cummings, Ranking Member of House Comm. on Oversight & Gov’t Reform, to Timothy J. Mayopoulos, President & Chief Exec. Officer of Fannie Mae (Jan. 18, 2017), <https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/2017-01-18.EEC%20to%20Fannie%20Mae.pdf>.

100 Letter from Elijah E. Cummings, Ranking Member of House Comm. on Oversight & Gov’t Reform, to Alex Szkaradek, Chief Exec. Officer of Vision Prop. Mgmt. (May 11,

agency charged with protecting consumers, is investigating whether large investment sellers are complying with federal truth-in-lending laws.<sup>101</sup> During a Senate hearing in May 2017, Senator Sherrod Brown told the director of the Federal Housing Finance Agency, the federal agency responsible for supervising Fannie Mae and Freddie Mac, that “the agency should prohibit Fannie and Freddie from selling nonperforming mortgages and houses to firms looking to resell them through [land] contract[s].”<sup>102</sup> The director “promised that the housing agency would act to limit those sales.”<sup>103</sup>

In addition to politicians, activists have called for significant reform at the national level. The National Consumer Law Center published a “comprehensive set of rules” that include requiring an independent inspection, a third-party appraisal, the right to prepay, recordation, resolution of taxes and liens owed prior to the sale, and protections for early termination, among other reforms.<sup>104</sup> Similarly, the Federal Reserve Bank of Boston published an article that called for requiring independent inspections, appraisals, disclosure of the true cost of credit, settlement of property taxes and liens at sale, recordation, and protection upon default.<sup>105</sup> These calls for reform at both the state and national level present an opportunity to implement changes that will protect contract buyers from predatory sellers.

#### IV. IMPLEMENTATION

The current reform proposals present several potential strategies going forward. Two of the most promising reforms are requiring an independent inspection and requiring an independent appraisal before signing the land contract. These reforms would give contract buyers the reliable information they need about the physical condition of the house and the reasonableness of the total price being paid. The literature on reforms suggests that regulation at the national level “would provide the most efficient way to protect consumers.”<sup>106</sup> However, the current literature has left questions as to how such reforms would be implemented. Given the premium our legal system places on individuals’ freedom to contract, it is worth taking a closer look at how legislators, and potentially courts, may implement independent inspections and appraisals for land contract sales.

##### A. *How These Protections Work in a Traditional Home Sale*

Before discussing implementation, it is useful to have a working knowledge of how inspections and appraisals function in traditional home sales. In

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2017), <https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/2017-05-11.EEC%20to%20Vision.pdf>.

101 See Stevenson & Goldstein, *supra* note 41.

102 Stevenson & Goldstein, *supra* note 73.

103 *Id.*

104 See BATTLE ET AL., *supra* note 9, at 9–11.

105 See Mancini & Saunders, *supra* note 6, at 11.

106 *Id.* at 11; see also BATTLE ET AL., *supra* note 9, at 9–12; Barron, *supra* note 32, at 9–10.

a traditional bank-financed sale, the buyer usually requests an inspection.<sup>107</sup> The general inspector “investigates all major systems and components” of the home and if necessary suggests additional inspections by specialists to investigate further.<sup>108</sup> If any inspection reveals unexpected problems, the buyer will typically be able to negotiate with the seller through contingencies in the contract.<sup>109</sup> In contrast, an appraisal is traditionally requested by the lender as part of the process to secure bank financing.<sup>110</sup> The appraisal is the bank’s “way of making sure the contract price is the right price.”<sup>111</sup> Often the bank will use the appraisal price rather than the contract price when determining the size of the loan it is willing to give to the buyer.<sup>112</sup>

### B. Implementing Mandatory Inspections

Implementing mandatory inspections may be one of the easier reforms to pass because the government already has an established role in monitoring the physical condition of properties and ensuring homes meet minimum standards. For instance, city code ordinances regulate all types of residential housing—both owner-occupied and rental—to “establish minimum housing standards necessary for the preservation of the public safety, health, and general welfare in all buildings . . . intended to be used for dwelling purposes.”<sup>113</sup> However, enforcement of building codes can be inconsistent and insufficient.<sup>114</sup> Thus, additional protections are needed to help contract buyers learn about the physical conditions of the property before signing. There are two different approaches that have been suggested to solve this problem: (1) expand the implied warranty of habitability to land contracts, or (2) require an independent property inspection before finalizing the land contract.

Unlike owner-occupied homes, residential rental property must satisfy the implied warranty of habitability. While the definition of habitable may vary by region, it is generally accepted that the implied warranty of habitability imposes a duty on landlords to ensure that minimum standards are met and the property is suitable “for its intended use” as a dwelling.<sup>115</sup> The implied warranty of habitability was created in the 1960s and 1970s to “restore [the tenant and landlord] to a reasonable balance” after recognizing that the old standard of *caveat emptor* was ill fitted for our modern real estate

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107 See Brendon DeSimone, *The 7 Steps to Buying a Home*, ZILLOW PORCHLIGHT (Dec. 26, 2013), <https://www.zillow.com/blog/the-7-steps-to-buying-a-home-141376/>.

108 *Id.*

109 *See id.*

110 *See id.*

111 *Id.*

112 *See What You Need to Know About Home Appraisals*, TRULIA (Feb. 15, 2017), <https://www.trulia.com/blog/what-to-do-when-the-appraisal-is-less-than-the-offer/>.

113 CINCINNATI, OHIO, HOUSING CODE § 1117-05 (2017).

114 *See Freyfogle, supra* note 31, at 299.

115 *Id.* at 301.

market where the landlord has greater bargaining power than the tenant.<sup>116</sup> Many of the same incentives that drove the creation of the implied warranty of habitability for rental properties also exist in modern land contracts. Contract buyers “are typically ill-prepared to unravel the textual ambiguities and considerable risks of the installment contract and to undertake needed protective steps.”<sup>117</sup> Because properties sold in land contracts are often in severe states of disrepair, policymakers could argue—like they did when initially supporting the implied warranty of habitability—that extending the implied warranty of habitability to land contracts is needed to prevent dilapidated housing from becoming a public nuisance.<sup>118</sup>

However, the idea of extending the implied warranty of habitability to land contracts has not garnered as much support as requiring mandatory inspections.<sup>119</sup> Policymakers may be concerned that extending the implied warranty of habitability makes land contract too much like a rental agreement or that it will discourage sellers from offering land contracts at all.<sup>120</sup> The implied warranty of habitability would remove one of the main elements of a land contract: the buyer’s responsibility for all home repairs. If a land contract is truly a seller-financed home purchase, then imposing the implied warranty of habitability on the seller for the duration of the contract would not make sense. In a rental agreement, both the legal and equitable ownership interests remain with the landlord. In a land contract, the legal title stays with the contract seller until the completion of the contract, but—in many states—at some point the equitable ownership interest transfers to the buyer.<sup>121</sup> Imposing a duty on the legal owner to ensure that the house occupied by the equitable owner is habitable would distort how the law traditionally construes home sales.

To avoid requiring the legal owner to protect the equitable owner, Eric Freyfogle, a proponent of expanding the implied warranty of habitability, restricts the implied warranty of habitability to land contracts that functionally resemble residential rental agreements where the seller retains both legal and equitable title.<sup>122</sup> Freyfogle proposes limiting the implied warranty of habitability to land contracts in which: (1) the buyer has little equity in the property; (2) the “periodic payments by the [buyer are] substantially equivalent to the reasonable rental value of the property”; and (3) the seller

116 *Id.* at 297.

117 *Id.* at 305.

118 *See id.* at 298–99 (“Perhaps the prime motive behind the new habitability duty, however, was the public policy concern over the quality of the nation’s housing stock. Dilapidated housing was a public as well as a private concern.”).

119 *See supra* notes 96, 104 and accompanying text.

120 For a critique of the idea that the implied warranty of habitability may discourage sellers from offering land contracts, see Freyfogle, *supra* note 31, at 312–13, 319.

121 *See* Curry & Durham, *supra* note 31, at 570; Nelson, *supra* note 14, at 1126–27. A contract buyer’s equitable ownership in the property is an important asset because the buyer having it may require the seller to go through the foreclosure process if the buyer defaults rather than simply declare a forfeiture. *See generally id.*

122 Freyfogle, *supra* note 31, at 310–19.

is “likely to recover the property.”<sup>123</sup> However, these three factors may be difficult to apply in practice. Determining when the buyer has “little equity” in the property or when the seller is “likely to recover the property” would require courts to make detailed, fact-specific inquiries into the real estate market and the individual land contract in question in each case.<sup>124</sup> There is also the trouble of enforcement. The implied warranty of habitability would only be enforced if a contract buyer brought a claim and proved that the land contract should be treated as a lease.<sup>125</sup> Given that contract buyers are often low-income earners with little access to legal counsel,<sup>126</sup> they may not have the resources to bring a claim. Thus, even if the implied warranty of habitability were extended to land contracts, it may not prevent contract buyers from being trapped in substandard housing.

Instead of extending the implied warranty of habitability, legislators should implement mandatory independent inspections before the parties sign a land contract.<sup>127</sup> Compared to the implied warranty of habitability, requiring an inspection would put less of a burden on the contract seller. Instead of being forced to make repairs, sellers would only have to give the buyer accurate information about the condition of the property. Accurate information would allow contract buyers to go into the contract knowing what would be required to make the home habitable, decreasing the number who find out that the home needs costly repairs after signing.

Enforcing an inspection requirement may also be easier than enforcing the implied warranty of habitability. If the contract seller did not provide the buyer with an inspection report before finalizing the contract, then the contract would be either void or voidable, depending on how the law is written. While the buyer would still have to go to court to void a voidable contract, the court would not have to apply a fact-specific inquiry like Freyfogle’s functional equivalence test. The Illinois legislature has already implemented a mandatory inspection requirement that could be used as a model. In Illinois, a land contract is voidable by the buyer if the seller fails to attach a certificate of compliance establishing that a government-approved inspector inspected the property within the last thirty days and certified that there are no code violations.<sup>128</sup> Alternatively, the contract seller may attach a warranty expressing that there have been no code violations against the property in the last ten years, or if there have been code violations, attach a notice of all viola-

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123 *Id.* at 314.

124 *Id.* at 314–15. Freyfogle explains how courts would have to determine the “real equity” of the property by “the resale value of the home minus the unpaid contract price,” and “examine all [the] evidence” such as the seller’s “record in prior sales and contract terms, such as large balloon payments” to determine if the seller is likely to recover the property. *Id.*

125 *Id.* at 316.

126 See *supra* notes 70–71 and accompanying text.

127 For examples of advocates who support mandatory inspections, see BATTLE ET AL., *supra* note 9, at 10; BARRON, *supra* note 32, at 7; and Mancini & Saunders, *supra* note 6, at 11.

128 See 765 ILL. COMP. STAT. 75/1–75/2 (2017).

tions and a “detailed statement of all violations referred to in such notice.”<sup>129</sup> Under a statute like the Illinois provision, contract sellers would either be forced to repair their properties up to code standards or fully disclose all violations so buyers would recognize what repairs would be necessary. If, with full knowledge, a buyer chooses to go through with a land contract on a property with code violations, then the law would not prevent the two parties from doing so. Inspections would be a transparent way to ensure that both the contract buyer and seller are aware of the physical condition of the property before entering into the land contract.

### C. *Implementing Mandatory Appraisals*

Requiring mandatory appraisals would be another way to ensure that contract buyers are able to make informed decisions. Contract buyers, especially if they are low income, may be more concerned about the monthly payments than the amount they will end up paying overall during the length of the contract.<sup>130</sup> If buyers only consider the monthly payment and the purchase price, they may not realize that with the high interest, they would be paying considerably more during the entire contract period.<sup>131</sup> A fair estimate of the market value of the house determined by an independent appraisal would serve as a benchmark for the buyers to determine if the true cost of the contract including interest payments is too high. However, requiring an independent appraisal may be challenging to implement because unlike in a traditional home sale where the appraisal is part of the institutional lender’s approval process, in a land contract there may be no party who is willing and able to pay for the appraisal. The buyer wants an appraisal but may not be able to pay for the upfront cost, particularly given that many contract buyers are low income, or may not know enough about the home-buying process to request an appraisal. Given the inflated prices contract sellers often charge,<sup>132</sup> sellers likely would not want an appraisal and certainly would not want to pay for the appraisal unless the cost was added to the sales price. Thus, the government will need to mandate that one of the parties get an appraisal. While the cost of an appraisal may be prohibitive for a contract buyer, the cost is usually nominal compared to the total purchase price—the average cost of an appraisal is about \$330<sup>133</sup>—so requiring the seller to get an appraisal and allowing them to add the cost to the purchase price would be preferable.

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129 *Id.* at 75/2.

130 See Goldstein & Stevenson, *supra* note 1 (describing how one contract buyer “thought he had found a great deal on a home” because “[t]he monthly fee . . . was cheaper than the rent on his last home”).

131 See BATTLE ET AL., *supra* note 9, at 8; Perlberg, *supra* note 15.

132 See *supra* note 65 and accompanying text.

133 *How Much Does It Cost to Hire a Property Appraiser?*, HOMEADVISOR, <https://www.homeadvisor.com/cost/inspectors-and-appraisers/hire-a-property-appraiser/> (last visited Feb. 9, 2018).

Some contract sellers may already be required to get an appraisal and provide the buyer with additional financial information under the Truth in Lending Act.<sup>134</sup> Originally passed in 1968, the Truth in Lending Act (TILA) is intended to give consumers important information about the cost of real estate transactions before deals are finalized.<sup>135</sup> For the past six years, TILA has been enforced by the CFPB, which was created in 2011 as a response to the 2008 housing crisis.<sup>136</sup> TILA applies to “creditor[s],” defined as any “person who regularly extends consumer credit that is subject to a finance charge or is payable . . . in more than four installments.”<sup>137</sup> Residential real estate sellers are considered to “regularly extend[ ] consumer credit” if they engage in more than five transactions in a calendar year.<sup>138</sup> Thus, the investment firms in the land-contract market, such as Harbour Portfolio Advisors, who likely sell far more than five land contracts a year,<sup>139</sup> must comply with TILA.

Under TILA, the lender, in this case the contract seller, must give the buyer “a detailed line-item breakdown of fees, cash needed to close, rate, terms and costs over the life of the loan.”<sup>140</sup> The costs over the life of the loan would be a critical element for land contracts because it would allow the buyer to see the total cost including interest payments, which an uneducated home buyer may not fully consider when simply shown the monthly payment, interest rate, and purchase price in isolation.<sup>141</sup> In addition, for higher-priced mortgage loans, TILA requires lenders to conduct an appraisal performed by a certified or licensed appraiser before closing the sale.<sup>142</sup> A higher-priced mortgage loan is a transaction with an annual percentage rate<sup>143</sup> 1.5 or more percentage points above the average prime offer rate.<sup>144</sup> Most land contracts would qualify as higher-priced mortgage loans.<sup>145</sup> Finally, TILA gives the CFPB the power “to issue regulations addressing mortgage lending practices that are unfair or deceptive, or that seek to evade

134 Pub. L. No. 90-321, 82 Stat. 146 (1968).

135 See 12 C.F.R. § 1026.1(b) (2017).

136 Julian Hebron, *New Mortgage Disclosure Rules Arm Home Buyers with Information*, ZILLOW PORCHLIGHT (June 16, 2015), <https://www.zillow.com/blog/new-mortgage-disclosure-rules-178197/>.

137 12 C.F.R. § 1026.2(a)(17)(i).

138 *Id.* § 1026.2(a)(17)(v).

139 See *supra* notes 42–43 and accompanying text.

140 Hebron, *supra* note 136.

141 See BATTLE ET AL., *supra* note 9, at 8.

142 12 C.F.R. § 1026.35(c)(3).

143 The “annual percentage rate” is a uniform method of determining “the cost of credit, expressed as a yearly rate.” *Id.* § 1026.22(a)(1).

144 *Id.* § 1026.35(a)(1). The “[a]verage prime offer rate” is “an annual percentage rate that is derived from average interest rates, points, and other loan pricing terms currently offered to consumers by a representative sample of creditors for mortgage transactions that have low-risk pricing characteristics.” *Id.* § 1026.35(a)(2).

145 Since land contracts often have interest rates well above the national average for institutional-lender-backed mortgages, which has been hovering around four percent, it is likely that many would qualify as higher-priced mortgage loans under TILA. See BATTLE ET AL., *supra* note 9, at 1; Way & Wood, *supra* note 51, at 44; Perlberg, *supra* note 15.

TILA's regulations" and "gives buyers the right to sue in the case of injury caused by the seller's noncompliance with the law."<sup>146</sup> TILA should provide a method to require appraisals for some of the riskiest contract loans, and the CFPB has begun to hold land contract investors liable.<sup>147</sup>

However, TILA does not apply to all land contracts, and would not protect contract buyers who buy from an independent seller who does five or fewer deals a year. The simplest solution to address sellers not subject to TILA would be legislation that mandates all contract sellers obtain an appraisal, like the current Ohio reform bill.<sup>148</sup> Such legislation, however, may be politically unpopular because it would increase government regulation and limit the parties' valued freedom to contract. Instead of attempting to legislate mandatory appraisals, some states such as Minnesota have focused on advocacy and education; the Minnesota Commerce Department's website has a page dedicated to land contracts that encourages consumers to get an independent appraisal before signing a land contract.<sup>149</sup> There are also other ways that contract buyers can determine if they are paying a reasonable price without conducting a full appraisal. For example, Maryland requires contract sellers to disclose "with respect to the six-month period prior to the date of purchase . . . every transfer of title to the property, the sale price of each transfer, and the substantiated cost to the [seller] of repairs or improvement."<sup>150</sup> Maryland's law helps some of the most vulnerable buyers, those that deal with investment sellers who frequently turn over properties to new contract buyers,<sup>151</sup> learn whether the price they agree to pay is a good value without requiring sellers to conduct a new appraisal. Sites such as Zillow can also help buyers estimate the value of their home to determine if the contract seller is offering them a fair price.<sup>152</sup> Together with consistent enforcement

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146 Mancini & Saunders, *supra* note 6, at 11.

147 See Matthew Goldstein & Alexandra Stevenson, *Consumer Agency Can Demand Answers About Foreclosed Homes, Judge Rules*, N.Y. TIMES (Feb. 16, 2017), <https://www.nytimes.com/2017/02/16/business/dealbook/foreclosures-consumer-financial-protection-bureau.html>.

148 See H.B. 368, 132nd Gen. Assemb., Reg. Sess. (Ohio 2017) ("Prior to executing a land installment contract, the vendor shall obtain and pay for an appraisal of the property by an appraiser listed on the department of commerce web site . . . . The vendor shall provide a copy of the appraisal report to the vendee prior to execution of the contract.").

149 See *Contract for Deed: Important Tips*, MINN. COMMERCE DEP'T, <https://mn.gov/commerce/consumers/your-home/protect/real-estate/contract-deed.jsp> (last visited Jan. 27, 2018); see also MINN. HOME OWNERSHIP CTR., *CONTRACT FOR DEED: WHAT HOMEBUYERS AND SELLERS NEED TO KNOW TO ACHIEVE A SUCCESSFUL OUTCOME* (2012), <http://www.hocmn.org/wp-content/uploads/2013/01/Contract-for-DEED.pdf>; MINN. LEGAL SERVS. COAL., *TIPS ON RENTING TO OWN AND BUYING ON A CONTRACT FOR DEED* (2017), <http://www.lawhelpmn.org/files/1765CC5E-1EC9-4FC4-65EC-957272D8A04E/attachments/DB2293B4-BD09-4B09-96DC-EA2CCEC271CC/h-20-renting-to-own-a-home.pdf>. While it is helpful to encourage buyers to get an appraisal, this strategy may not be effective given contract buyers' limited resources and knowledge.

150 MD. CODE ANN., REAL PROP. § 10-103(a)(4) (LexisNexis 2017).

151 See *supra* notes 48–49 and accompanying text.

152 See *Zestimate*, ZILLOW, <https://www.zillow.com/zestimate/> (last visited Nov. 14, 2017).

of TILA, increased disclosure laws like Maryland's and increased buyer education like Minnesota's approach would help contract buyers determine the reasonableness of the purchase price even if the legislature cannot implement mandatory appraisals for all land contracts.

#### D. *How to Enforce Changes*

Enforcement of these suggested reforms presents its own set of challenges. In some states, reforms have already been passed, but they are not being enforced. For example, in Minnesota, records show that in “hundreds of cases . . . sellers failed to provide mandated home inspections that would have revealed code violations and safety hazards.”<sup>153</sup> In Minnesota, no state agency is responsible for overseeing compliance with the inspection legislation, so to reap any benefit from the protections, a contract buyer must sue the contract seller.<sup>154</sup> Similarly, the newly proposed Ohio bill requires the buyer to bring suit against the seller to obtain relief for violations.<sup>155</sup> Given that contract buyers are typically low-income individuals with little access to legal services,<sup>156</sup> relying on buyers to bring suits is unlikely to solve the predatory practices of contract sellers.

Instead, either states should charge one department with enforcing the new reforms or the reforms should be implemented at the national level. At the national level, the CFPB “has the authority to issue a comprehensive regulation that would address [the predatory nature of land contracts].”<sup>157</sup> However, the resignation of former CFPB director Richard Cordray, and the Trump administration's subsequent selection of Mick Mulvaney for CFPB acting director, puts the agency's future into question.<sup>158</sup> The Trump adminis-

153 Meitrodt, *supra* note 35.

154 See Jeffrey Meitrodt, *New Minnesota Law Puts Light on Contract for Deed*, STAR TRIB. (July 5, 2013), <http://www.startribune.com/new-minnesota-law-puts-light-on-contract-for-deed/214330131/> (“Legislators acknowledge that enforcing the new law will be difficult. No state agency has been charged with overseeing the market or rooting out abuses.”).

155 See H.B. 368, 132nd Gen. Assemb., Reg. Sess. § 5313.04 (Ohio 2017). However, the Ohio bill does give specific departments the power to implement sections of the new bill. See, e.g., *id.* § 5313.021(E)(3).

156 See BATTLE ET AL., *supra* note 9, at 4, 8.

157 *Id.* at 10; see also Mancini & Saunders, *supra* note 6, at 11.

158 As of this writing, Mulvaney's appointment is in litigation as the courts determine whether President Trump or resigning director Richard Cordray has the power to name the acting director. See Miranda Green, *Federal Judge Won't Block Trump's Pick to Lead Consumer Protection Agency*, CNN (Nov. 29, 2017), <http://www.cnn.com/2017/11/28/politics/director-cfpb-judge/index.html>. On January 10, 2018, Mulvaney won the first part of the legal battle when a federal district judge “denied a request for a preliminary injunction to remove Mick Mulvaney as acting director.” Jim Puzanghera, *Judge Denies Injunction to Remove Mick Mulvaney as Consumer Bureau's Acting Director*, L.A. TIMES (Jan. 11, 2018), <http://www.latimes.com/business/la-fi-cfpb-acting-director-20180110-story.html>. Leandra English, Cordray's pick for acting director and Mulvaney's challenger, has appealed the district court's decision, and the case is pending in the D.C. Circuit. See Ben Lane, *Court of Appeals Agrees to Quickly Review Legal Battle over CFPB Leadership*, HOUSINGWIRE (Jan. 23, 2018), <http://www.housingwire.com/articles/42351-court-of-appeals-agrees-to-quickly-review-le>

tration and Mulvaney have both called for limitations on the CFPB, with President Trump going so far as to say the agency is a “total disaster.”<sup>159</sup>

Whether enforcement happens at the national or state level, there is a risk that implementing new reform will increase compliance costs and cause fewer sellers to offer homes through land contracts. While “compliance headache”<sup>160</sup> and a subsequent decrease in the overall land-contract market is a real possibility, it should not deter lawmakers from enacting reform to combat predatory behavior. The new regulations could be structured to minimize compliance costs and target the worst offenders.<sup>161</sup> Furthermore, if the goal is to provide an affordable and achievable path to homeownership, then a decrease in the number of land contracts should not be a concern if the decrease is because there are no longer predatory sales.

#### CONCLUSION

Ultimately, requiring an independent inspection and appraisal would not prevent a willing buyer and a willing seller from signing a land contract. The two parties have the freedom to contract for whatever price they consider to be adequate consideration regardless of what an appraiser says the property is worth or what problems an inspector discovers. However, having an inspection and an appraisal would allow the contract buyer to enter the transaction with more complete information and would lessen the current imbalance of power often present between contract sellers and buyers. Land contracts have the potential to benefit marginalized communities, and there are current examples of successful land contracts.<sup>162</sup> With the implementation of independent inspections and appraisals, land contracts could provide more people with genuine opportunities to own homes.

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gal-battle-over-cfpb-leadership. *Id.* In addition to the controversy surrounding the acting director, some have questioned whether the structure of the CFPB—headed by one director who is removable only for good cause—is constitutional. In a recent en banc decision, the D.C. Circuit ruled that the CFPB director’s good-cause removal protection is constitutional. *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018). The D.C. Circuit decision is unrelated to the pending litigation between Mulvaney and English.

159 Renae Merle, *Dueling Officials Spend Chaotic Day Vying to Lead Federal Consumer Watchdog*, WASH. POST, (Nov. 27, 2017), [https://www.washingtonpost.com/business/economy/two-dueling-officials-spend-chaotic-day-vying-to-lead-federal-consumer-watchdog/2017/11/27/381eada2-d39c-11e7-b62d-d9345ced896d\\_story.html?utm\\_term=.56155c9f79f](https://www.washingtonpost.com/business/economy/two-dueling-officials-spend-chaotic-day-vying-to-lead-federal-consumer-watchdog/2017/11/27/381eada2-d39c-11e7-b62d-d9345ced896d_story.html?utm_term=.56155c9f79f).

160 Barron, *supra* note 32, at 10.

161 For example, Minnesota regulations do not apply if the contract seller sells fewer than four properties a year or if the buyer is represented by a licensed real estate broker or attorney. Meitrodt, *supra* note 154.

162 See *supra* Section II.B.