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From Reconstruction to  
Deconstruction: Undermining  
Black Landownership, Political  
Independence, and Community  
through Partition Sales of  
Tenancies in Common

Thomas W. Mitchell



*Land Tenure Center*

AN INSTITUTE  
FOR RESEARCH AND EDUCATION  
ON SOCIAL STRUCTURE,  
RURAL INSTITUTIONS,  
RESOURCE USE,  
AND DEVELOPMENT

# **FROM RECONSTRUCTION TO DECONSTRUCTION:**

## **UNDERMINING BLACK LANDOWNERSHIP, POLITICAL INDEPENDENCE, AND COMMUNITY THROUGH PARTITION SALES OF TENANCIES IN COMMON**

by

**Thomas W. Mitchell**

All views, interpretations, recommendations, and conclusions expressed in this paper are those of the author and not necessarily those of the supporting or cooperating institutions.

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## TABLE OF CONTENTS

<b>Introduction</b>	1
<b>1. Partition sales of black-owned land: How the rules of tenancies in common and patterns of family wealth transmission contribute to land loss in rural, African American communities</b>	9
1.1 Tenancies in common	10
1.2 Patterns of family wealth transmission amongst poor, rural African Americans contribute to the fractionation of interests and make much black-owned land a target for land speculators	13
<b>2. African American land imperative and historical factors contributing to land loss</b>	19
<b>3. Political and property theory together with comparative studies supports the view that land can provide the basis for community and ground greater democratic participation</b>	27
3.1 Visions of participatory democracy in a racially mixed society	27
3.2 Landownership in a participatory democracy	29
<b>4. Legal acknowledgment of the link between land and community</b>	38
4.1 Modern federal Indian policy recognizes that Indian landownership promotes Indian culture and community, despite the federal judiciary's tepid vindication of this policy	38
4.2 In takings jurisprudence, judges do not consider the importance land may have for minority communities in considering condemnation	44
<b>5. Proposal</b>	52
5.1 Land consolidation	53
5.2 Allow either a majority or a supermajority of those holding common tenancy interests to restructure as a limited liability company	57
5.3 States should establish land consolidation courts to aid rural property owners locked in inefficient patterns of ownership and improve the productivity of the land base	61
5.4 Restoration of land the USDA foreclosed upon or provision of alternative, in lieu land	64
5.5 Legal services attorneys with specialized training should be hired to provide assistance to heir property owners	65
5.6 Placing into trust African American heritage land	66
<b>CONCLUSION</b>	67

# **FROM RECONSTRUCTION TO DECONSTRUCTION: UNDERMINING BLACK LANDOWNERSHIP, POLITICAL INDEPENDENCE, AND COMMUNITY THROUGH PARTITION SALES OF TENANCIES IN COMMON<sup>1</sup>**

by

**Thomas W. Mitchell<sup>2</sup>**

## **INTRODUCTION**

Forty acres and a mule. The government broke that promise to African American farmers. Over one hundred years later, the USDA broke its promise to Mr. James Beverly. It promised him a loan to build farrowing houses so that he could breed hogs. Because he was African American, he never received that loan. He lost his farm because of the loan that never was. Nothing can completely undo the discrimination of the past or restore lost land or lost opportunities to Mr. Beverly. . . .<sup>3</sup>

The story of the federal government's failure to deliver "forty acres and a mule" to freed slaves after the Civil War has long been a part of African American folklore. This history has now been highlighted in an opinion by a federal judge in the landmark settlement of the class action lawsuit filed by black farmers against the United States Department of Agriculture ("the USDA"). The history of those individual African Americans who purchased land in states throughout the South following emancipation, however, remains largely unknown and uncelebrated. In total, this group acquired approximately 15 million acres of land in the region in the 50 years following the Civil War. As much as any group of Americans in this nation's history, these landowners embraced the republican ideal of the rural smallhold and widely distributed ownership, and believed that only through such ownership could real economic and political independence be achieved.<sup>4</sup>

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<sup>1</sup> Revised version of a thesis submitted in partial fulfillment of the requirements for the degree of Master of Laws (LL.M.) at the University of Wisconsin Law School, 1999.

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<sup>3</sup> *Pigford v. Glickman*, 185 F.R.D. 82, 112 (D.D.C. 1999).

<sup>4</sup> ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877* 109 (1988).

Unlike the large numbers of poor white men who were able to acquire land from the public domain under federal homestead laws in the late 1800s, African Americans who acquired land did so mostly by private market purchases, often in the teeth of threatened violence, limited access to credit, and overt discrimination.<sup>5</sup> The new group of black landowners who purchased rural land between 1865 and 1910 generally became owner-operators of farms; consequently, the high-water mark for black landownership strongly correlates with the high-water mark for the number of black farmers in the South. By 1920, there were more than 925,000 black farmers in the United States and one in four black farmers owned the land. Almost all of these black owner-operators lived in the South.

With the new millennium just on the horizon, the pattern of landownership in the rural African American community represents the mirror opposite of the trend in black land acquisition 100 years ago at the dawn of the twentieth century. Remarkable levels of acquisition have been replaced by extraordinary levels of land loss in the past half-century or so. Today, African American farm owner-operators—whether full- or part-owners—own little more than 2 million acres of land in the United States.<sup>6</sup> In part this is a trend amongst small farmers of all races and in every region. The number of small farmers and the acreage under ownership by small farmers have declined significantly in recent times. Yet land loss in rural African American communities far exceeds farmland lost by white farmers.<sup>7</sup> Even American Indian landowners—a group whose current land base represents but a fraction of its ancestral landholdings—have fared better than rural African American landowners over the past 50 to 60 years.<sup>8</sup>

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<sup>5</sup> *Id.* at 376, 403–4; see also LOREN SCHWENINGER, BLACK PROPERTY OWNERS IN THE SOUTH: 1790–1915 145–6, 148, 151–2 (1990).

<sup>6</sup> 1 BUREAU OF THE CENSUS, DEP'T OF AGRIC., 1997 CENSUS OF AGRICULTURE, PART 51, UNITED STATES SUMMARY AND STATE DATA 25 (1997) [hereinafter 1997 CENSUS OF AGRICULTURE]. The 1997 census reveals that the 11,192 black, full-farm owners owned 1,095,093 acres of land and the 5,368 black, part-owners owned 1,068,343 acres of land. In addition to these owners, an additional 1,891 tenant farmers rented 221,432 acres of land.

<sup>7</sup> *The Minority Farmer: A Disappearing American Resource; Has the Farmers Home Administration Been the Primary Catalyst?*, H.R. REP. NO. 101-984, at 5 (1990) (noting that the difference in the rate of land loss in the 1950s between the rural, black community with a 51.3 percent rate of loss and the rate of rural, white land loss which stood at 28.8 percent has been steadily growing) [hereinafter *The Minority Farmer: A Disappearing American Resource*]; see also *Decline of Minority Farming in the United States: Hearing Before the Government Information, Justice, and Agriculture Subcomm. of the House Comm. On Gov't Operations*, 101<sup>st</sup> Cong. 26 (July 25, 1990) (testimony of David H. Harris, Jr., of the Land Loss Prevention Project) [hereinafter *Decline of Minority Farming in the United States*].

<sup>8</sup> In fact, since the Indian Reorganization Act of 1934, the American Indian land base held in trust by the federal government for both Indian tribes and individual American Indians has appeared to increase if one compares the number of acres held in trust in 1934 with the number of acres the Bureau of Indian Affairs reports that are currently held in trust for Indian tribes and individual American Indians. In 1934, the federal government held 48 million acres of land in trust for Indians. See ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW 152 (3<sup>rd</sup> ed. 1991). At the end of 1997, the Bureau of Indian Affairs reported that nearly 56 million acres were held in trust for both tribes and individual American Indians. BUREAU OF INDIAN AFFAIRS, U.S. DEP'T OF INTERIOR, 1997 ANNUAL REPORT OF INDIAN LANDS, FORM 5-5425, <<http://doi.gov/bia/realty/report97.html>> (the ANNUAL REPORT OF INDIAN LANDS was last officially published by the Bureau of Indian Affairs in September 1985). According to the 1997 annual report, the most recent such report, the Bureau of Indian Affairs holds in trust 45,678,161 acres of land for Indian tribes and an additional 10,059,291 acres for individual Indians.

Even the USDA has acknowledged that for many farmers, “especially minority and limited-resource farmers,” land loss has been involuntary.<sup>9</sup> Such involuntary land loss extends to rural, black landowners generally. This paper focuses on one of the primary causes of involuntary black land loss in recent times—partition sales of black-owned land held under tenancies in common. A partition sale can be viewed as a “private” forced sale of land held under concurrent ownership arrangements, typically the tenancy in common. The combined effect of two sets of legal rules contribute to the loss of black-owned rural land as a result of partition actions. First, like many other poor people in this country, rural African American landowners have tended not to make wills; at the owner’s death, state intestacy rules transfer to a broad class of heirs an interest in real property of the intestate. Property passed down by intestacy over generations becomes highly fractionated, splintering the fee into hundreds and even thousands of interests.

Second, the resulting tenancies in common are governed by rules of common ownership that fail to distribute rights and responsibilities fairly amongst the tenants in common. Any tenant in common, whether a co-tenant holding a minute interest or a majority interest, may force a sale of the land, thereby ending the tenancy in common. Any co-tenant may sell their interest to someone outside of the family or ownership group, bringing a stranger into the common ownership, without seeking the consent of the other co-tenants. Despite these broad powers, there are no corresponding obligations to contribute to the ongoing costs of maintaining the property.

In the special case of fractionated heir property, especially as held by poor people, these distributional problems can be magnified. It may be impossible even for a diligent co-tenant in possession to obtain contribution from the other co-tenants for the ongoing costs of maintaining the property. Poor people who own heir property in common are unlikely to have access to lawyers who can craft sophisticated, private agreements to manage common property in a manner that fairly distributes rights and responsibilities and ensures continued ownership of the land by the group. Race compounds this problem as minorities often have less access to legal professionals than other, similarly situated people in terms of economic class.<sup>10</sup> And where interests are fractionated, any effort to reach such a private agreement *ex post facto* involves prohibitive transactions costs. Simply identifying the other co-tenants who often are dispersed throughout the country can be impossible.

Opportunistic lawyers or land speculators have taken advantage of these legal rules in order to acquire black-owned land. Many times, family members know—or learn from an outsider—that they own an interest in a tenancy in common and decide to cash out. Although some seek legal

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<sup>9</sup> CIVIL RIGHTS ACTION TEAM, U.S. DEP’T OF AGRIC., CIVIL RIGHTS AT THE U.S. DEP’T OF AGRIC. 14 (1997) [hereinafter the CRAT Report].

<sup>10</sup> As the supervisor for the past two years of a clinical externship program run jointly by the Land Tenure Center of the University of Wisconsin–Madison and the University of Wisconsin Law School, I have observed firsthand the problem that poor African Americans experience in securing legal representation. Under this externship program, we have sent law students from the University of Wisconsin Law School and Howard University School of Law to work for the Federation of Southern Cooperatives/Land Assistance Fund in Epes, Alabama, over the course of the past three summers. The Federation is an organization of rural agricultural, marketing, and credit cooperatives located throughout the South that serves a primarily rural and African American population. In addition, the Federation attempts to help African American landowners retain their land; however, such work is difficult because the Federation does not have any lawyers on their staff. Each summer, we have had great difficulty in finding attorneys in Alabama interested in representing the African American landowners and former landowners who have brought their cases to the Federation, in many cases out of desperation.

assistance, many of these people do not want the entire land sold.<sup>11</sup> Many of these family members exit the tenancy in common by selling their interest to nonfamily members.<sup>12</sup> They often do not know the financial pressure that this may place on other co-tenants who may wish to remain on the land or to preserve it for the family. Unbeknownst to the family member, the buyer often takes the interest with the underlying motive of seeking a partition sale.<sup>13</sup> Even the partition actions initiated by family members who seek a sale of the property tend to be brought by “heirs who are physically removed from the land.”<sup>14</sup>

Through the mechanism of the partition sale, many rural African Americans who had worked land that had been in the family for generations have been forced off the land in recent decades. Interestingly, this story has parallels in the land tenure experience of other poor and minority communities in the United States, especially of land identified with political or spiritual significance for such communities. For example, at the conclusion of the United States–Mexico War, many cash-poor Mexicans who sought to confirm prior grants of land (suddenly on the U.S. side of the border) under the terms of the Treaty of Guadalupe Hidalgo lost their land after attorneys who agreed to represent them in exchange for an interest in the land filed partition actions once they acquired that interest in the land.<sup>15</sup> Throughout this article, to highlight the common land tenure problems poor, minorities in this country have faced and continue to face—common problems that have been little noted by scholars—comparisons are made to certain American Indian land tenure problems, both historical and contemporary.

Other factors have contributed to the diminishment of the rural African American land base. Some landowners sold their land voluntarily and did not reinvest in other land.<sup>16</sup> For some this represented a decision to leave farming or leave the region. Many other, nominally “voluntary” sales of black-owned land have been “occasioned by trickery, forgery, duress and other means which give the appearance of ‘voluntariness’ on the face of the conveying instrument.”<sup>17</sup> In these instances and in other legal proceedings that have led to land loss, lawyers and land speculators use sharp practices and sometimes commit outright fraud in order to dispossess African Americans of their land.<sup>18</sup>

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<sup>11</sup> THE EMERGENCY LAND FUND, *THE IMPACT OF HEIR PROPERTY ON BLACK RURAL LAND TENURE IN THE SOUTHEASTERN REGION OF THE UNITED STATES* 280 (1984) [hereinafter *THE EMERGENCY LAND FUND*].

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 126.

<sup>15</sup> See Guadalupe T. Luna, *Chicana/Chicano Land Tenure in the Agrarian Domain: On the Edge of a “Knaked Knife,”* 4 MICH. J. RACE & L. 39, 127 (1998).

<sup>16</sup> See the CRAT Report, *supra* note 8, at 14.

<sup>17</sup> THE EMERGENCY LAND FUND, *supra* note 10, at 252–3. Similarly, many “voluntary” sales of Indian-owned land during the life of the Dawes Act were made under questionable circumstances. Cf. Judith Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 5 (1995).

<sup>18</sup> Unscrupulous land speculators used many of the legal processes that have contributed to black land loss to deprive individual American Indians of millions of acres of land between passage of the Burke Act in 1905 and passage of the Indian Reorganization Act in 1934. During this period many of the Indians holding individual allotments were dispossessed of their land once the federal government removed the trust status and accompanying restrictions on alienation of their property. The trust status was removed either through expiration of the 25-year period under the Dawes Act or under provisions of the Burke Act whereby Indians who held allotments were deemed to be “competent” prior

In addition to partition sales, other legal processes have contributed to involuntary land loss in rural African American communities. Discrimination in federal agricultural subsidies and lending—the subject of the *Pigford* class action—is one factor contributing to involuntary land loss. Well-respected activists who have worked to promote black land retention in the South over the past thirty years also cite tax sales, foreclosure, adverse possession, and eminent domain as legal processes that contribute to the loss of black-owned land.

Of all the legal processes that have contributed to black land loss, however, forced sales of land represent a particularly harsh mechanism by which someone can lose land under the Hegelian, personality theory of property set forth by Margaret Jane Radin and others.<sup>19</sup> One can make a reasonable argument that a landowner who opens himself or herself to adverse possession by not vigilantly watching over his or her property over an extended period of time may not consider such ownership vital to their sense of personhood. In contrast, under private forced sales such as partition sales and foreclosure, other legal actors may force a sale of land in possession of a person holding some interest in the land who may be productively using the land.<sup>20</sup> Foreclosure is directly linked to a property owner's financial insolvency, although racial discrimination often causes or contributes to the financial ruin of African American property owners in the first instance, as the judge in the *Pigford* lawsuit noted.<sup>21</sup> However, unlike the very structure of the legal rules

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to the expiration of 25 years, even though a great number of these people could neither read nor write. See JANET A. McDONNELL, *THE DISPOSSESSION OF THE AMERICAN INDIAN, 1887–1934* 120 (1991).

<sup>19</sup> MARGARET JANE RADIN, *REINTERPRETING PROPERTY 197–98* (1993) (“Forced sale is sometimes (but not always) an injury to personhood. It is not an injury to personhood where the person is appropriately thought of as a wealth-maximizing entity holding fungible property, but it is an injury to personhood where personal property, taking on the attribute-aspect, is involved”). Radin’s discussion of forced sales and “personhood” fits within her broader theory that grounds property rights in the flourishing of the human personality. According to Radin, property closely associated with a person—property for personhood—should be more strongly protected than property less imbued with significance to a person. Radin posits that a person holding property less associated with the personhood perspective holds only “fungible property rights” that may be overridden. The “personhood perspective” of property is premised upon the notion that individuals must control certain tangible resources in the external world in order to develop themselves properly. Margaret Jane Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957 (1982).

<sup>20</sup> Under eminent domain, governmental entities are required to demonstrate that a condemnation of land held by a property owner will result in some public good for the community as a whole. In contrast, forced sales through partition sales or foreclosure occur whether or not the person seeking to force a sale can demonstrate that the community will benefit from such a sale.

<sup>21</sup> *Pigford v. Glickman*, 185 F.R.D. 82, 87 (1999). The Court in *Pigford* highlighted how the Farmers Home Administration contributed to the financial demise of Mr. James Beverly which resulted in Mr. Beverly’s being forced to sell his property. The Court noted:

Mr. James Beverly of Nottaway County, Virginia, was a successful small farmer before going to the FmHA. To build on his success, in 1981 he began working with the FmHA office to develop a farm plan to expand and modernize his swine herd operations. The plan called for loans to purchase breeding stock and equipment as well as farrowing houses that were necessary for the breeding operations. FmHA approved his loans to buy breeding stock and equipment, and he was told that the loan for farrowing houses would be approved. After he already had bought the livestock and equipment, his application for a loan to build the farrowing houses was denied. The livestock and equipment were useless to him without the farrowing houses. Mr. Beverly ended up having to sell his property to settle his debt to the FmHA.

*Id.* In a similar vein, many formerly solvent African American homeowners have been driven to bankruptcy and have lost their homes through foreclosure as a result of the predatory lending practices of certain finance companies that have targeted minority communities. MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH, WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 21 (1997).

governing partition actions that encourage forced sales of a tenant in common's property interest irrespective of his/her financial solvency or his/her desire to maintain continued ownership of the land, the legal rules governing foreclosure do not in and of themselves contribute to a person's insolvency and subsequent loss of property.

In the African American experience in this country, not only has landownership proved vital to individual development and democratic participation, but also such ownership has contributed to building community. Those rural African Americans who acquired land soon after emancipation rose to join the small numbers of those at the top of the rural, black class structure.<sup>22</sup> Real improvements in the lives of many of these landowners validated the strongly held view within the community that landownership could “complete their independence’.”<sup>23</sup> These landowners gained an immediate stake in the economy and helped make the political life of the region more democratic and robust. Landowning African Americans were much more likely to register, vote, and run for office than other rural black people.<sup>24</sup>

In later periods, including in the era of the civil rights movement, individual black landowners and landowning groups of African Americans became anchors within their communities; they served as buffers for their communities from the racism of the surrounding society.<sup>25</sup> Many black landowners, for instance, dedicated portions of their land for use by the wider community; schools, churches, and community centers were often built on such dedicated land. Whether land was under individual or community ownership, such landownership helped improve the life chances of many destitute, rural African Americans. Not just theory but experience affirms the powerful conviction amongst African Americans that landownership assures not just a living and autonomy, but that there is a link between land, community, and power.

Given the historical, unfulfilled promise of governmental reallocation of land after the Civil War and the undermining of black landownership once achieved without any significant governmental assistance, our society has a clear moral obligation to reverse the processes that have stripped black landowners of their land. The Vatican recently urged major land reform in

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<sup>22</sup> FONER, *supra* note 3, at 404.

<sup>23</sup> *Id.* at 104.

<sup>24</sup> *Id.* at 69.

<sup>25</sup> RICHARD A. COUTO, *AIN'T GONNA LET NOBODY TURN ME AROUND: THE PURSUIT OF RACIAL JUSTICE IN THE RURAL SOUTH* 39–40, 87–8, 244 (1991). Couto's interview of an African American medical doctor from rural Tennessee highlights the role that African American owner-operators of farms played in the registration of black voters in Tennessee during the civil rights movement. In the course of an interview, Dr. Jesse Cannon, Jr., stated:

The largest group of blacks at that time who were heading the movement were people from this particular community. They were the ones who provided homes for various civil rights workers or other legal people to have a place to stay during that particular struggle. They provided homes for them, and they knew that they could provide those homes without fear that some one was going to kick them out of their home because they were doing that. Not only that, they organized rallies and provided transportation. They did the legwork, and they organized the first massive groups to descend upon the courthouse here in Brownsville, the county seat, and they were the ones who stood there in lines for weeks to get registered. They could do this because they had their own farms. They weren't tenant farmers who, if they weren't out there in the fields, they were going to get kicked off the farms.

*Id.* at 39.

poor countries on largely moral grounds.<sup>26</sup> Reform of laws in the United States to promote land acquisition and retention in disadvantaged communities would be consistent with this international focus on promoting just patterns of land distribution. Some political and moral thinkers advocate that land be reallocated to specific ethnic groups in order to promote enhanced cultural integrity for such groups. Hurst Hannum for one states that “[w]ith few exceptions, a territorial base . . . is essential to the preservation of a group’s culture.”<sup>27</sup> Yet African Americans who fought to acquire and retain land throughout the past century were not motivated in the main by the idea of building a separate and distinct culture that would be separate from the rest of the country. They sought landownership as a vehicle that could facilitate participation in the larger society. For this reason, strengthening the ability of African Americans to maintain landownership—no matter how diffuse or scattered these holdings may be—should specifically concern democrats whose goal is to increase the participation of African Americans and reverse their historic marginalization. This article advocates government intervention to promote enhanced landownership—both quantitatively and qualitatively—for African Americans.

Reform of the state laws of intestacy to narrow the class of heirs to whom property may pass could prevent fractionation of the ownership interest in the first instance. So, too, public interest lawyers, legal aid offices, and community activists could work to educate landowners of the importance of estate planning with the goal of family-land retention. Such reforms, however, would only marginally impact ownership interests that already are fractionated. In these cases, the horse is already out of the barn. Instead, this paper maintains that the problem of fractionated heir property within the rural, African American community justifies more fundamental reform of common property law and the creation of government institutions that would have the capacity to help those who own heir property restructure their ownership in a way that the ownership could be stabilized and the property could be used productively.

Federal intervention to address the issue of fractionated heir property in minority hands would not be unprecedented. In 1984, Congress recognized that the problem of fractionated heir property in Indian hands, mostly in the West, warranted drastic intervention, notwithstanding the fact that the particular proposed solution—twice ruled unconstitutional by the Supreme Court<sup>28</sup>—remains contested both within and without the American Indian community. Moreover, under the Indian Reorganization Act of 1934 (“the IRA”),<sup>29</sup> the federal government reversed its fifty-year policy of assimilation that it had sought to advance in part by land dispossession under the Dawes Act. Supporters of the IRA made clear that landownership must be maintained for American Indians given that land is so strongly identified with the American Indian heritage and is strongly linked to the community’s sovereignty and survival. Notwithstanding the shortcomings of the act identified by many in the American Indian community and by a number of academics, the IRA has helped arrest the precipitous loss of Indian land that occurred between 1887 and 1934 under the

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<sup>26</sup> PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, TOWARDS A BETTER DISTRIBUTION OF LAND (1997). Other world religions such as the Baha’i Faith have also specifically addressed the importance of farmers and the role of the agricultural sector to society. *See, e.g.*, BAHA’I PUBLISHING TRUST, THE PROMULGATION OF UNIVERSAL PEACE: TALKS DELIVERED BY ‘ABDU’L-BAHÁ DURING HIS VISIT TO THE UNITED STATES AND CANADA IN 1912 217 (2d ed. 1982) (“The fundamental basis of the community is agriculture, tillage of the soil. All must be producers”).

<sup>27</sup> HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION 112 (1990)

<sup>28</sup> *See* Babbitt v. Youpee, 519 U.S. 234 (1997); *Hodel v. Irving*, 481 U.S. 704 (1987).

<sup>29</sup> Indian Reorganization Act of June 18, 1934, 48 Stat. 988.

terms of the General Allotment Act of 1887 and other congressional acts enacted during this time period.

The reforms proposed in this paper are not race specific for the most part; land tenure amongst rural landowners and small farmers generally would be strengthened should these proposals be enacted. Given the specific examples of linkage between landownership and community in many parts of the Black Belt, land tenure reform provides a tested strategy, consistent with the American liberal tradition, to promote racial justice and a more democratic society. This would suggest that the federal government's possible payment of \$50,000 to Mr. Beverly without restoring his farm to him not only fails to make him whole economically, but also leaves him one short in the "bundle of democratic tools" that he formerly possessed. Although the court in *Pigford* took the fatalistic position that "[h]istorical discrimination cannot be undone,"<sup>30</sup> our legal institutions should do their very best to make whole, as both economic and civic actors, African Americans unfairly dispossessed of their land. Short of this, the federal government should act now to ensure that rural, black landownership does not become merely an interesting, but short-lived chapter in American history.

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<sup>30</sup> *Pigford v. Glickman*, 185 F.R.D. 82, 112 (1999).

## 1. PARTITION SALES OF BLACK-OWNED LAND: How the rules of tenancies in common and patterns of family wealth transmission contribute to land loss in rural, African American communities

Though many legal rules and processes contribute to black land loss, activists and academics agree that partition sales of land held under tenancies in common and tax sales are common avenues of land loss.<sup>31</sup> These experts also conclude that foreclosure,<sup>32</sup> adverse possession,<sup>33</sup> and eminent domain also contribute to land loss.<sup>34</sup> In some of these legal proceedings, opportunists use sharp practices to acquire black-owned land against the clear will of most of those owning such land.<sup>35</sup> One organization with long experience promoting black land retention claims that “a sale for partition and division is the most widely used legal method facilitating the loss of heir property” within the African American communities they serve.<sup>36</sup> In order to understand how partition sales cause loss of black-owned land, one needs to understand the tenancy in common as a form of concurrent ownership of land and the consequences of estate planning practices common of a large number of poor, rural African Americans.

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<sup>31</sup> See, e.g., THE EMERGENCY LAND FUND, *supra* note 10, at 251–77; see also THE BLACK RURAL LANDOWNER—ENDANGERED SPECIES xix–xx (Leo McGee and Robert Boone eds., 1979) [hereinafter THE BLACK RURAL LANDOWNER]; ONLY SIX MILLION ACRES: THE DECLINE OF BLACK-OWNED LAND IN THE RURAL SOUTH 50 (Robert S. Browne ed., 1973); and *The Decline of Minority Farming in the United States*, *supra* note 6, at 66. One of the most respected attorney-advocates of black farmers and black land retention, David Harris, left the Durham, North Carolina-based, Land Loss Prevention Project in 1998 to serve as associate counsel heading up the civil rights division within the U.S. Department of Agriculture. Elizabeth Wellington, *Champion of Black Farmers Takes New Role*, THE NEWS AND OBSERVER, Jan. 18, 1998, at B1.

<sup>32</sup> BROWNE, *supra* note 30, at 50. See also *Pigford*, 185 F.R.D. at 87.

<sup>33</sup> THE EMERGENCY LAND FUND, *supra* note 10, at 251.

<sup>34</sup> BROWNE, *supra* note 30, at 45.

<sup>35</sup> THE EMERGENCY LAND FUND, *supra* note 10, at 44 (“There is an array of persons and entities that prey on the heir property situation by practices which are, although technically legal, clearly unscrupulous. These persons and entities include lawyers, judges, individual citizens, businessmen, marginal lending institutions, land speculators, and public officials”).

<sup>36</sup> *Id.* at 273; see also John G. Casagrande, Jr., Note, *Acquiring Property Through Forced Partitioning Sales: Abuses and Remedies*, 27 B.C. L. REV. 755, 756 n. 9 (1986) (noting that Edward Pennick of the Federation of Southern Cooperatives/Land Assistance Fund estimated in 1985 that half of the cases at that time leading to the drop in black land ownership involved partition actions that led to a sale of black-owned property). Although the author has spoken to representatives of both the Land Loss Prevention Project in Durham, North Carolina, and the Federation of Southern Cooperatives/Land Assistance Fund who confirm that they have handled hundreds of cases in which black rural landowners have lost land as the result of partition actions, a LEXIS search uncovered only one reported state case that explicitly addressed the partition sales of black-owned rural land. See *McNeely v. Bone*, 287 Ark. 339, 341, 698 S.W.2d 512 (Ark. 1985) (holding that partition sale of black-owned property did not violate 5<sup>th</sup> and 14<sup>th</sup> Amendments of the U.S. Constitution even if the sale of the land was below market price).

## 1.1 TENANCIES IN COMMON

### General characteristics

Tenancies in common are the most widespread form of concurrent estates in land.<sup>37</sup> Unlike the joint tenancy, which normally requires the presence of the four “unities” of time, title, interest, and possession, a tenancy in common merely provides that each of the common owners who hold an undivided interest in the property is entitled to use and possess the entire property.<sup>38</sup> Unlike the joint tenancy’s right of survivorship, a tenant in common may alienate his or her interest during life and at death without seeking the consent of his or her other co-tenants.<sup>39</sup>

Like the joint tenancy and other common-law concurrent estates, but unlike other forms of common ownership of equity resources created by statute such as the corporation, no formal management structure inheres by law in a tenancy in common. The allocation of management responsibilities between tenants in and out of possession must be worked out in each particular case, if this allocation is worked out at all. The common law has developed some rules that allocate rights between co-tenants with respect to use and maintenance of the property. These include rules that govern the rights of an “ousted” co-tenant, the distribution of rental income paid by third parties, and the right to contribution for the payment of ongoing costs such as property taxes, mortgages, and necessary repairs.<sup>40</sup> Yet these rules are not comprehensive, uniform, or prophylactic; they do not allocate responsibility for paying the ongoing expenses of co-owned property between the common owners in the first instance, the area in which most conflicts amongst tenants occurs.

A tenant in common who fails to pay his or her proportional share of these ongoing expenses does not lose any interest in the property.<sup>41</sup> Not surprisingly, “free-rider” problems<sup>42</sup> are frequent. The tenant who has paid more than a pro rata share of ongoing costs of maintaining the property may seek to recoup payments made in excess of his or her share against other co-tenants.<sup>43</sup> However, such contribution actions can jeopardize the interests of those who desire to maintain ongoing ownership of the land. Some courts permit a tenant in common to initiate an independent action short of a final accounting against his or her fellow co-tenants seeking contribution for repair costs incurred in excess of the tenant’s pro rata share; other courts maintain that such a co-tenant can recover these excess repair expenses only in a final accounting as part of a partition action that terminates the concurrent ownership estate.<sup>44</sup> Many times one co-tenant pays more than his share of the property taxes. Due to the fact that the co-tenants are not personally liable in most circumstances for payment of the property taxes, the tenant who has paid more than his/her pro

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<sup>37</sup> ROGER A. CUNNINGHAM ET AL., *THE LAW OF PROPERTY* § 5.2, at 188, (2d ed. 1993).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 190.

<sup>40</sup> *Id.* at §§ 5.9, 5.10, at 215–222.

<sup>41</sup> The Emergency Land Fund, *supra* note 10, at 43.

<sup>42</sup> JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 49–50 (4<sup>th</sup> ed. 1998).

<sup>43</sup> CUNNINGHAM ET AL., *supra* note 36, at 215–17.

<sup>44</sup> *Id.* at 215.

rata share of the property taxes may recoup such excess expenses only after a court sells the property at a judicial sale and equitably distributes the proceeds from the sale.<sup>45</sup>

### Partition sale

In most social contexts, a tenancy in common represents an unstable form of common ownership of equity. Each interest may be freely alienated by the holder, allowing any co-tenant to bring a stranger into the community of ownership. A person holding an undivided interest in a tenancy in common—no matter how small that interest may be—may file a partition action to terminate the co-tenancy without the consent of the other co-tenants.<sup>46</sup> The court will either order that the property be partitioned in kind (resulting in the physical division of property) or that the entire property be sold and the proceeds of the sale distributed.<sup>47</sup>

Most state statutes provide that a physical division of the property is the preferred remedy in a partition action; a partition sale should be ordered only if the parties would be prejudiced by a partition in kind. Yet courts now order partition sale in almost every case.<sup>48</sup> Although some courts and commentators still refer to partition sale as a drastic remedy,<sup>49</sup> the current preference for partition sale reflects the ascendant economic view that places primary importance on individual wealth maximization. According to this view, an economically valuable parcel of land should be allocated to the person willing to pay the highest price on the free market.<sup>50</sup> This assures efficient use, at least theoretically. In accordance with this view, partition sale is preferred over partition in kind because land sold as a unit often has a higher economic value than the aggregate value of subdivided parcels that result from a division in kind.<sup>51</sup> Further, transferring ownership from common owners who may not be able to compete against more wealthy or better financed bidders at a forced, public sale constitutes a public good under this view because the value of landownership is measured only against the market. Therefore, it is irrelevant if many of these forced sales transfer land from smallholders to large landowners, including large corporate interests. As one commentator holding this view has claimed:

[A] rule favoring sales in partition actions would promote efficiency by placing the property on the open market where co-owners opposing a sale or having a particular emotional attachment to the property would have an opportunity to retain possession by outbidding all comers. Therefore, the market price would reflect both the objective and the subjective values of the property. . . . Under the principle of wealth maximization, when property is placed on the open market, courts are

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<sup>45</sup> *Id.* at 217.

<sup>46</sup> *DUKEMINIER & KRIER, supra* note 41, at 340. The remedy of partition is also available to joint tenants, but is not available to tenants by the entirety. *Id.* at 341.

<sup>47</sup> *CUNNINGHAM ET AL., supra* note 36, § 5.13, at 229.

<sup>48</sup> *Id.* at 231; *see also* *DUKEMINIER & KRIER, supra* note 41, at 347; 4A R. POWELL, *THE LAW OF REAL PROPERTY* ¶ 612, at 651 (rev. ed. 1982); and Candace Reid, Note, *Partitions in Kind: A Preference Without Favor*, 7 *CARDOZO L. REV.* 855, 862 (1986).

<sup>49</sup> *See, e.g.,* *Vesper v. Farnsworth*, 40 *Wis.* 357, 359 (Wis. 1876) (holding that a “partition sale is a dangerous expedient, exposing those of the parties who are not able to bid at the same, to the deprivation of their property without just compensation”); *see also* JOSEPH W. SINGER, *PROPERTY LAW: RULES, POLICIES, AND PRACTICES* 719 (2d ed. 1997) (“[P]artition is a drastic remedy that may very well result in a sale of the property”).

<sup>50</sup> RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 82–86 (5<sup>th</sup> ed. 1998).

<sup>51</sup> *See* Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 *HARV. L. REV.* 621, 665 (1998).

assured that the property will fetch the highest price possible and will end up in the hands of the party who values it most.<sup>52</sup>

By liberal, or even routine, orders for partition sale, the courts now enable an individual co-tenant, no matter how small his/her interest in the land, to force a sale of the entire property so as to maximize the amount of money s/he will receive in the distribution of the proceeds.

The current preference for partition sale represents a particular application of the modern view that land is merely a fungible commodity whose value should be determined by the market.<sup>53</sup> The shift in the view of the economic importance of land roughly tracks the transition from classical to neoclassical economics that many economic scholars claim occurred in the late 1800s.<sup>54</sup> By the conclusion of World War II, economists increasingly challenged the traditional view that land holds unique value.<sup>55</sup> At present, the view that “land is no different than the other factors of production” is the predominant one in most economic textbooks, and those textbooks have directly influenced the thinking of economists and noneconomists alike.<sup>56</sup>

The development of the law in partition actions mirrors the shift in views by many economists with respect to the importance of landownership. Older judicial opinions, along with a handful of more contemporary decisions, take into account the noneconomic interests of those who wish to maintain landownership. In *Delfino v. Vealencis*,<sup>57</sup> for example, the Supreme Court of Connecticut reversed a lower court decision that ordered a partition sale and stated that “[i]t is the interests of all of the tenants in common that the court must consider; . . . and not merely the economic gain of one tenant, or a group of co-tenants.”<sup>58</sup> Now, courts primarily seek to protect the economic interests of individual co-tenants. Nevertheless, as discussed *infra*, the modern practice of routinely ordering partition sales in order to maximize the monetary return of an individual tenant stands in contrast to the legal rules regulating exit from other common-ownership forms such as corporations, other noncorporate business organizations, and condominium associations.

The rules that govern partition of many, nontribal Indian allotments differ markedly from the common-law rules of partition just discussed.<sup>59</sup> At least some federal courts vested with exclusive

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<sup>52</sup> Reid, *supra* note 47, at 878–9.

<sup>53</sup> LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 63 (1985). In comparing land transactions in the early American colonies with property transfers in England, Friedman states: “Land transactions shifted from status to contract; land rights were no longer matters of family birth, and tradition; rather, land was a commodity, traded on the open market. This was a slow but inexorable process. It was not complete until the 19<sup>th</sup> century, and in a sense not even then.”

<sup>54</sup> Emery N. Castle, Why Land Matters (paper commissioned for a conference held at the University of Wisconsin–Madison), “Who Owns America? Land and Resource Tenure Issues in a Changing Environment” (June 21–24, 1995) (on file with the Land Tenure Center).

<sup>55</sup> *See id.* at 1.

<sup>56</sup> *Id.* at 5.

<sup>57</sup> 436 A.2d 27 (Conn. 1980).

<sup>58</sup> *Id.* at 33.

<sup>59</sup> As in many areas of federal Indian law, the law governing partition actions for Indian-owned land is complicated. State partition laws apply to those allotments that are subject to the General Allotment Act. *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 623 (Rennard Strickland ed. 1982) [hereinafter COHEN’S HANDBOOK OF FEDERAL INDIAN LAW]. In some states, the state courts have jurisdiction over partition actions. For example, allotments owned by members of the “Five Civilized Tribes” became subject to the partition laws of the State of Oklahoma in 1918. *See*

jurisdiction over partition actions involving American Indian tenancies in common appear to be more sensitive to the implications and equities of ordering a division in kind as opposed to a partition sale than many state courts hearing partition actions in the non-Indian context. For example, in *Oyler v. United States*,<sup>60</sup> on a motion for reconsideration of a court-ordered partition sale of an Indian allotment, the district court set aside its order for a partition sale and imposed an order that provided mixed relief, including division in kind of most of the 94-acre tract, and sale and reallocation to one group of defendants of a 2.6-acre tract.<sup>61</sup> In ordering a remedy that mostly consisted of partition in kind, the court noted that the majority of the interest holders opposed sale.<sup>62</sup> The court also considered the consequences of ordering a sale of land that the defendants valued as part of their heritage, especially in a manner that would not fully compensate the parties after subtracting the costs of the litigation. The court stated:

[I]t appears less likely to the court that all of the parties will realize the full value of their interest in the land if a public sale of the property occurs. Even if the land is sold precisely at the appraised value, after the costs of this action are subtracted from the proceeds of the sale, some of the parties will receive precious little compensation for land which, if nothing else, represents their Indian heritage.<sup>63</sup>

The *Oyler* court acknowledged not just the real-world, economic ramifications of ordering a partition sale, but specifically took into account the land's significance to one group of Americans dispossessed of much of their historical land base. The *Oyler* court's concern for preserving Indian heritage land has few analogs in partition cases involving land acquired by African Americans following emancipation.

## **1.2 PATTERNS OF FAMILY WEALTH TRANSMISSION AMONGST POOR, RURAL AFRICAN AMERICANS CONTRIBUTE TO THE FRACTIONATION OF INTERESTS AND MAKE MUCH BLACK-OWNED LAND A TARGET FOR LAND SPECULATORS**

The tenancy in common represents a potentially unstable form of ownership because alienability is unrestricted and the partition remedy is weighted toward dissolution. A tenancy in common with a large numbers of co-tenants is even more unstable simply because the problems of free-riding and exit are multiplied.<sup>64</sup> Because of the low incidence of estate planning amongst poor, rural African Americans,<sup>65</sup> much of the black-owned land base in the South has been traditionally

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Act of June 14, 1918, 40 Stat. 606 (codified at 25 U.S.C. § 355). The Oklahoma state courts have jurisdiction of these partition actions. In other instances, the federal courts have exclusive jurisdiction over partition cases. *Id.* at 623–24.

<sup>60</sup> 1995 U.S. Dist. LEXIS 5652 (92-2104 Mar. 17, 1995).

<sup>61</sup> *Id.* at \*3–6.

<sup>62</sup> *Id.* at \*14.

<sup>63</sup> *Id.* at \*14, n. 9.

<sup>64</sup> See C. Scott Graber, *Heirs Property: The Problems and Possible Solutions*, Sept. 1978 Clearinghouse Rev. 273, 277 (1978) (“One thousand heirs provide 1,000 targets to a person who really wants the land”).

<sup>65</sup> As discussed *infra*, the incidence of will-making amongst rural, African American landowners may not be that much lower than the rate of will-making amongst poor people generally despite the assumption by many commentators who have written articles suggesting that African American landowners make wills at an especially low rate.

transferred from one generation to another under state intestacy laws.<sup>66</sup> Property acquired under the intestacy laws is commonly referred to as “heir property.”<sup>67</sup>

Although a tenancy in common created by volition and a tenancy in common created by operation of the laws of intestacy may be governed by the same set of property laws,<sup>68</sup> these two different methods of formation yield ownership arrangements that are quite different in character. A tenancy in common created consensually resembles a closely held corporation: there tend to be a small number of co-owners, each member of the ownership structure knows the other owners, and the owners are likely to live within close proximity of one another. A tenancy in common created under the laws of intestacy, by contrast, bundles together groups of people who may have little actual connection to one another or even knowledge of one another’s existence.<sup>69</sup>

First, as time passes, not only do the number of interests increase in a tenancy in common created by operation of law, but divergences also appear in the size of individual ownership interests, especially after any in the first generation of heirs with children or lineal heirs die and their interests pass to their descendants.<sup>70</sup> When the property comes to be held by owners from multiple generations, the common owners are likely to value the land differently and conflicts are more likely to arise. Further, as the number of interests increase, the owners are more likely to live in scattered locations. Decisions regarding the disposition of the property that may have been fairly simple to coordinate when all of the tenants in common resided, for example, in Sumpter County, Alabama, become more difficult if some common owners live in Demopolis, Alabama, others in Albany, Georgia, and still others in Chicago, Illinois.<sup>71</sup> And as the number of interests increase, it becomes difficult to locate and keep track of all of the owners: problems arise with the known but unlocatable heir and with unknown heirs.<sup>72</sup> Moreover, unlike land that is purchased or transferred by gift or devise, heir property lacks record title.<sup>73</sup> Because of these characteristics of heir property, economic development of a significant proportion of land owned by African Americans has been stifled. Owners have difficulty obtaining financing and co-owners may not be able to agree on the most appropriate use of the land.

Consider the case study of an African American estate in Mississippi conducted by the Emergency Land Fund. A certain African American named John Brown purchased 80 acres of land in Rankin County, Mississippi, in 1887.<sup>74</sup> After he died intestate in 1935, the land continued to be

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<sup>66</sup> Robert Zabawa, “And the Devil Got Alabama and Georgia”: Black Land Ownership in the South (paper commissioned for a conference, “Who Owns America? Land and Resource Tenure Issues in a Changing Environment” held at the University of Wisconsin–Madison) (June 21–24, 1995) (held on file with the Land Tenure Center).

<sup>67</sup> THE EMERGENCY LAND FUND, *supra* note 10, at 8. In St. Lucia, a country in the Caribbean, such land is referred to as “family land.” See John W. Bruce, *Family Land Tenure and Agricultural Development in St. Lucia*, Land Tenure Center R.P. 79, U.S. ISSN 0084-0815 (1983).

<sup>68</sup> The two different types of tenancies in common will be governed by the same property law if the tenancy in common created by agreement adopts the default rules governing tenancies in common that automatically apply to a tenancy in common created by operation of law.

<sup>69</sup> THE EMERGENCY LAND FUND, *supra* note 10, at 62. For example, one study has revealed that a typical heir property tract in the Southeast is owned by eight people, five of whom live outside of the southeastern region. *Id.*

<sup>70</sup> See THE EMERGENCY LAND FUND, *supra* note 10, at 40.

<sup>71</sup> See *id.* at 42–3.

<sup>72</sup> *Id.* at 43.

<sup>73</sup> *Id.* at 44.

<sup>74</sup> *Id.* at 283.

passed down by intestacy. By the time an heir holding more than 50 percent of the interest in the land filed for a partition in kind of the property in 1978, there were 77 heirs who held an interest in the property, with the smallest interest holder owning a 1/19,440th interest in the land.<sup>75</sup> Like many other cases, the desire of the majority interest holder to secure a physical partition of the land was frustrated as the court decided to order a sale of the property after a few of the other heirs holding a minority interest objected to the proposed division of the property.<sup>76</sup> The fractionated heir property problem within rural African American communities manifested by the John Brown estate is typical; a 1984 study estimated that 41 percent of black-owned land in the southeastern states is heir property.<sup>77</sup>

If heir property tends to be highly fractionated and fractionation increases the risk of partition, then this pattern of family wealth transmission directly contributes to black land loss. The evidence is that at least half and perhaps most rural, African American landowners in the South have not made wills. Because parents, grandparents, and great-grandparents did not make wills either, a significant proportion of rural, black-owned land in the South can be labeled heir property. Two separate studies conducted within restricted geographical areas of the South indicate that most rural, black landowners have not made wills. One study surveyed 1,708 black landowners in 10 counties located in 5 southeastern states. Eighty-one percent of the black owners of rural parcels had not made wills.<sup>78</sup> Another study of 120 rural, black landowners in 12 counties in south-central Alabama found that 56 percent of these landowners had not made wills.<sup>79</sup>

As an aside, the assumption that the rate of will-making for rural, African American landowners lags far behind that of other, similarly situated landowners appears misguided. Moreover, it is difficult to determine whether the pattern of will-making within the rural African American landowning group is a marker of class or race because there are not many similar studies of poor, rural white landowners.<sup>80</sup> More broadly, one study indicates that 55 percent of people surveyed in five states had not made wills.<sup>81</sup> This five-state study also indicates that 65 percent of those with family income below \$65,000 a year do not make wills.<sup>82</sup> Further, 72 percent of those with estates worth less than \$130,000 and 50 percent of those with estates worth less than \$260,000 had not made wills.<sup>83</sup>

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<sup>75</sup> *Id.* at 283–85.

<sup>76</sup> *Id.* at 283.

<sup>77</sup> *Id.* at 475.

<sup>78</sup> *Id.* at 65, 113.

<sup>79</sup> Robert Zabawa and Ntam Baharanyi, *Estate Planning Strategies and the Continuing Phenomenon of Black-Owned Landloss*, THE RURAL SOC., July 1992, at 13, 16 (1992). The rates of will-making for black landowners in both the broader survey conducted in ten counties in five southeastern states and the study limited to ten counties in Alabama were higher than the rate that the Emergency Land Fund forecasts. In their study on heir property, the Emergency Land Fund hypothesized that approximately 90 percent of black landowners in the Southeast will die without making wills. See THE EMERGENCY LAND FUND, *supra* note 10, at 114.

<sup>80</sup> THE EMERGENCY LAND FUND, *supra* note 10, at 118 (noting that no comparable survey exploring the will-making practices of rural, white landowners has been conducted). It would be interesting to conduct such a study and examine whether there is a comparable problem of land loss in poor white, rural communities.

<sup>81</sup> LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW 30 (2d ed. 1997).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

Moreover, the explanations offered by academics for the numbers of rural black landowners who have not made wills are not very convincing. Although one study ascribes the failure of many rural black landowners to make wills to a legal system that African Americans had come to mistrust because their property interests were often not protected by it, there does not appear to be any empirical evidence to support this assertion.<sup>84</sup> In fact, the survey results of black landowners who both made and had failed to make wills—included in the report—seems to contradict the historical explanation and suggests that many of those who experienced the most direct racism had learned the importance making wills.<sup>85</sup> Other commentators have suggested that descendants of slaves brought from Africa to different parts of the world have come to rely on the laws of intestacy to further the supposed West African customary practice of succession under which all children inherit.<sup>86</sup> However, given the wide representation of ethnic groups amongst those who were brought to this country as slaves from Africa and the impact that the slavery experience had on transforming traditional culture, it appears unlikely that the rate of will-making can be linked to some particularized, traditional African cultural practice.<sup>87</sup> Interestingly, the cultural explanations offered for the failure of many people of African descent to make wills have parallels with the explanations some have offered for the high percentage of American Indians who have not made wills which has led to the fractionation of many individual Indian allotments.<sup>88</sup>

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<sup>84</sup> THE EMERGENCY LAND FUND, *supra* note 10, at 115 (stating that “Estate planning through testacy was not incorporated into black thought because blacks felt that they could not trust or rely on a legal system which had traditionally failed to protect their interests”).

<sup>85</sup> See THE EMERGENCY LAND FUND, *supra* note 10, at 121. The report states the following:

“Fifty (50%) percent of the respondent will-makers were over fifty-five (55) and eighty-four (84%) percent were over thirty-five (35) years of age. Although the older black landowners still harbor a distrust of the legal system, many have evidently learned that the legal system can be relied upon to support affirmative initiative to protect their land. By making wills, they can provide for orderly and efficient disposition of their property.  
 . . .

Younger minority landowners have not learned the bitter lesson taught the older generation regarding minority land retention in the rural South. They did not witness the loss of ten (10) million acres of black-owned land between 1910 and 1969. They may soon learn, however; but the lesson may be costly.”

*Id.* The difference in the rate of will-making between older black landowners and younger black landowners highlighted in the foregoing study closely tracks the difference in the rate of will-making by age revealed in a study of the rates of will-making conducted in five states, especially when one takes into account the economic class of the landowners. In the five-state study, 61 percent of those between the ages of 46 and 54 and 63 percent of landowners between the ages of 55 and 64 had made wills; in contrast, only 12 percent of those between 17 and 30 years of age and 35 percent of those between 31 and 45 had made wills. See WAGGONER ET AL., *supra* note 80, at 30.

<sup>86</sup> Edith Clarke, *Land Tenure and the Family in Four Selected Communities in Jamaica*, 1 SOC. & ECON. STUD. 81, 86–7 (1953).

<sup>87</sup> See Bruce, *supra* note 66, at 14–5.

<sup>88</sup> A group called the Indian Agricultural Committee (“IAC”) has proposed policy reforms to address the fractionation of heir property in Indian country. As part of a draft proposal addressing the fractionation of Indian allotments, the IAC offered its view of the reason Indians had not made wills after ancestral Indians lands were allotted in the late nineteenth century. The IAC stated:

The lack of a tradition of private ownership resulted in a lack of formal wills or other conveyance documents which would have prevented the current situation. This situation may not have become a problem if left to traditional tribal remedies, because the established tribal decision making process would have re-allocated the holdings. However, the allotments were made under federal provisions, and therefore the distribution of a decedent’s assets were also based on the English Common Law, not the local law or tribal cultures understood by the affected individuals.

Although the root causes of the low incidence of will-making amongst rural, African American landowners are not well understood, it does appear that many black landowners lack a sophisticated understanding of the legal rules governing the transfer of property from one generation to another. Two studies indicate that a clear majority of the black landowners surveyed were apathetic about preparing a will, expressing the sentiment that they simply “had not got around to it.”<sup>89</sup> However, the surveys also revealed that many of the landowners were quite misinformed about the laws governing tenancies in common. In one study, almost 75 percent of those acquiring property through intestacy believed that all the tenants in common must consent to a sale of the land.<sup>90</sup> The misconceptions held by many rural, African Americans concerning the laws that govern tenancies in common suggest that these communities have comparatively limited access to attorneys and indicate that meaningful policy reform would include proposals designed to increase the access such owners have to legal professionals for purposes of basic estate planning.

The reliance on intestacy has contributed to intense fractionation of property held under common ownership structures within other poor communities both in the United States and in other countries. For American Indians, one commentator has stated that the heirship problem, “[is] second only to alienation amongst the evils wrought by” the era of the allotment of Indian lands that was federal Indian policy between 1887 and 1934.<sup>91</sup> Studies by the U.S. Senate and the U.S. House of Representatives in the early 1960s indicated that one-half of the allotted Indian lands then held in trust by the federal government had become fractionated.<sup>92</sup> The Supreme Court noted the problem in *Hodel v. Irving*.

“The failure of the allotment program became clearer as successive generations came to hold the allotted lands. Thus 40-, 80-, and 160-acre parcels became splintered into multiple undivided interests in land, with some parcels having hundreds, and many parcels having dozens, of owners.”<sup>93</sup>

Just as the John Brown estate highlighted the intense fractionation of heir property typical of many rural, African American property holdings, certain tracts of land on the Sisseton-Wahpeton Lake Traverse Reservation demonstrate the degree of fractionation of all too many Indian allotments. The average tract on that reservation has 196 owners and the average owner holds undivided

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(Unpublished document on file with author).

<sup>89</sup> THE EMERGENCY LAND FUND, *supra* note 10, at 113; Zabawa and Baharanyi, *supra* note 78, at 18.

<sup>90</sup> THE EMERGENCY LAND FUND, *supra* note 10, at 123.

<sup>91</sup> Michael C. Lawson, *Heirship: The Indian Amoeba*, reprinted in *Hearing on 2.2480 and S.2663 Before the Senate Select Comm. on Indian Affairs*, 98<sup>th</sup> Cong. 81 (1984) [hereinafter *Heirship: The Indian Amoeba*]. See also *Hodel v. Irving*, 481 U.S. 704, 707 (1987) (“The policy of allotment of Indian lands quickly proved disastrous for the Indians. Cash generated by land sales to whites was quickly dissipated, and the Indians, rather than farming the land themselves, evolved into petty landlords, leasing their allotted lands to white ranchers and farmers and living off the meager rentals”).

<sup>92</sup> See HOUSE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS, 86<sup>th</sup> Cong., 2D SESS. INDIAN HEIRSHIP LAND STUDY, (Comm. Print 1961); SENATE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS, 86<sup>th</sup> Cong., 2D SESS., INDIAN HEIRSHIP LAND SURVEY, (Comm. Print 1960-61).

<sup>93</sup> *Hodel*, 481 U.S. at 707.

interests in 14 tracts.<sup>94</sup> An especially dramatic example of this fractionation is tract 1305. According to the Supreme Court:

Tract 1305 is 40 acres and produces \$1,080 in income annually. It is valued at \$8,000. It has 439 owners, one-third of whom receive less \$.05 in annual rent and two-thirds of whom receive less than \$1. The largest interest holder receives \$82.25 annually. The common denominator used to compute fractional interests in the property is 3,394,923,840,000. The smallest heir receives \$.01 every 177 years. If the tract were sold (assuming the 489 owners could agree) for its estimated \$8,000 value, he would be entitled to \$.000418. The administrative costs of handling this tract are estimated by the Bureau of Indian Affairs at \$17,560 annually.<sup>95</sup>

Fractionation of individually owned Indian trust land precludes meaningful economic development, preventing wealth generation from one generation to another. However, such fractionation has not led to significant land loss because of the different application of partition laws in cases involving much of nontribal, Indian trust land. Until 1980, the Interior Department had maintained that even a partition in kind of an Indian allotment required the consent of all of the tenants in common.<sup>96</sup> In 1980, a federal district court in South Dakota ruled that at the discretion of the Secretary of the Interior a partition can be ordered even if only one co-tenant files an application.<sup>97</sup> Even after *Sampson*, however, partition sales do not appear to be a major source of land loss in the American Indian community.

Outside of the United States, other poor communities have also experienced significant problems with fractionation of commonly owned property. In St. Lucia and other Caribbean countries, for example, “family land” has become intensely fractionated over time due to the failure of landowners to make wills.<sup>98</sup> Owners of such land find it difficult to secure credit and marketable title, limiting productive use of their land.<sup>99</sup> But the comparative American Indian and Caribbean case studies show that the dynamic of land loss requires more than just fractionated heir property. Partition rules are crucial. In contrast to rural, African Americans, St. Lucian owners of “family land” have not lost much of their land through partition because the law does not allow an individual common owner to seek partition without the consent of all the other common owners.<sup>100</sup>

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<sup>94</sup> See *Hodel*, 481 U.S. at 712.

<sup>95</sup> *Id.* at 713.

<sup>96</sup> COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 58, at 623; see also *Heirship: The Indian Amoeba*, *supra* note 90, at 60; Ethel J. Williams, Comment, *Too Little Land, Too Many Heirs – The Indian Heirship Land Problems*, 46 Wash. L. Rev. 709, 714 (1971). Under current law, a partition in kind of an inherited trust allotment may be made either by the Secretary of the Interior without application if it is determined that the partition is to the “advantage of the heirs,” or after the heirs make a written application for partition in kind and it is determined that the land is capable of partition. 25 C.F.R. §152.33 (a)(b)(1999).

<sup>97</sup> *Sampson v. Andrus*, 483 F. Supp. 240 (D.S.D. 1980).

<sup>98</sup> See Bruce, *supra* note 66, at 3–4.

<sup>99</sup> *Id.* at 21–3; see also THE EMERGENCY LAND FUND, *supra* note 10, at 236–250, 306–7.

<sup>100</sup> *Cf.* Bruce, *supra* note 66, at 4 (noting that an administrator of an intestate’s estate in St. Lucia may not partition the land in kind unless all of the heirs consent.).

## 2. AFRICAN AMERICAN LAND IMPERATIVE AND HISTORICAL FACTORS CONTRIBUTING TO LAND LOSS

Africans brought to this country and enslaved were denied the right to acquire land by law. Aside from being denied basic human rights under the slave system, some commentators argue that the African slaves had no prior experience with private ownership of land. According to this view, despite the linguistic and cultural practices that distinguished the slaves who were brought to the New World from different regions in West Africa, the slaves as a group were all drawn from societies that practiced communal land tenure.<sup>101</sup> Whether or not this assessment is fully accurate, over time the American slave system squelched the ability to practice the culture of African ancestors and reoriented the enslaved to a system with different economic values. As time progressed, the slaves “began to think of themselves more and more as individuals bound together by the exploitative system of human bondage, and less as culturally united by a distinct African culture(s).”<sup>102</sup>

Thrust into the lower rungs of an economic system that promoted individualism, African American slaves accepted the notion that a better life was possible through the accumulation of capital and property, even if their capacity to participate in the economic system was severely constrained.<sup>103</sup> From the earliest days in America, an internal slave economy developed that enabled African Americans to participate in limited ways in the economic life of this country. In early colonial Virginia, for example, many plantation owners set aside small tracts of land for their slaves to use to grow food for themselves.<sup>104</sup> Although slaves were almost never allowed to acquire real property, many acquired some personal property that was owned individually, as opposed to collectively.

Property ownership amongst slaves remained small during the eighteenth century, but by the eve of the Civil War—according to comments of slaveholders, increasing enactments to halt “pretended ownership,” the recollection of former slaves, and the reports of postwar investigators—considerable numbers of slaves had become property owners. They possessed cattle, milk, cows, horses, pigs, chickens, cotton, rice, tobacco, gold and silver coin, wagons, buggies, fancy clothing, and in rare instances even real estate.<sup>105</sup>

Further, in the antebellum period, the incentive to acquire capital was particularly felt by those African Americans given the opportunity to purchase their freedom.<sup>106</sup> Those fortunate enough to be freed spared no effort to become property owners.<sup>107</sup>

After issuance of the Emancipation Proclamation, the freedmen and freedwomen fully expected the government to redistribute land throughout the South to a new class of black

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<sup>101</sup> SCHWENINGER, *supra* note 4, at 11.

<sup>102</sup> *Id.* at 27.

<sup>103</sup> *Id.* at 12.

<sup>104</sup> *Id.* at 30.

<sup>105</sup> *Id.* at 59.

<sup>106</sup> *Id.* at 65–6.

<sup>107</sup> *Id.* at 69.

smallholders.<sup>108</sup> The great majority of emancipated slaves had experience only in agriculture,<sup>109</sup> but lacked any resources to purchase land.<sup>110</sup> These hopes of land reallocation seemed justified by events that occurred both in the closing phases of the Civil War and in the actions taken by the federal government soon thereafter. In his march through the South, General Sherman issued Field Order 15 on 16 January 1865, declaring as abandoned land the Sea Islands stretching from Savannah, Georgia, to Charleston, South Carolina, a total of 485,000 acres of land.<sup>111</sup> Within months of this order, General Rufus Saxton, tasked with implementing Sherman's order, settled 40,000 freedmen on the islands on 40-acre plots. In addition to land, Sherman authorized Saxton to give surplus horses and mules to the freedmen to the extent they were available.<sup>112</sup> As it would turn out, General Saxton's allotment of land to the freedmen on the Sea Islands under Field Order 15 would constitute the greatest land redistribution program ever benefiting African Americans in this country's history.<sup>113</sup>

Furthermore, in March 1865, Congress established the Bureau of Refugees, Freedmen, and Abandoned Lands ("the Freedmen's Bureau").<sup>114</sup> The legislation creating this agency "promised every male citizen, whether refugee or freedman, forty acres of land at rental for three years with an option to buy."<sup>115</sup> And in 1866, Congress passed the Southern Homestead Act opening to the freed slaves settlement of 46 million acres of public lands. The 1866 Homestead Act differed from the Homestead Act of 1862 in that the latter provided for homesteading only by non-Confederate whites.<sup>116</sup> In the first two years of the Southern Homestead Act, applicants could apply for settlement of 80 acres of land; later this limit was increased to 180 acres.<sup>117</sup>

Ultimately, however, hopes for significant land reform were destroyed.<sup>118</sup> The impact of the Freedmen's Bureau was muted and the Southern Homestead Act has been labeled "a dismal failure."<sup>119</sup> Although the Freedmen's Bureau had 850,000 acres of land under its control in 1865,<sup>120</sup> half of the land was returned to the former white owners by mid-1866.<sup>121</sup> Further, several

<sup>108</sup> Manning Marable, *Historical Perspective*, in *THE BLACK RURAL LANDOWNER*, *supra* note 30, at 4. Eric Foner has stated that the aspiration for landownership amongst African Americans after emancipation was similar to the post-emancipation yearnings of freedmen in many other countries throughout the Western Hemisphere such as Haiti and Brazil. However, Foner states that only "American blacks emerged from slavery convinced that the federal government had committed itself to land distribution." FONER, *supra* note 3, at 104.

<sup>109</sup> Adell Brown, Jr., et al., *Structural Changes in U.S. Agriculture: Implications for African American Farmers*, *THE REV. OF BLACK POL. ECON.*, Spring 1994, at 58.

<sup>110</sup> ROGER L. RANSOM & RICHARD SUTCH, *ONE KIND OF FREEDOM: THE ECONOMIC CONSEQUENCES OF EMANCIPATION* 81 (1977).

<sup>111</sup> COUTO, *supra* note 24, at 163.

<sup>112</sup> *Id.* at 165. Eric Foner has suggested that the program of land distribution on the Sea Islands that included forty acres and, sometimes, a horse or a mule, may account for the familiar call for "forty acres and a mule" after the end of the Civil War. FONER, *supra* note 3, at 70–1.

<sup>113</sup> COUTO, *supra* note 24, at 165.

<sup>114</sup> Act of Mar. 3, 1865, ch. 90, 13 Stat. 507.

<sup>115</sup> COUTO, *supra* note 24, at 165.

<sup>116</sup> OLIVER & SHAPIRO, *supra* note 20, at 4.

<sup>117</sup> *Id.*

<sup>118</sup> FONER, *supra* note 3, at 161.

<sup>119</sup> *Id.* at 246.

<sup>120</sup> *Id.* at 165.

months after passage of the Freedmen's Bill, President Andrew Johnson began issuing a number of pardons to former Confederates and ordered General O.O. Howard, commissioner of the Freedmen's Bureau, to issue a circular restoring land to the pardoned southerners.<sup>122</sup> Few African Americans were able to settle lands under the Southern Homestead Act due to the fact that anyone who claimed that they had not supported the Confederacy was eligible to apply for land under the act. Seventy-seven percent of the applicants under the Southern Homestead Act were white by one estimate, and the limited number of black applicants faced additional hurdles of discrimination in their effort to obtain government homesteads.<sup>123</sup>

Despite the government's failure to provide significant land to the freed slaves during Reconstruction, African Americans still maintained their focus on acquiring landownership.<sup>124</sup> Almost completely through private purchase, African Americans acquired 15 million acres of land in the South between emancipation and 1910, overcoming discriminatory credit practices, violence perpetuated by anti-black groups, and the refusal of many whites to sell to black people.<sup>125</sup> African Americans throughout the South overcame obstacles to land acquisition by demonstrating what can only be described as heroic action. In the agricultural sector, where the overwhelming number of black landowners were concentrated, black farm owners constituted 16.5 percent of all southern landowners by 1910.<sup>126</sup> It must be noted, however, that African Americans never were permitted to purchase any significant amount of prime real estate; for the most part, black people could buy land in "areas with less fertile soil, perhaps tucked away in the hills, not too close to the main highways or railroads, nor to white schools or churches."<sup>127</sup>

No matter what the quality of the land, these remarkable gains in black landownership in the rural South have almost been wiped out. At the end of this century, African Americans in the region have been losing land almost as rapidly as their forebears acquired it at the beginning of the century. One study estimates that almost none of the 15 million acre land base that black people acquired between 1865 and 1910 remains within the original black families that once owned the land.<sup>128</sup> Fewer than 3 million acres of land are currently owned by rural, African Americans in farming, irrespective of when such land was acquired.<sup>129</sup> Black-operated farms today are

<sup>121</sup> *Id.* at 161.

<sup>122</sup> FONER, *supra* note 3, 159.

<sup>123</sup> OLIVER & SHAPIRO, *supra* note 20, at 14–15.

<sup>124</sup> RANSOM & SUTCH, *supra* note 109, at 82–3.

<sup>125</sup> See Peggy G. Hargis, *Beyond the Marginality Thesis: The Acquisition and Loss of Land by African Americans in Georgia, 1880–1930* in AGRIC. HIST., Spring 1998, at 246. Not only did many African Americans who tried to acquire land face violence, but also some whites who sold land to African Americans were threatened with violence from their fellow whites for what was considered their unpatriotic acts. See RANSOM & SUTCH, *supra* note 109, at 86.

<sup>126</sup> U.S. COMM'N ON CIVIL RIGHTS, THE DECLINE OF BLACK FARMING IN AMERICA 21 (1982) at 21 [hereinafter THE DECLINE OF BLACK FARMING IN AMERICA].

<sup>127</sup> *Id.* at 23.

<sup>128</sup> THE EMERGENCY LAND FUND, *supra* note 10, at 100.

<sup>129</sup> See *supra* note 9 and accompanying text. It should be noted that the exact amount of black landownership is difficult to ascertain precisely because most estimates rely in part on agricultural census data. These data are problematic for many reasons. See THE EMERGENCY LAND FUND, *supra* note 10, at 19–21; see also THE DECLINE OF BLACK FARMING IN AMERICA, *supra* note 125, at 2, n. 3. Due to the methodological problems in calculating the precise number of acres under black landownership, there has been some conflict in the literature that addresses black land loss as to the precise amount of black landholdings. For example, in 1973, one commentator estimated that blacks in the rural South

concentrated in the southeastern states within the Black Belt<sup>130</sup> and in Texas, Oklahoma, and California.<sup>131</sup>

Black land loss closely tracks the steep decline of black farmers since 1920, a phenomenon the recently settled class-action lawsuit filed by black farmers against the USDA brought to national attention in the past year. In 1920, black farm owners accounted for one out of every seven farms in the United States; today these farms account for less than 1 percent of all U.S. farms.<sup>132</sup> Overall, the number of black farmers has decreased from a high of 925,708 in 1920 when one in four black farmers owned their own land<sup>133</sup> to approximately 18,000 today—a 98 percent decline.<sup>134</sup> The number of white farmers has declined as well, but the rate of decline of black farmers far outpaces that of white farmers.<sup>135</sup> Even in 1870, just five years after the end of the Civil War, there were close to 29,000 black farm owners in the South.<sup>136</sup>

With the age distribution of black farmers heavily tilted toward older farmers, the future of black farmers in America looks, if possible, worse. The 1997 agricultural census counted only 745 black farmers under 35 years of age in the entire country, most of them concentrated in the Southern states; these young farmers comprised just 4 percent of all black farmers.<sup>137</sup> Black farmers who were 70 years or older easily constituted the largest group of black farmers, representing 24 percent of the total.<sup>138</sup> Overall, the average age of black farmers was the highest of any identified group of farmers, whether minority or white.<sup>139</sup>

General economic shifts in the agricultural industry have squeezed out many small farmers—the group in which most black farmers are concentrated.<sup>140</sup> The few remaining black farmers face the additional threat of being forced out of farming due to continued discrimination by the USDA.

owned only 6 million acres of land. *See generally* Browne, *supra* note 30. A different 1984 study concluded that there were “9,257,311 acres of black-owned rural land in the southeastern states.” THE EMERGENCY LAND FUND, *supra* note 10, at 61.

<sup>130</sup> Strictly speaking, the Black Belt refers to the region (and not the people) in the Southeastern portion of the country with fertile, dark soil. THE EMERGENCY LAND FUND, *supra* note 10, at 18.

<sup>131</sup> *The Minority Farmer: A Disappearing American Resource*, *supra* note 6, at 6.

<sup>132</sup> *Id.*

<sup>133</sup> Marable, *supra* note 30, at 15. Of the approximately 888,000 black farmers in 1910, 175,000 fully owned their farms and another 43,000 partially owned farms.

<sup>134</sup> 1997 CENSUS OF AGRICULTURE, *supra* note 5, at 25. The number of white farmers also decreased significantly between 1920 and 1992; however, the white rate of decline of 65 percent in this period still pales in comparison to the rate of decline of black farmers. Spenser D. Wood & Jess Gilbert, *Re-entering African-American Farmers: Recent Trends and a Policy Rationale 2* (unpublished paper on file with author).

<sup>135</sup> For example, between 1982 and 1987, the percentage of black farmers declined by 30.9 percent at the same time as the percentage of white farmers declined by 6.6 percent. 1987 CENSUS OF AGRICULTURE, PART 51, UNITED STATES SUMMARY AND STATE DATA 21, App. A-7 (1987).

<sup>136</sup> SCHWENINGER, *supra* note 4, at 164, 174.

<sup>137</sup> 1997 CENSUS OF AGRICULTURE, *supra* note 5, at 26.

<sup>138</sup> *Id.* *See also*, Jerry Thomas, *Black Farmers’ Battle Reaps Bitter Harvest*, CHI. TRIB., Dec. 7, 1997, at Sec. 1, 1 (discussing difficulty last full-time, black owner-operator of a farm in Kankakee County, Illinois, has had farming and trying to pass his farming operation onto another black farmer to continue the enterprise).

<sup>139</sup> 1997 CENSUS OF AGRICULTURE, *supra* note 5, at 24, 26.

<sup>140</sup> *Id.* The 1997 census indicates that 77 percent of black farmers had agricultural sales of less than \$10,000 and 86 percent of these farmers had sales of less than \$20,000.

Applications for farm credit and other benefits available under the USDA are approved or denied by state, by county committees of local farmers.<sup>141</sup> Federal regulations mandate that those eligible to elect commissioners to the three to five member county committees and those eligible to be elected must possess an interest in a farm either as owner, operator, tenant, or sharecropper.<sup>142</sup> Paralleling the small percentage of black farmers nationally, there are only 37 African American county commissioners out of 8,147 county commissioners nationwide.<sup>143</sup>

The settlement of the *Pigford* class action made no substantive changes to the federal mechanism of loan determinations that vests so much power in local commissioners.<sup>144</sup> Given the historic and stubborn refusal of these commissioners to treat black farmers fairly, even after repeated federal studies over the past decades documented blatant discrimination against black farmers by USDA officials and county commissioners,<sup>145</sup> disparity in government support for black farmers is likely to recur despite the settlement of the *Pigford* lawsuit. In fact, at the very time the government was settling the *Pigford* lawsuit, black farmers in Arkansas and Georgia claimed that commissioners in five county offices in the two states improperly denied black farmers disaster assistance.<sup>146</sup> One constant phenomenon has recurred since the first government reports highlighted discrimination against black farmers over 30 years ago—the number of black farmers has declined after each report has been issued. In fact, whereas the U.S. Commission on Civil Rights reported that there were only 57,271 black farm operators in 1982,<sup>147</sup> the 1997 census

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<sup>141</sup> 7 C.F.R. §§ 7.1-7.38 (1999).

<sup>142</sup> 7 C.F.R. §§ 7.5, 7.15 (1999).

<sup>143</sup> The CRAT Report, *supra* note 8, at 19. The representation of other minority farmers on county commissions tracks the meager representation of black farmers. In 1994, minorities accounted for 4.7 percent of those eligible to vote for county committee seats; however, just 2.9 percent of the county commissioners elected in 1994 were minorities. *Id.* at 20.

<sup>144</sup> *Pigford v. Glickman*, 185 F.R.D. 82, 110 (D.D.C. 1999). The Court stated:

The Consent Decree does not, however, provide any forward-looking injunctive relief. It does not require the USDA to take any steps to ensure that county commissioners who have discriminated against class members in the past are no longer in the position of approving loans. Nor does it provide a mechanism to ensure that future discrimination complaints are timely investigated and resolved so that the USDA does not practice the same discrimination against African American farmers that led to the filing of this lawsuit. In fact, the Consent Decree stands absolutely mute on two critical points: the full implementation of the recommendations of the Civil Rights Action Team and the integration and reform of the county committee system to make it more accountable and representative. The absence of any such provisions has led to strong, heart-felt objections. It has also caused the Court concern.

<sup>145</sup> Although the *Pigford* lawsuit filed by black farmers helped reveal the widespread and systematic discrimination within the federal farm program, the allegations of discrimination that formed the basis of the lawsuit have a long history and were well documented in many reports dating back to at least 1965. *See, e.g.*, Office of Inspector General, *General Evaluation Report for the Secretary on Civil Rights Issues* (1997); the CRAT Report *supra* note 8 (1997); GAO, *Farm Programs: Efforts to Achieve Equitable Treatment of Minority Farmers* (1997); U.S. Comm'n on Civil Rights, *Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs* (1996); GAO, *Minorities and Women on Farm Committees* (1995); *The Minority Farmer: A Disappearing American Resource*, *supra* note 6 (1990); *Decline of Minority Farming in the United States*, *supra* note 6 (1990); U.S. Dep't of Agric., *Report of the USDA Task Force on Black Farm Ownership* (1983); THE DECLINE OF BLACK FARMING IN AMERICA, *supra* note 125; U.S. Comm'n on Civil Rights, *Cycle to Nowhere*, CLEARINGHOUSE PUB. No. 14 (1970); and U.S. Comm'n on Civil Rights, *Equal Opportunity in Farm Programs* (1965) (finding discrimination in the USDA's Farmers Home Administration, Cooperative Extension Service, Soil Conservation Service, and Agricultural and Conservation Service).

<sup>146</sup> *Disaster Aid Denied, Black Farmers Charge*, CHI. TRIB., Aug. 11, 1999, §§1, 3.

<sup>147</sup> THE DECLINE OF BLACK FARMING IN AMERICA, *supra* note 125, at 1.

reports that there are currently just 18,451 black farm operators in the country.<sup>148</sup> Even if discrimination is rooted out, policies designed to uphold all small farmers—white and minority—must be implemented in order to renew the prospects for small farmers who have not prospered under this country’s agricultural policy over the past half-century.<sup>149</sup>

Members of the *Pigford* class publicly voice concern about an issue even more fundamental than the issue of whether or not African American farmers will survive. They believe the actions of the USDA and its state agents have been designed to strip away the diminishing number of acres under black ownership in rural America.<sup>150</sup> Some believe the USDA participated in a conspiracy to take land from black farmers.<sup>151</sup> Others say the refusal to restore land lost as a direct result of the USDA’s acknowledged discrimination amounts to an intentional choice to dispossess black farmers of their land. At root, these allegations reflect the view that black-owned rural land is a political and not just a cultural or economic heritage. Without land, they fear, African Americans will have less power to build community and to exercise the range of activities associated with full citizenship in a democracy.

Behind the raw numbers indicating a historic decline in the numbers of black landowners in the rural South are other factors, including African American migration patterns in this century. As blacks left the South, the dispersal of family contributed to less secure common ownership of real land left behind. Ironically, at the peak of black landownership and farming in the South in 1910, large numbers of African Americans began migrating out of the South. This “Great Migration” continued through the 1960s and fundamentally redistributed the black population of the country.<sup>152</sup> In 1900, 90 percent of black people lived in the South;<sup>153</sup> by 1980, the percentage

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<sup>148</sup> 1997 CENSUS OF AGRICULTURE, *supra* note 5, at 25.

<sup>149</sup> Wendell Berry, *Failing our Farmers*, N.Y. TIMES, July 6, 1999, at A21 (stating that “farm communities have disintegrated everywhere . . . [a]nd a destructive agricultural economy is profoundly undemocratic”).

<sup>150</sup> The author attended the “3rd National Black Land Loss Summit,” held in Durham, North Carolina, in February 1999, sponsored by the Black Farmers and Agriculturists Association. A number of conference participants were also members of the *Pigford* class. These members almost uniformly expressed their opposition to the then-proposed and now-final settlement of the lawsuit because it provides little assistance to black farmers who seek to recover land lost as a direct result of the USDA’s discrimination. The concerns this author heard mirror the concerns that black farmers expressed throughout the country in listening sessions held by the USDA’s Civil Rights Action Team. See The CRAT Report, *supra* note 8, at 14.

<sup>151</sup> *Id.* The CRAT Report makes this clear:

Many minority and limited-resource farmers believe that USDA has participated in a conspiracy to take their land. They cite as proof the severe decline in farm ownership by minorities, especially African American farmers, in the last 70 years. Much of this land had been owned for generations, in some cases acquired by these farm families after slavery was abolished in the 1860’s.

*Id.*

<sup>152</sup> Initially, “The Great Migration” referred to the migration of black people out of the South that occurred during and soon after World War I. More generally, the term has also been used to capture the migration of blacks out of the South during and after World War II. Stewart E. Tolnay, *The Great Migration and Changes in the Northern Black Family, 1940 to 1990*, 75 SOC. FORCES 1213 (1997). Between 1910 and 1920, 525,000 African Americans migrated out of the South; in the 1920s, 877,000 black people left the South. REYNOLDS FARLEY & WALTER R. ALLEN, *THE COLOR LINE AND THE QUALITY OF LIFE IN AMERICA* 113 (1987). Prior to 1910, blacks had migrated out of the South in much smaller numbers. In the 1870s, 70,000 left; in the 1880s, 80,000 left; in the 1890s, 174,000 left; and between 1900 and 1910, 197,000 more left. The doubling of the numbers of blacks migrating out of the region in the period between 1890 and 1910 as compared to the period between 1870 and 1890 has been attributed, in part, to the increasing

had declined to 50 percent.<sup>154</sup> Various push and pull factors encouraged blacks to leave the South in large numbers during the World War I period. With the onset of war in 1914, northern factories expanded their production; at the same time, the cheap supply of labor from southern and eastern Europe dried up due to the outbreak of war.<sup>155</sup> In the same period, in Louisiana in 1906, and moving to Mississippi in 1913 and to Alabama in 1916, the Mexican boll weevil wreaked havoc on the southern cotton crop.<sup>156</sup> The appearance of the boll weevil coincided with a plunge in the price of cotton and a series of floods that hit the South in 1915 and 1916.<sup>157</sup> These natural devastations led southern planters to shift their production to food crops and livestock, which required fewer tenant farmers and day laborers.<sup>158</sup>

As once relatively unified African American families dispersed, those who remain in the region and in possession of family agricultural land and those who left sometimes have come to value their common property holdings differently. But the legal rules governing tenancies in common

use of blacks as strikebreakers in northern labor disputes. DOUGLASS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 28 (1993).

<sup>153</sup> *Id.* at 1214; see generally FARLEY & ALLEN, *supra* note 151, at 110–113.

<sup>154</sup> Nick Clooney, *Black Americans Tilt Southward*, CIN. POST, Feb. 11, 1998, at A1. Interestingly enough, the demographic trends have now shifted and more black people are currently migrating to the South than to any other region in this country. In 1988, the proportion of African Americans living in the South increased to 56 percent from a low of 52 percent in 1980. See Barbara Vobejda, *In Turn Back, Blacks Moving to the South; Dramatic Shift Reflects Economy, Racial Mood*, WASH. POST, Jan. 29, 1998, at A3. Further, between 1990 and 1995, 375,000 black people moved into the South, doubling the number that had moved in during the prior 5-year period. *Id.* According to William Frey, a demographer at the University of Michigan, the South was the only region in the country where more black people moved in than migrated out between 1990 and 1995. *Id.* The regional net black migration numbers between 1990 and 1995 are as follows: Midwest, -106,500; West, -28,700; Northeast, -233,600; and South, 368,800. *Id.* In a stark reversal of sentiment, many blacks now find the South socially more progressive than the north. *Id.*

Analysis of demographic distribution patterns in the past century for American Indians and African Americans reveals some interesting correlations. Just as 90 percent of African Americans lived in the south in 1900, 90 percent of Native Americans lived in rural areas as recently as 1930. See CHANGING NUMBERS, CHANGING NEEDS: AMERICAN INDIAN DEMOGRAPHY AND PUBLIC HEALTH 21 (Gary D. Sandefur et al. eds., 1996). By comparison, in 1930, a little more than half of all other Americans lived in urban areas. *Id.* By 1990, slightly more than 50 percent of the American Indian population resided in urban areas. *Id.* at 37. Just as African Americans first came north in large numbers due to the outbreak of World War I, World War II served as the primary “pull” factor that drew American Indians out of rural areas in large numbers. *Id.* at 22. Twenty-five thousand American Indians served in the military during World War II, and another 50,000 were employed in war-related industries. *Id.* A higher percentage of Indians fought in World War II than any other ethnic group in America and many of these Indians enthusiastically volunteered for military service. DONALD L. FIXICO, *TERMINATION AND RELOCATION: FEDERAL INDIAN POLICY, 1945–1960* 4, 6 (1986). Further, American Indians invested \$17 million in war bonds and supported the war effort in many other sacrificial ways. *Id.* In contrast to the oppressive racist conditions that caused many African Americans to seek a better life in the North during the years of “The Great Migration,” the federal policy of “termination and relocation” served as the predominant “push” factor that drove increasingly larger numbers of Indians to urban areas from approximately 1950 to the mid-1970s. The policy of “termination and relocation” served as the official federal Indian policy from 1950 to 1975. An estimated 100,000 American Indians relocated to cities between 1952 and 1972. Sandefur et al., CHANGING NUMBERS, *supra* note 153, at 22. Although the rural-urban migration trends for American Indians have not reversed as dramatically as for African al. Americans, the American Indian migration pattern appeared to reach an equilibrium in approximately 1970, at roughly the same time that the out-migration of blacks from the South came to a halt. *Id.* at 23, 38.

<sup>155</sup> Tolnay, *supra* note 151, at 1214; see also MASSEY & DENTON, *supra* note 151, at 28–9.

<sup>156</sup> MASSEY & DENTON, *supra* note 151, at 29.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

in conjunction with intestacy rules do not distinguish between family members who disperse and lose all meaningful connection to the land and those who maintain meaningful ties to the land. As noted before, many migrants out of the region during the Great Migration (and their descendants) unwittingly sell their interests in land in the South to land speculators who then initiate legal proceedings that force a sale of the entire family's landholdings. The distant relatives geographically removed from the land are almost never cognizant that the fractional interests they sell will be used as a lever to force their distant relations off of family land.

### 3. POLITICAL AND PROPERTY THEORY

**Together with comparative studies supports the view that land can provide the basis for community and ground greater democratic participation**

#### 3.1 VISIONS OF PARTICIPATORY DEMOCRACY IN A RACIALLY MIXED SOCIETY

Although emancipated from slavery over one hundred years ago, African Americans never realized the full benefits of citizenship as measured by the ability to participate meaningfully in the political and economic life of the country. Undeniably, the history of struggle has been dynamic and uneven. There have been periods in which African Americans as a group, often with the assistance of others committed to social justice, acquired greater social capital and thereby improved their social and economic status. Yet in other periods of retrenchment the wider society scaled back its commitment to bringing African Americans into the mainstream of American life.

Iris Marion Young asserts that participatory democracy has both instrumental and intrinsic value. Instrumentally, involvement in the political life of one's community is the best way for citizens to express their views and to ensure that their interests are not crowded out by others.<sup>159</sup> In terms of the intrinsic value of democracy, Young draws upon the work of Rousseau and John Stuart Mill to emphasize the development of human capacities for self-government and social relation:

Having and exercising the opportunity to participate in making collective decisions that affect one's actions or the conditions of one's actions fosters the development of capacities for thinking about one's own needs in relation to the needs of others, taking an interest in the relation of others to social institutions, reassuring and being articulate and persuasive, and so on. Only such participation, moreover, can give persons a sense of active relation to social institutions and processes.<sup>160</sup>

In the past half century, those fighting to change the persistent, subordinate status of African Americans have worked hard to develop mechanisms that would provide African Americans with more ability to participate meaningfully in electoral politics. Elections and voting rights, however, have not always been the central strategy for empowerment within the American black community. Since emancipation, black leaders advanced sometimes-conflicting strategies to promote the group's uplift, with the conflict between integration and nationalist or self-determination strategies.

In the nineteenth century, Frederick Douglass contended that black Americans had no desire to form their own state or to return to Africa; once freed, he believed black Americans would be quickly assimilated into the mainstream of society.<sup>161</sup> By contrast, Martin Delany, the leading black nationalist of that time, maintained that any free people needed to be part of the group that ruled society. Yet he insisted that entrenched racism would prevent black people from ever joining the

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<sup>159</sup> IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 91 (1990).

<sup>160</sup> *Id.*

<sup>161</sup> Frederick Douglass, *The Future of the Colored Race*, in IV *LIFE AND WRITINGS* 193–96 (Phillip S. Foner ed., 1950).

ruling elite in America. Therefore, at one stage of his career Delany advocated that black people in America should emigrate to Central and South America, as well as the West Indies.<sup>162</sup> Following emancipation, most freed slaves wanted to become landowners even more than they wanted voting rights or education.<sup>163</sup> Landownership meant economic security and self-determination.

The conflicting ideologies of nationalists and integrationists converged during the civil rights movement and, especially, with the passage of the Voting Rights Act of 1965.<sup>164</sup> Black people along a wide ideological spectrum embraced the view that fundamental change in the social and economic agenda of the country could be achieved through the ballot box. Many assumed that increased voting in the black community would result in the election of more black officials, who in turn would be the engines of political transformation.<sup>165</sup> Despite the energy that African Americans invested in trying to reshape the political system, African Americans continue to be severely underrepresented in politics.

By democratic principle, it is unjust that minorities do not play a substantial role in the political decision-making process. Yet, the American liberal tradition, individualistic in theory, views politics as concerning the relationship between an individual and the state, “with little or no room for groups in-between, other than as transient outgrowths of the combination of individual interests.”<sup>166</sup> This individualistic focus provides little space for group-level concerns of minorities.<sup>167</sup> This explains the resistance to opening up the American political system through mechanisms such as proportional representation or cumulative voting that would empower groups.<sup>168</sup> Lani Guinier was pilloried by conservatives in politics and the media for simply suggesting that some alternative voting system such as one based on cumulative voting—a commonly used voting mechanism in many corporations that is used to protect minority shareholders—should be adopted in order that racial minorities may more effectively participate in politics.

Majority groups often worry that granting rights to minority groups qua groups will fragment the national fabric and undermine national unity.<sup>169</sup> Perhaps with this in mind, John Stuart Mill claimed it would be “next to impossible” for real democracy to flourish in an ethnically diverse society.<sup>170</sup> Mill’s response was to argue that a country’s boundaries be drawn along ethnic lines and that national minorities be granted the right to secede.<sup>171</sup> These are not realistic alternatives

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<sup>162</sup> MARTIN DELANY, *THE CONDITION, ELEVATION, EMIGRATION AND DESTINY OF THE COLORED PEOPLE OF THE UNITED STATES* 184 (1968) (1<sup>st</sup> ed. 1852).

<sup>163</sup> RONALD TAKAKI, *A DIFFERENT MIRROR: A HISTORY OF MULTICULTURAL AMERICA* 131–32 (1993).

<sup>164</sup> LANI GUINIER, *THE TYRANNY OF THE MAJORITY* 45 (1994).

<sup>165</sup> The assumption that black elected officials as a group would push programs that held the promise for fundamental social and economic change that would inure to the benefit of the wider black community has not been borne out in many instances. See Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1448 (1991).

<sup>166</sup> Jacob Levy, *Classifying Cultural Rights*, in *NOMOS XXXIX* 22 (Ian Shapiro and Will Kymlicka eds., 1997).

<sup>167</sup> HANNUM, *supra* note 26, at 56.

<sup>168</sup> HANNA F. PITKIN, *THE CONCEPT OF REPRESENTATION* (1967).

<sup>169</sup> HANNUM, *supra* note 26, at 71.

<sup>170</sup> JOHN STUART MILL, *UTILITARIANISM, LIBERTY AND REPRESENTATIVE GOVERNMENT* 361 (E.P. Dutton 1910).

<sup>171</sup> *Id.* at 362, 366.

for ethnically pluralistic western societies. The project for modern democracies is to learn to thrive on heterogeneity.

Faith in assimilation has triumphed at the level of constitutional principle, yet ethnic minorities continue to face obstacles to meaningful participation in ostensibly democratic states, including the United States.<sup>172</sup> Despite noticeable gains since the 1960s, for example, African Americans today hold less than 2 percent of elected offices throughout the country.<sup>173</sup> To a striking degree, large portions of the American landscape remain geographically segregated by race. In fact, Douglass Massey and Nancy Denton show that racial segregation of housing has worsened in this century. One-third of African Americans live in areas so intensely segregated that they are almost completely isolated from other groups in society, rendering them amongst “the most isolated people on earth.”<sup>174</sup>

### 3.2 LANDOWNERSHIP IN A PARTICIPATORY DEMOCRACY

Just as participatory democracy has both instrumental and intrinsic value, an enduring liberal political tradition sees landownership as a vehicle for human development, not just an instrument for economic development.<sup>175</sup> Yet the structure of the common law tenancy in common is undemocratic. Minority interest holders may terminate the tenancy against the wishes of the majority interest holders. In these instances, the minority interest holders have more power than their proportional share of the tenancy suggests is fair. Although many property theorists connect property rights and political and economic participation in society, few have specifically considered, however, how minority landownership might make democracy more inclusive.

John Locke maintains that property ownership is essential to civil society.<sup>176</sup> People enter into political or civil societies primarily to preserve property, he argues, defined in this context as “Lives, Liberties and Estates.”<sup>177</sup> Elsewhere, Locke asserts that the “chief matter of property is the Earth itself,” that is, land.<sup>178</sup> Locke’s theory of the social compact assumes that those with valuable material possessions—most importantly land—have the strongest incentive to enter into agreements to establish governments given their desire to preserve their property. Further, once governments are formed, people should retain their property if civil society is to serve its ends. Locke asserts:

The *Supream Power cannot take* from any Man any part of His property without his own consent. For the preservation of Property being the end of Government, and that for which Men enter into

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<sup>172</sup> *Id.* at 30.

<sup>173</sup> OLIVER & SHAPIRO, *supra* note 20, at 24.

<sup>174</sup> MASSEY & DENTON, *supra* note 151, at 77.

<sup>175</sup> See Robert Browne, *The Plight of Black Ownership*, 2 S. EXPOSURE 112, 115 (1974); see also Winston P. Nagan, *Resource Allocation: Land and Human Rights in a New South Africa* (unpublished, undated paper on file with author).

<sup>176</sup> JOHN LOCKE, TWO TREATISES OF GOVERNMENT 111 (Peter Laslett ed., Cambridge Univ. Press 1967) (3d. ed. 1698).

<sup>177</sup> *Id.* at 368, § 123. In the Second Treatise Locke uses at times both a more materialistic definition of property and the more expansive definition referred to above.

<sup>178</sup> *Id.* at 308–9, § 32.

Society, it necessarily supposes and requires, that the People should *have Property*, without which they must be suppos'd to lose that by entering into Society, which was the end for which they entered into it, too gross an absurdity for any Man to own. *Men therefore in Society having Property*, they have such a right to the goods, which by the Law of the Community are theirs, that no Body hath a right to take their substance, or any part of it from them, without their own consent; without this, they have no *Property* at all.<sup>179</sup>

Ownership, therefore, also means a stake in sustaining a viable political sphere.

Locke qualifies the right to private property in two ways. First, he maintains that an individual's right to property is subject to the principle that there must be "enough, and as good left in common for others."<sup>180</sup> Second, Locke maintains that an individual cannot take more property than he can use.<sup>181</sup> Even so, Locke's principal interest lay in setting forth moral and philosophical arguments to support the right to private property, and his ideas were used by Anglo-American politicians to support the property rights of the rich, irrespective of these provisos.<sup>182</sup> Moreover, Locke's arguments for property address the conditions under which individuals initially acquire property rights that become subject to governmental protection, but do not ask whether the distribution of property at any moment in time reflects the fact that different individuals and groups possess unequal power to acquire property in the first instance.<sup>183</sup>

Locke's political theory of property powerfully influenced the framers of the U.S. Constitution, as well as early American jurists.<sup>184</sup> Thomas Jefferson, for one, fully accepted Locke's view of the sanctity of private property rights.<sup>185</sup> Jefferson, however, was relatively more concerned about democratic principles than Locke, a concern that shaped his civic republican view of the proper distribution of land. According to republicans, democracy works best if citizens are enlightened and independent. For Jefferson, private property was "a corollary to democracy" because landownership allowed men to achieve economic security and to develop self-reliance.<sup>186</sup> Believing that the "small land holders are the most precious part of a state,"<sup>187</sup> Jefferson thought that as many men as possible should own land. Jefferson's argument for widely distributed property is also linked to his view of the good society. Agriculture, for Jefferson, held sociological and moral value that was even more important than its economic value.<sup>188</sup> Freed from the corrupting influence of industry and commerce, rural smallholds could help develop virtues that would protect the moral fiber of the country and ensure its longevity.<sup>189</sup>

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<sup>179</sup> *Id.* at 378, §138.

<sup>180</sup> *Id.* at 306, ¶ 27.

<sup>181</sup> *Id.*, ¶ 30.

<sup>182</sup> A. Whitney Griswold, *The Agrarian Democracy of Thomas Jefferson*, 40 AM. POL. SCI. REV. 657, 675 (1946).

<sup>183</sup> Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. Rev. 1283, 1466–68 (1996).

<sup>184</sup> *See, e.g.*, *Johnson v. McIntosh*, 21 U.S. 543, 590 (1823).

<sup>185</sup> Griswold, *supra* note 181, at 673. Jefferson was so closely identified with Locke that some of his detractors accused him of copying Locke's treatises in drafting the Declaration of Independence. *Id.* at 674.

<sup>186</sup> *Id.* at 672.

<sup>187</sup> Letter from Thomas Jefferson to Rev. James Madison (cousin of President James Madison) (Oct. 28, 1785), in VIII THE WRITINGS OF THOMAS JEFFERSON 196 (Andrew A. Lipscomb ed., 1903).

<sup>188</sup> *Id.* at 667.

<sup>189</sup> IV THE WRITINGS OF THOMAS JEFFERSON 85–6 (Andrew A. Lipscomb ed., 1903).

One hundred fifty years later in 1935, in his book *Black Reconstruction*,<sup>190</sup> W.E.B. Du Bois focused upon the failure of the government to allocate land to the freedmen in explaining the failure of Reconstruction to build a real democracy. The enfranchisement of black people in the South after the Civil War was stripped of its liberating potential, he argued, because white landowners maintained their monopoly of land.<sup>191</sup> Although black people used their political power to establish public school systems, Du Bois asserted that “universal suffrage could not function without personal freedom, land and education.”<sup>192</sup> As a socialist thinker, Du Bois considered incomplete the popular black demand for private ownership of land (and little else) in the economic realm.<sup>193</sup> But even so, Du Bois believed that black people in possession of a land base could achieve a measure of economic independence that would give meaning to the right to vote.<sup>194</sup> In the end, according to Du Bois, white resistance to ceding land to blacks, “spelled for [black people] the continuation of slavery.”<sup>195</sup>

The self-determination underpinnings of Du Bois’s philosophy were echoed thirty years later during the height of the civil rights struggle.<sup>196</sup> Leaders of the Black Power movement challenged as misguided the agendas of white liberals and black civil rights leaders. Single-minded efforts to increase social-welfare spending as a means to achieve social uplift for black people would fall short, they predicted. Instead, they argued that black people should work toward self-determination, not just increased participation in mainstream politics. And they believed that more energy should be spent developing and supporting black institutions controlled by black people.<sup>197</sup> Important amongst these were economic institutions that could assure autonomy, just as Jefferson had argued.

### **Comparative studies demonstrate the link between land and participation**

The political theories of “democratic property” have been tested in social science case studies that document the links between land and many measures of community well-being and empowerment.

Complex social networks develop around particular pieces of land for communities defined by continuity rather than mobility. Thus land and place are important to working-class and poor,

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<sup>190</sup> W.E.B. DU BOIS, *BLACK RECONSTRUCTION: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860–1880* (1935); *see also* GUNNAR MYRDAL, *AN AMERICAN DILEMMA* 225 (1944).

<sup>191</sup> DU BOIS, *supra* note 189, at 619.

<sup>192</sup> *Id.* at 585.

<sup>193</sup> *Id.* at 611.

<sup>194</sup> *Id.* at 624.

<sup>195</sup> *Id.* at 611.

<sup>196</sup> *See generally* STOKELY CARMICHAEL & CHARLES V. HAMILTON, *BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA* (1967).

<sup>197</sup> *Id.* at 46, 156. Notwithstanding the radical, public image of the leaders of the black power movement, the economic philosophy underpinning many of the programs advocated by some of the movement’s leaders echoed the view of many liberal whites during the Reconstruction period one hundred years earlier. *See* Myrdal, *supra* note 189, at 226–27 (noting that a liberal Southern white politician believed that after emancipation black people should have been given land instead of being turned over without an economic base “to the mercy of Republican politicians, white and black, who made political slaves of them”).

minority communities in ways not common to mobile, middle-class communities.<sup>198</sup> One study of a working-class, Italian-American community in the West End of Boston displaced in an urban redevelopment project underscores the point that certain groups need property rights in order to maintain a healthy sense of group identity. Not only were complex sets of social networks localized within the particular area of the West End from which the residents were displaced, but most residents also considered the entire area “as an extension of home” and constructed their identity around this extended home.

Social science studies demonstrate that in African American communities, too, landownership promotes community well-being. Landownership has been correlated with increased civic participation,<sup>199</sup> psychological well-being,<sup>200</sup> and enhanced sense of community.<sup>201</sup> Landownership can also benefit families and communities, irrespective of any measurable economic benefits to particular individuals.<sup>202</sup> Even those extended community members who “return home” only periodically may draw psychological strength from the very existence of the rooted community.<sup>203</sup> But because those who own land have greater security than those who rent or work for wages, family landholdings may induce more family members to remain in relative proximity to one another. The land itself can provide the base upon which to build institutions geared to community development.<sup>204</sup> This focus on land as a base for community infrastructure extrapolates from the classical liberal view that landownership is uniquely important to the protection of individual liberty interests. To this end, Robert Ellickson has stated:

“Compared to other resources, land remains a particularly potent safeguard of individual liberty. Like no other resource, land can provide a physical haven to which a beleaguered individual can retreat.”<sup>205</sup>

Just as land can shelter the “beleaguered individual,” it provides a physical base for groups trying to improve their collective lot.

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<sup>198</sup> Ernest Norton Tooby, *The Interest in Rootedness: Family Relocation and an Approach to Full Indemnity*, 21 STAN. L. REV. 800, 814 (1969); Marc Fried, *Grieving for a Lost Home: Psychological Costs of Relocation*, in URBAN RENEWAL, THE RECORD AND THE CONTROVERSY 359, 362 (1966) (James Q. Wilson ed., 1966) (hereinafter Fried, *Grieving*); Marc Fried and Peggy Fleicher, *Some Sources of Residential Satisfaction in an Urban Slum*, 27 J. AM. INST. PLANNERS 305, 311 (1961) (hereinafter Fried & Fleicher, *Residential Satisfaction*).

<sup>199</sup> LESTER M. SALAMON, LAND AND MINORITY ENTERPRISE: THE CRISIS AND THE OPPORTUNITY 42–3 (1976).

<sup>200</sup> See cf. Fried, *Grieving*, *supra* note 197, at 377 (discussing post-relocation depression suffered by those relocated due to urban renewal projects).

<sup>201</sup> Lisa Groger, *Tied to Each Other Through Ties to the Land: Informal Support of Black Elders in a Southern U.S. Community*, 7 J. CROSS-CULTURAL GERONTOLOGY 205 (1992); see also SALAMON, *supra* note 198, at 29–53; Browne, *supra* note 30, at 121.

<sup>202</sup> Cf. Fried & Fleicher, *Residential Satisfaction*, *supra* note 197, at 315; Fried, *Grieving*, *supra* note 197, at 365–66.

<sup>203</sup> THE BLACK RURAL LANDOWNER, *supra* note 30, at xviii; see also Frank G. Progue, *The Mobile Black Family: Sociological Implications*, in THE BLACK RURAL LANDOWNER *supra* note 30, at 25, 36 (“Landownership . . . becomes important because it provides an economic base for sociopsychological release and/or identification even for blacks who have migrated”).

<sup>204</sup> Groger, *supra* note 200, at 209.

<sup>205</sup> Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1353 (1993).

As indicated, families that own land often build mutually beneficial support systems based around the land. One study comparing differences in the systems of informal support between equally poor, landowning and landless elderly black people in the Piedmont region of North Carolina<sup>206</sup> demonstrated that a greater percentage of the children of the sharecroppers moved far away from their parents (often to northern cities) than did the children of landowners. The elderly sharecroppers were more often left to fend for themselves.<sup>207</sup> By contrast, over two-thirds of the landed households in the case study lived on “compounds” in which children or other relatives resided on the land itself or in the immediate vicinity. In these compounds, the children/relatives and the black elders established “reciprocal exchange relationships” that benefited each person tied to the land in some meaningful way.

In addition to particular rural black families, whole communities of African Americans have been strengthened through landownership. Dating back to the early days after the Civil War, African American families and individuals formed rural land collectives either on their own or with the assistance of the government. For example, freedmen in Hampton, Virginia, formed the Lincoln’s Land Association and cooperatively purchased hundreds of acres of land that groups of families then collectively worked.<sup>208</sup> During the Depression, the Resettlement Administration and the Farm Security Administration established several, rural communities for destitute, low-income families.<sup>209</sup> If measured by a survivorship rate, the African American communities would not appear to have been very successful; most did not last even a generation. Yet, these communities greatly improved the life chances of the individuals involved. According to Lester Salamon, many poor tenants (through lease-purchase agreements) gained the chance to become landowners in the newly created communities replete with schools, cooperative enterprises, and other community buildings.<sup>210</sup> Many program participants who purchased land expressed increased self-esteem.<sup>211</sup> The landowners were also much more active in their communities than were tenants as measured by such indicia as relative participation in social and religious organizations, voter registration, and voting turnout.<sup>212</sup>

The Prairie Farms project in western Alabama is a good example of the community-building potential of land-based communities. The Resettlement Administration designed this program to settle destitute and low-income tenant families on approximately 3,000 acres in Macon County, Alabama.<sup>213</sup> Each of the 34 families that were settled at Prairie Farms was provided with a farmstead. The cooperative living at Prairie Farms “centered on farming, and the education and social activities that revolved around agriculture.”<sup>214</sup> The farm families shared livestock for

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<sup>206</sup> Groger, *supra* note 200, at 209.

<sup>207</sup> *Id.* at 209–10.

<sup>208</sup> FONER, *supra* note 3, at 106.

<sup>209</sup> SIDNEY BALDWIN, *POVERTY AND POLITICS: THE RISE AND DECLINE OF THE FARM SECURITY ADMINISTRATION* 92, 111–113 (1968).

<sup>210</sup> SALAMON, *supra* note 198, at 31–2.

<sup>211</sup> *Id.* at 41.

<sup>212</sup> *Id.* at 42–3.

<sup>213</sup> Robert E. Zabawa & Sarah T. Warren, *From Company to Community: Agricultural Community Development in Macon County, Alabama, 1881 to the New Deal*, 2 *AGRIC. HIST.* 459, 477 (1998).

<sup>214</sup> *Id.* at 480.

breeding, set aside a community pasture for common use, and cooperatively used certain machinery and equipment.

The newly constructed school became a major center of community life at Prairie Farms. As the first school to provide a high school education for black students in the surrounding area, the school enrolled 213 students from the very beginning although it was built with a capacity of just 175 students.<sup>215</sup> The school offered the children many enrichment opportunities including the ability to join the school newspaper, a student cooperative, and a number of clubs ranging from the 4-H club to the nature club.<sup>216</sup> Further, the school held adult education classes focusing on agriculture.<sup>217</sup> The school also doubled as the community center where meetings, plays, religious services, and public health programs were held.<sup>218</sup>

Although many of the African American communities formed by the Resettlement Administration and the Farm Security Administration did not endure, one must remember that these projects were started during the Depression, a particularly turbulent period of history.<sup>219</sup> And the African American resettlement communities suffered from differential treatment in the form of lesser funding than white farm-settlement communities established during the same period by the same governmental programs. However, the people who had the opportunity to live within these communities clearly benefited. As Robert Zabawa and Sarah Warren have stated:

[Prairie Farms] was an exercise in the community based on change. There was a change in the relationship to the land: from tenancy and shares to ownership. There was a change in the relationship to production: from cotton to diversified farming. There was a change in the economic relationships: from dependency on the plantation owner and store to cooperative buying and selling. There was a change in the relationship to education: from sporadic elementary education to high school level offerings and adult education. And there was a change in the relationship to community: from cabins scattered along an eroded wasteland, to new houses in a farming community with a health and community center. This is what Prairie Farms had to offer.<sup>220</sup>

Another real-world perspective on the importance of landownership to disadvantaged communities can be gleaned from comparing indigenous populations in North America. Despite their relatively impoverished status, Native Americans within the United States are more politically self-determining and economically developed than Indians in either Canada or Mexico.<sup>221</sup> Studies of American Indian communities demonstrate a strong link between self-governance and social and economic development.<sup>222</sup> With reservations that dwarf the landholdings of most Indian groups

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<sup>215</sup> *Id.* at 484.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 485.

<sup>218</sup> *Id.* at 484–85.

<sup>219</sup> *Id.* at 486.

<sup>220</sup> *Id.*

<sup>221</sup> Anthony DePalma, *Three Countries Face Their Indians*, N.Y. TIMES, Dec. 15, 1996, at E3.

<sup>222</sup> Stephen Cornell and Joseph P. Kalt, *Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations*, in WHAT CAN TRIBES DO? STRATEGIES AND INSTITUTIONS IN AMERICAN INDIAN ECONOMIC DEVELOPMENT (Stephen Cornell & Joseph P. Kalt eds., 1992); *see also* DePalma, *supra* note 220.

in Canada and Mexico, American Indian tribes in the United States have a base upon which their sovereign powers can be meaningfully expressed and organized.<sup>223</sup>

The historical record of federal Indian policy amply demonstrates the link between Native American social welfare and landholding. With the passage of the Dawes Act in 1887, Congress shifted its Indian policy from containing Indians within reservations to promoting assimilation of Indians into American society, principally through transferring huge tracts of Indian land to whites and forcing private ownership upon individual Indians.<sup>224</sup> Just as previous, smaller-scale experiments in allotting Indian land had largely failed to achieve their stated goals,<sup>225</sup> widespread application of the allotment policy under the Dawes Act devastated many Native American communities.<sup>226</sup>

Native Americans lost millions of acres of land that was declared surplus under the Dawes Act.<sup>227</sup> In addition, two-thirds of all the land allotted to individual Indians under the Dawes Act—roughly 27 million acres—ended up in non-Indian hands by 1934, mostly by means of sale, mortgage foreclosure, and tax sale, after restrictions on alienation initially built into the Dawes Act were rapidly stripped away, beginning with passage of the Burke Act in 1906.<sup>228</sup> Although the destruction of communal tenure and its impact on Native American communities under the Dawes Act is well documented, the plight of those Indians who lost their individual allotments was no less damning of the policy. On most reservations that were allotted,<sup>229</sup> between 75 and 100 percent of Indians who received fee patents lost their lands in short measure, and the overwhelming majority of these Indians became impoverished.<sup>230</sup> Although the Dawes Act was lauded upon its enactment as a vehicle to civilize Indians through private property ownership,<sup>231</sup> as land quickly passed out of Indian hands and these Indians slipped into poverty, champions of the allotment policy shifted their support to grounds of social Darwinism. Impoverished Indians would be forced to learn the value of hard work and money.<sup>232</sup>

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<sup>223</sup> Cornell & Kalt, *supra* note 221.

<sup>224</sup> From enactment of the Dawes Act in 1887 to the Congressional repudiation of the allotment policy in 1934, approximately 90 million acres of land passed out of Native American control. COHEN'S HANDBOOK OF FEDERAL LAW, *supra* note 58, at 138.

<sup>225</sup> Royster, *supra* note 16, at 9.

<sup>226</sup> One author who has reviewed the history of the Indian Claims Commission has stated that the allotment policy was a “disaster second only to the original onslaught of the Europeans” as it pertained to Indian cultural integrity. MICHAEL LIEDER & JACK PAGE, *WILD JUSTICE: THE PEOPLE OF GERONIMO V. THE UNITED STATES* 77 (1997).

<sup>227</sup> The federal government appropriated approximately 60 million acres of land from Native American people under the surplus land provisions of the Dawes Act—38 million in outright cessions and an additional 22 million under provisions that allowed non-Indians to homestead on 44 reservations. 1 AMERICAN INDIAN POLICY REVIEW COMM., FINAL REPORT 309 (1977).

<sup>228</sup> COHEN'S HANDBOOK OF FEDERAL LAW, *supra* note 58, at 138. *See also* STEPHEN CORNELL, THE RETURN OF THE NATIVE 118 (1988).

<sup>229</sup> During the allotment period, 118 reservations were allotted. 1 AMERICAN INDIAN POLICY REVIEW COMM., *supra* note 226, at 309.

<sup>230</sup> MCDONNELL, *supra* note 17 at 106–7, 112–3; INSTITUTE FOR GOVERNMENT RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION 460–61 (Lewis Meriam, technical dir., 1928) [hereinafter the Meriam Report].

<sup>231</sup> Royster, *supra* note 16, at 9.

<sup>232</sup> MCDONNELL, *supra* note 17, at 107, 114–15.

The Catawba tribe provides a poignant example of the fundamental importance of landownership. Prior to contact with white settlers, the Catawbans occupied a vast tract of land in an area that now constitutes much of present-day North and South Carolina.<sup>233</sup> Under the terms of two treaties—executed in 1760 and 1763, respectively—between the tribe and the King of England, the Catawbans relinquished aboriginal territory in exchange for undisturbed ownership of a 144,000-acre tract of land located within South Carolina.

After the Revolutionary War, South Carolina acceded to pressures from land-hungry white settlers and enacted a series of statutes authorizing non-Indians to lease Catawba land in contravention of the Nonintercourse Act.<sup>234</sup> At the time of the first leases with non-Indians, the Catawbans were “then strong and felt themselves in their own greatness”;<sup>235</sup> by the 1830s, practically all of the land reserved to the tribe under treaty had been leased to non-Indians on terms highly disadvantageous to the Catawbans.<sup>236</sup> Like so many other Indian tribes, the once-strong Catawbans were reduced to a pathetic shadow of their former selves 30 years after first transferring some of their property rights to white settlers. In a “state of starvation and distress,” the tribe finally acquiesced to South Carolina’s repeated efforts to purchase all of their land.<sup>237</sup>

Just as the loss of a land base contributed to the demise of the Catawba tribe, the Catawbans experienced a resurgence after the federal government—concerned about the tribe’s sinking fortunes<sup>238</sup>—placed into trust approximately 3,500 acres of land for their benefit in the 1940s.<sup>239</sup> From the brink of starvation, the Catawbans recovered so rapidly that within fifteen years of

<sup>233</sup> See *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 500 (1986).

<sup>234</sup> *Id.* at 513–14; the Nonintercourse Act, Act of Mar. 1, 1793, § 8, 1 Stat. 330, is codified as reenacted and amended at 25 U.S.C. § 177. The Nonintercourse Act prohibited any “claims” to protected land in addition to prohibiting outright purchases of such land by entities other than the federal government.

<sup>235</sup> *Catawba Indian Tribe*, 476 U.S. at 514.

<sup>236</sup> *Id.* (“rents were ‘generally paid in old horses, old cows or bed quilts and clothes, at prices that the whites set on the articles taken.’”) The Catawbans’ land bargain was consistent with the overall experience of Indian tribes who rarely were given much value for their land cessions or lease agreements. See FRANCIS PAUL PRUCHA, *AMERICAN INDIAN TREATIES* (1994); see also ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 325, 339 (J.P. Mayer ed. & George Lawrence trans., 1969) (stating that “Americans cheaply acquired whole provinces which the richest sovereigns of Europe could not afford to buy”); Legislative Documents, 21<sup>st</sup> Cong., No. 277, p. 6 (1830) (“Up to the present time so invariable has been the value of certain causes, first in diminishing the value of forest lands to the Indians, and secondly in disposing them to sell readily, that the plan of buying their right of occupancy has never threatened to retard, in any perceptible degree, the prosperity of any of the States”).

<sup>237</sup> The Catawba experience is consistent with the experience of those Indians who lost land allotted to them under the Dawes Act. The overwhelming majority of Indians who were not able to maintain ownership of their allotments found themselves in dire poverty. MCDONNELL, *supra* note 17, at 120.

<sup>238</sup> *Catawba Indian Tribe*, 476 U.S. at 502, n. 7. By 1930, the tribe’s population had been depleted by two-thirds and a Senate subcommittee holding field hearings in South Carolina “‘found some hundred and seventy-five remnants of this band located on a tract of practically barren rock and gradually starving to death.’” *Id.* (quoting from *Division of Tribal Assets of Catawba Indian Tribe, Hearings on H.R. 6128*, Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 80th Cong., 1<sup>st</sup> Sess. (unpublished), Insert 5, at 3 (Minutes of State and Federal Conference, Oct. 21, 1958), quoting letter from Senator Thomas to Commissioner Rhoads (Feb. 10, 1932)).

<sup>239</sup> In addition to placing this land in trust for the Catawbans, the federal government agreed to make a specified annual monetary contribution to the tribe and “to assist the Tribe with education, medical benefits, and economic development.” *Catawba Indian Tribe*, 476 U.S. at 502, n. 7.

obtaining a new land base and various other forms of federal assistance,<sup>240</sup> the government determined that the Catawbas were one of the twelve tribes in the period between 1954 and 1962<sup>241</sup> who were suitable candidates for the withdrawal of federal assistance and services under the termination policy.<sup>242</sup>

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<sup>240</sup> See S. Rep. No. 863, 80<sup>th</sup> Cong., 1<sup>st</sup> Sess. 3 (1959) (“The Catawba Indians have advanced economically . . . during the past fourteen years, and have now reached a position that is comparable to their non-Indian neighbors”).

<sup>241</sup> FRANCIS PAUL PRUCHA, *THE GREAT FATHER* 1048 (1984).

<sup>242</sup> The federal government’s federal Indian policy has been characterized by distinct periods stamped with underlying ideologies that oscillate back and forth on a spectrum that at one end recognizes the benefits of Indian self-determination to some limited degree and on the other end seeks to assimilate all Indians—physically, spiritually, and culturally—into the majority society. In marked contrast to the federal government’s policy that made allowances for Indian self-determination during the New Deal, the architects of the termination policy that was ushered in with passage of H.R. Con. Res. 108 on August 1, 1953, believed that American Indians should completely assimilate into the majority culture.

## 4. LEGAL ACKNOWLEDGMENT OF THE LINK BETWEEN LAND AND COMMUNITY

Though the theoretical link predicted between landownership and enhanced minority civic participation has been proven on the ground, legal recognition of the importance of minority landholding to building community and increasing democratic participation has been “fragmentary” at best.<sup>243</sup> Only federal Indian law explicitly recognizes that promoting landownership is necessary to self-determination for minority groups who otherwise face systematic discrimination. Outside of the Indian context, neither common law nor statutes acknowledge the value of minority landownership.

This section illustrates the degree to which the law has supported (or not supported) minority landownership by considering the intersection of minority landownership and the law in two instances: (1) current federal Indian law policy and case law, and (2) Fifth Amendment takings jurisprudence. Further, and by way of comparison, this section considers the lawfulness of restraints on alienation as they pertain to relatively newer forms of common property. In the context of condominiums, housing cooperatives, and similar forms of residential ownership both statutory and common law permit groups to restrain individual rights in order to promote “community.”

### 4.1 MODERN FEDERAL INDIAN POLICY RECOGNIZES THAT INDIAN LANDOWNERSHIP PROMOTES INDIAN CULTURE AND COMMUNITY, DESPITE THE FEDERAL JUDICIARY’S TEPID VINDICATION OF THIS POLICY

In the past century, federal Indian policy has oscillated between recognition of tribes as sovereign entities with primary responsibility for managing their resources and attempts to strip Indians of their land and cultural resources in order to facilitate assimilation.<sup>244</sup> The modern policy, set largely by Congress and the president,<sup>245</sup> seeks to promote tribal autonomy. President Lyndon Johnson helped steer away from the assimilationist policies of termination and relocation that predominated in the 1940s and 1950s. Yet President Richard Nixon is credited with setting a course that emphasizes “tribal self-determination, sovereignty, and control over Indian country.”<sup>246</sup> President Bill Clinton publicly supports a “government-to-government” relationship between the United States and Indian tribes and Congress now promotes greater tribal control of Indian land.<sup>247</sup>

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<sup>243</sup> Cf. Radin, *supra* note 18, at 1006.

<sup>244</sup> Royster, *supra* note 16, at 7–20; *Boisclair v. Superior Court of San Diego County (Imperial Granite Co., Real Party in Interest)*, 801 P.2d 305, 310 (Cal. 1990).

<sup>245</sup> Royster, *supra* note 16, at 20.

<sup>246</sup> *Id.* at 19.

<sup>247</sup> *Id.*

Today, federal Indian policy supports retention of Indian lands in Indian hands. The roots of this policy lie in the Indian Reorganization Act of 1934<sup>248</sup> and the philosophy of John Collier, the charismatic commissioner of Indian Affairs who served in this role between 1933 and 1945.<sup>249</sup> In developing a program that became known as the Indian New Deal,<sup>250</sup> Collier drew upon the 1928 Meriam Report.<sup>251</sup> This report set forth “in scientific survey style, the staggering degree of poverty, ill health, poor education, and community disorganization that generally prevailed on the reservations.”<sup>252</sup> The report denounced the allotment program, supported efforts to strengthen Indian communities, and advocated increased protection of Indian property rights.<sup>253</sup>

Consistent with these recommendations, specific provisions of the Indian Reorganization Act nullified and reversed the federal government’s century-old mission to assimilate Native Americans by breaking up tribal property holdings into individual interests.<sup>254</sup> Section one of the act ends any further allotment of reservations.<sup>255</sup> Section two extends trust restrictions on allotments indefinitely.<sup>256</sup> Section five authorizes the Secretary of the Interior to acquire additional lands to be put into trust for Indian tribes.<sup>257</sup> Since implementation of these provisions, Native American landholdings have increased moderately.<sup>258</sup>

Today, American Indian land retention is promoted by a number of federal statutes that subject much of tribal and individually owned land to restraints on alienation. The Indian Nonintercourse Act,<sup>259</sup> 25 U.S.C. § 462<sup>260</sup> and 25 U.S.C. § 464,<sup>261</sup> are amongst the more important such statutes.<sup>262</sup> Congress even maintained the federal restraints on alienation when it

<sup>248</sup> Indian Reorganization Act of June 18, 1934, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-495 (1988)).

<sup>249</sup> CORNELL, *supra* note 227, at 93.

<sup>250</sup> *Id.*

<sup>251</sup> The Meriam Report, *supra* note 229.

<sup>252</sup> *Id.* at 90.

<sup>253</sup> *Id.* at 460–61.

<sup>254</sup> CORNELL, *supra* note 227, at 93.

<sup>255</sup> Ch. 576, § 1, 48 Stat. 984 (codified at 25 U.S.C. § 461 (1988)).

<sup>256</sup> Ch. 576, § 2, 48 Stat. 984 (codified at 25 U.S.C. § 462 (1988)).

<sup>257</sup> Ch. 576, § 5, 48 Stat. 984 (codified at 25 U.S.C. § 465 (1988)).

<sup>258</sup> In addition to land that the government has taken into trust on behalf of Native American tribes, land has been restored to various tribes through legislative resolution of land claims. The return of the 130,000 acres of land to the Pueblo of Taos and the resolution of the Passamaquoddy and Penobscot land claims in Maine (under which each tribe was awarded 150,000 acres of land to be placed into trust) represent two of the better-known legislative resolutions of Indian land claims. CLINTON ET AL., *AMERICAN INDIAN LAW* 737 (1991).

<sup>259</sup> 25 U.S.C. § 177 (1999). The Nonintercourse Act provides in pertinent part that:

“No purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.”

<sup>260</sup> 25 U.S.C. § 462 (1999).

<sup>261</sup> 25 U.S.C. § 464 (1999).

<sup>262</sup> *Boisclair v. Superior Court of San Diego County (Imperial Granite Co., Real Party in Interest)*, 801 P.2d 305, 309 (Cal. 1990).

enacted Public Law 280 in 1953, which permitted states to assume civil and criminal jurisdiction over Indian country.<sup>263</sup>

The rationale for federal restraints on alienation of Indian land has developed over time. In order to federalize the process of Indian land cessions, Congress first imposed pervasive restraints on alienation of Indian land in 1790 in the first in a series of Trade and Intercourse Acts.<sup>264</sup> Ever since, restraints on alienation of Indian land have been a cornerstone of federal Indian policy.<sup>265</sup> When restraints on alienation were first established 200 years ago, Congress was not primarily concerned with slowing the loss of Indian land.<sup>266</sup> Tribes were largely a pawn in a power struggle for supremacy between the federal government and the states; the shifting of power from the states to the federal government in the area of Indian affairs represents one step in the federal government's gradual rise to political supremacy.<sup>267</sup> In addition to consolidating its power in the area of Indian affairs as provided for in the Constitution,<sup>268</sup> Congress enacted the Nonintercourse Act in order prevent Indian uprisings<sup>269</sup> because under the Articles of Confederation, the “duplicity

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<sup>263</sup> Act of Aug. 15, 1953, ch. 505, 67 Stat. 588-90. Congress carved out an exception to the offer of civil jurisdiction. Section 1360(b) states:

Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

<sup>264</sup> Act of July 22, 1790, ch. 33, § 4, 1 Stat. 137. The 1790 Act provided the following:

That no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of preemption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.

The 1790 Act was a temporary measure and was reenacted—also for limited periods—in later years. *See*, Act of March 1, 1793, ch. 19, 1 Stat. 329; Act of May 19, 1796, ch. 30, 1 Stat. 469; and Act of March 3, 1799, ch. 46, 1 Stat. 743. Congress enacted a permanent Nonintercourse Act in 1802. Act of March 30, 1802, ch. 13, 2 Stat. 139. The 1802 Act, as amended, was largely incorporated in the 1834 Act, the final in the series of such acts. Act of June 30, 1834, ch. 161, § 12, 4 Stat. 730.

<sup>265</sup> Robert N. Clinton and Margaret Tobey Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 ME. L. REV. 17, 19, 38 (1979). *See also* Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana, 472 U.S. 237, 276, 105 S. Ct. 2587, 2608 (1985) (Brennan, J. dissenting); County of Oneida v. Oneida Indian Nation of New York, 470 U.S. 226, 247–8 (1985); Oneida Indian Nation of New York v. County of Oneida, 414 U.S. 661, 667–70 (1974); United States v. Creek Nation, 295 U.S. 103, 109–11 (1935); Cherokee Nation v. Georgia, 5 Pet. 1, 17 (1831); Johnson and Graham's Lessee v. McIntosh, 8 Wheat. 543, 591, 604 (1823).

<sup>266</sup> Clinton & Hotopp, *supra* note 264, at 36.

<sup>267</sup> *Id.* at 88.

<sup>268</sup> *See* U.S. Const., Art. I, § 8, cl. 3: “The Congress shall have Power . . . To Regulate Commerce . . . with the Indian Tribes. . . .”

<sup>269</sup> Mashpee Tribe v. Watt, 542 F. Supp. 797, 803 (D. Mass. 1982), *aff'd* 707 F.2d 23 (1<sup>st</sup> Cir. 1983), *cert. denied*, 469 U.S. 853 (1984); *see also* COHEN'S HANDBOOK OF FEDERAL LAW, *supra* note 58, at 508; Clinton & Hotopp, *supra* note 264, at 36; FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS 42–50 (1970).

and lack of uniformity in the states' handling of Indian land cessions were primary sources of Indian hostilities."<sup>270</sup>

In this century courts have construed the Nonintercourse Act and other restraints on alienation of Indian land as designed to protect Indians from being dispossessed of their land by parties other than the federal government.<sup>271</sup> However, judges in earlier cases often considered whether restraints on alienation of Indian land were applicable in a particular case against the backdrop of "the Government's paternal policy toward the Indians. . . ."<sup>272</sup> These judges viewed Indians as doltish, incompetent, or—at least—incapable of managing their own affairs. For example, in *United States v. Candelaria*,<sup>273</sup> the Supreme Court considered, *inter alia*, whether land owned by the Pueblo Indians of New Mexico was subject to federal restraints on alienation. In determining that the lands owned by the Pueblos in fee simple were subject to the restraints, the Court first considered the purpose of the statutory restraints, including those set forth in the Nonintercourse Act. The court stated that:

"Many provisions have been enacted by Congress—some general and others special—to prevent the Government's Indian wards from improvidently disposing of their lands and becoming homeless public charges."<sup>274</sup>

Next, the Court considered whether the Pueblo—who owned their land in fee simple, unlike many other tribes—were subject to the Nonintercourse Act by asking whether the Pueblo were capable enough to fend off those who might dispossess them of their land. The Court viewed the Pueblo as different from the "nomadic and savage Indians then living in New Mexico,"<sup>275</sup> but as markedly inferior to more advanced races. The Court characterized the Pueblos as follows:

"Although sedentary, industrious and disposed to peace, they are Indians in race, customs and domestic government, always have lived in isolated communities, and are a simple, uninformed people, ill-prepared to cope with the intelligence and greed of other races."<sup>276</sup>

Based on this obviously racist characterization, the Court subjected the Pueblos' landholdings to the federal restraints.<sup>277</sup>

<sup>270</sup> Clinton & Hotopp, *supra* note 264, at 36.

<sup>271</sup> *Cf. id.* at 37.

<sup>272</sup> *United States v. Minnesota*, 113 F.2d 770, 773 (8<sup>th</sup> Cir. 1940).

<sup>273</sup> 271 U.S. 432 (1925).

<sup>274</sup> *Id.* at 441.

<sup>275</sup> *Id.* at 442.

<sup>276</sup> *Id.*

<sup>277</sup> Federal courts demonstrated this same paternal attitude toward individual Indians who held allotments subject to restraints on alienation. In *United States v. Debell*, 227 F. 775 (8<sup>th</sup> Cir. 1915), the Eighth Circuit Court voided a sale of an allotment from an illiterate Indian woman to a white speculator. The court described the purposes of the federal restraints as follows:

The chief purpose and main object of the restriction upon alienation is not to prevent the incompetent Indian from selling his land for a price too low, but to prevent him from selling it at all, to the end that he shall be prevented from losing, giving away, or squandering its proceeds and thus be left dependent upon the government or upon charity for his support.

*Id.* at 776.

Federal courts no longer claim that restraints on alienation are necessary to protect lowly Indians from making improvident decisions. Instead, according to some judges, the restraints remain in place because policymakers believe that a substantial land base must be maintained in order for Indians to preserve their culture and for Indian communities to exercise self-determination.<sup>278</sup> In this light, land represents more than a fungible commodity capable of creating wealth for individual Indians. Indian land is not to be subject to the full force of the market because it represents a patrimony or political heritage. As one commentator has stated:

If the only purpose for federal restrictions were “to protect the Indians from themselves,” the character of the restrictions would be transitory, ceasing when the trust beneficiary had become sufficiently “educated” or “assimilated” to stand alone. Moreover, there would be less objection to transmuting the character of the trust; reservation land could be liquidated into money or corporate securities, for example, so long as the Secretary monitored the fairness of the exchange and continued to administer the new trust corpus to ensure that no waste occurred. If, rather, the objective of the federal trust responsibility is to provide a land and resource base for a distinct Indian society as long as tribes wish to preserve that society, sale of reservation land should not take place, even at a fair price, or at least should be tightly controlled.<sup>279</sup>

Although a great portion of the American Indian landholdings remain subject to federal restraints on alienation, Congress has unilateral power to remove the restrictions on tribal or individually owned land.<sup>280</sup> American Indians lost a great deal of land when restrictions were removed during the allotment era and the termination era. Recently, the Supreme Court has maintained that congressional transfer of land without restraints on alienation to Alaska Natives indicates that Congress does not value maintaining these native communities intact.

In *Alaska v. Native Village of Venetie Tribal Government*,<sup>281</sup> the Supreme Court considered whether the Native Village of Venetie Tribal Government could tax the State of Alaska and a private contractor for conducting business on tribal land. In order to determine this, the Court had to decide whether the community of native Neets’ aii Gwich’in in Alaska could be considered to be “dependent Indian communities” under 18 U.S.C. § 1151<sup>282</sup> after passage of the Alaska Native Claims Settlement Act (ANCSA).<sup>283</sup> Although the Neets’ aii Gwich’in’s reservation was revoked in 1971 pursuant to ANCSA, in 1973, two native corporations formed for the tribe took title to the former reservation land under a provision in ANCSA that permitted native corporations to do

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<sup>278</sup> COHEN’S HANDBOOK OF FEDERAL LAW, *supra* note 58, at 509–10. *See also* *Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 278–9, 105 S. Ct. 2587, 2610 (1985) (Brennan, J. dissenting); *Boisclair v. Superior Court*, 51 Cal. 3d 1140, 1148 (1990). *But see* *United States v. Michigan*, 882 F. Supp. 659, 675 (E.D. Mich. 1995) (“restricting the alienability of land based on the status of the titleholder is founded on the fear of the consequences of outright ownership . . .”).

<sup>279</sup> COHEN’S HANDBOOK OF FEDERAL LAW, *supra* note 58, at 509–10.

<sup>280</sup> *Clinton & Hotopp*, *supra* note 264, at 77.

<sup>281</sup> 522 U.S. 520 (1998).

<sup>282</sup> 18 U.S.C. § 1151 (1999). Section 1151, in pertinent part, defines “Indian country” as follows:

The term ‘Indian country’ . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . , (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

<sup>283</sup> Act of Dec. 18, 1971, 85 Stat. 688.

so provided that these corporations would forego the statute's other monetary payments and land transfers.<sup>284</sup>

Although the tribe's land was "exempt from adverse possession claims, real property taxes, and certain judgments as long as it . . . [was] not sold, leased or developed,"<sup>285</sup> ANCSA did not provide that former reservation land could be acquired by native corporations subject to federal restraints on alienation. The Court considered the fact that ANCSA did not provide that former reservation land acquired by a native corporation would be subject to restraints on alienation as an indication that Congress did not intend to use its power to preserve native communities intact. The Court stated that:

. . . ANCSA transferred reservation lands to private, state-chartered Native corporations, without any restraints on alienation or significant use restrictions, and with the goal of avoiding 'any permanent racially defined institutions, rights, privileges, or obligations'. By ANCSA's very design, Native corporations can immediately convey former reservation lands to non-Natives, and such corporations are not restricted to using those lands for Indian purposes. Because Congress contemplated that non-Natives could own the former Venetie Reservation, and because the Tribe is free to use it for non-Indian purposes, we must conclude that the federal set-aside requirement is not met.<sup>286</sup>

Although federal policy now supports Indian landownership, the federal judiciary has not fully supported the modern policy.<sup>287</sup> The courts over the past three decades increasingly conflate Indian sovereignty and Indian property rights, two concepts that are analytically distinct and are treated as such in non-Indian contexts.<sup>288</sup> In short, the courts recognize Indian power to govern only the land owned by tribal members or entities, even within the territorial boundaries of the reservation. Thus, fee ownership of land by tribal members or entities on Indian reservations has grown in importance as tribes seek to preserve their sovereign powers. In 1989, for example, the Supreme Court held that tribal governments may not exercise zoning authority over certain fee land owned by nontribal members located within a reservation.<sup>289</sup>

The demographic make-up of an Indian reservation can determine not only the extent of a tribe's sovereign powers, but in some instances the very physical boundaries of a reservation. In a series of cases involving allotment-era statutes, federal courts have decided whether Congress intended to diminish or terminate a reservation by passing surplus land acts that opened reservations to non-Indian settlers. The legal question raised in diminishment cases "constitutes a uniquely historical issue"<sup>290</sup> given that the drafters of the surplus land acts assumed that Indians

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<sup>284</sup> *Native Village of Venetie*, 522 U.S. at 524.

<sup>285</sup> *Id.* at 533.

<sup>286</sup> *Id.* at 532–3.

<sup>287</sup> Royster, *supra* note 15, at 20.

<sup>288</sup> Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 24 (1991); Carole Goldberg-Ambrose, *Of Native Americans and Tribal Members: The Impact of Law on Indian Group Life*, 28 LAW & SOC'Y REV. 1123, 1126 (1994). The judiciary has also limited tribal sovereignty in cases in which a tribe has attempted to assert jurisdiction over non-Indians. *Id.* See also *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (holding that, within Indian country, Indian tribes are more than "private, voluntary associations").

<sup>289</sup> *Brendale v. Confederated Tribes & Bands of the Yakima Nation*, 492 U.S. 408 (1989).

<sup>290</sup> CLINTON, *supra* note 7, at 132.

would assimilate into society within a generation after the reservations were opened and did not foresee that the reservations would continue to exist as a result of the New Deal Indian Reorganization Act.<sup>291</sup> Even so, courts have gone through the exercise of “determining” congressional intent by fine parsing of language used in different surplus land acts.

Aware that an effort to deduce Congress’s intent to diminish or preserve a reservation based on the contemporaneous record is a largely formalistic exercise untethered from reality, courts now also examine the “subsequent jurisdictional history,”<sup>292</sup> including the demographic composition of the opened lands.<sup>293</sup> At root, the focus in the cases on the demographic make-up of a community reflects the judiciary’s anxiousness to protect the non-Indian’s “justifiable expectations” that they should not fall under the jurisdiction of tribal government.<sup>294</sup> Where Indians remain a significant part of the population in the opened part of the reservation, courts have held that the reservation remained intact.<sup>295</sup> In cases where a majority of the population on the opened land consists of non-Indians, courts have determined that the reservation has been either diminished or terminated.<sup>296</sup> If sovereignty remains the key to Indian economic development, and courts are increasingly limiting tribal sovereignty and even territory to land owned in fee by either the tribe or its members, land ownership is vital.<sup>297</sup>

#### **4.2 IN TAKINGS JURISPRUDENCE, JUDGES DO NOT CONSIDER THE IMPORTANCE LAND MAY HAVE FOR MINORITY COMMUNITIES IN CONSIDERING CONDEMNATION**

In Fifth Amendment takings jurisprudence, courts have not balanced the public purpose a governmental entity offers in its bid to condemn property by eminent domain against the importance that the property holds for rooted communities, whether minority or majority.<sup>298</sup> In 1954, the Supreme Court held that a state’s eminent domain power was coterminous with the state’s police powers.<sup>299</sup> Thirty years later, in *Hawaii Housing Authority v. Midkiff*,<sup>300</sup> the Court held that the exercise of eminent domain power need be rationally related only to achieving a

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<sup>291</sup> *Solem v. Bartlett* 465 U.S. 463, 468 (1984).

<sup>292</sup> *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604 (1977).

<sup>293</sup> *Pittsburgh & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387 (10<sup>th</sup> Cir.), *cert. denied*, 498 U.S. 1012 (1990).

<sup>294</sup> *Royster*, *supra* note 16, at 70.

<sup>295</sup> *See, e.g.*, *Solem v. Bartlett*, 465 U.S. 463 (1984); *Mattz v. Arnett*, 412 U.S. 481 (1973); and *Seymour v. Superintendent*, 368 U.S. 351 (1962).

<sup>296</sup> *See, e.g.*, *Hagen v. Utah*, 510 U.S. 399 (1994); *Rosebud Sioux*, 430 U.S. at 584; *DeCoteau v. District County Court*, 420 U.S. 425 (1975); and *Pittsburgh & Midway Coal Mining*, 909 F.2d at 1387. This focus upon the Indian ownership of land as a key factor in determining the limits of a reservation hearkens back to the pre-1948, judicially determined, definition of Indian country. *See Ash Heep Co. v. United States*, 252 U.S. 159 (1920); *see also Bates v. Clark*, 95 U.S. 204 (1877).

<sup>297</sup> *Cf.* Stephen Cornell, *Pathways From Poverty: Economic Development & Institution Building on American Indian Reservations*, 14 AM. INDIAN CULTURE & RES. 89, 119 (1990).

<sup>298</sup> *Radin*, *supra* note 18, at 1005; *see also* 2A JULIUS L. SACKMAN & PATRICK J. ROHAN, *NICHOLS ON EMINENT DOMAIN* (rev. 3<sup>rd</sup> ed. 1997).

<sup>299</sup> *Berman v. Parker*, 348 U.S. 26, 32 (1954).

<sup>300</sup> *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

public purpose, and the means chosen to effect the articulated public purpose be merely rational.<sup>301</sup> Together, *Berman* and *Midkiff* vest state and federal authorities with almost unlimited power to condemn property provided the government pays just compensation, no matter whether the property could be characterized as fungible or “property for personhood.” Further, in comparing the two cases, in the later *Midkiff* case the Court focused less attention on the public use rationale. In *Berman* the Court made a nominal effort to address the manner in which the community as a whole may have benefited from the taking;<sup>302</sup> in *Midkiff* the Court did not view a taking that would transfer property from one private individual to another as inconsistent with the public use requirement because “it is not essential that the entire community, nor even any considerable portion, . . . directly enjoy or participate in any improvement” for the taking to be considered for the public use.<sup>303</sup> Of course, the use of the eminent domain power by a governmental entity does not always signify that land will be distributed away from the poor to the more wealthy; in fact, the state intervention in *Midkiff* redistributed land in favor of those with fewer rights in land.

In takings jurisprudence, urban renewal and highway projects highlight the lack of judicial attention to the value that land may have for minority communities. The urban renewal programs were initiated first under the Housing Act of 1949;<sup>304</sup> several highway projects were undertaken soon thereafter. Together, these projects displaced a tremendous number of people throughout the country and devastated poor and minority communities within many different cities.

A finding that an urban renewal or highway program will destroy or severely damage a community, however, provides no legal basis for halting such a program. In a 1967 case, *Nashville I-40 Steering Committee v. Ellington*,<sup>305</sup> the district court judge denied an application for a temporary injunction filed by a community group seeking to halt a highway program that would adversely impact a mostly African American community in Nashville, Tennessee, despite a finding that the community’s concerns were legitimate. As the court of appeals noted:

“[T]he blocking of other streets will result in a heavy increase in traffic through the campus of Fisk University and Meharry Medical College. A public park used predominantly by Negroes will be destroyed. Many business establishments owned by Negroes will have to be relocated or closed.”<sup>306</sup>

Relying in part on *Berman*, the Sixth Circuit held that the courts could not halt the project because the “minimizing of hardships and adverse economic effects is a problem addressing itself to engineers, not judges.”<sup>307</sup>

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<sup>301</sup> *Id.* at 241–42.

<sup>302</sup> *Berman*, 348 U.S. at 103 (“It was believed that the piecemeal approach, the removal of individual structures that were offensive, would be only a palliative. The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes but also schools, churches, parks, streets, and shopping centers”).

<sup>303</sup> *Midkiff*, 467 U.S. 229, 244 (quoting *Rindge Co. v. Los Angeles*, 262 U.S. 700, 707 (1923)).

<sup>304</sup> Housing Act of 1949, tit. I, 42 U.S.C. § 1441–64 (1964). The 1949 Housing Act introduced the program of urban renewal, which was the first governmental program that policymakers knew would lead to a major displacement of significant numbers of people in cities implementing such a project. Chester W. Hartman, *Relocation: Illusory Promises and No Relief*, 57 VA L. REV. 745, 747 n. 8 (1971).

<sup>305</sup> 387 F.2d 179 (6<sup>th</sup> Cir. 1967).

<sup>306</sup> *Id.* at 186.

<sup>307</sup> *Id.* at 185.

### Residential communities, common property, and restrictions on alienation

The body of statutory and common law rules governing the different forms of group ownership of real property is designed to advance specific economic or social policies. Even in private law doctrine, by allocating power between individuals and the group, policymakers make certain tradeoffs between promoting liberty and fairness.<sup>308</sup> As applied to some forms of common-law group ownership, specifically, the tenancy in common, the liberty interests of individuals prevail as against the ownership group; in other forms of common ownership such as the condominium, the law enhances the rights of the group as a whole at the expense of the individual. The laws that have developed to implement these latter policies subject the use and disposition of the property to group control—whether property owned in common by all the members of the group or property that individual members of the group own in some measure individually, but acquire subject to a group-ownership scheme.<sup>309</sup> Even in those instances in which groups have the power to curtail individual property rights of those within the group scheme, the law ensures that these individuals have the right to exit the group on reasonable terms.

From the initial development of common law rules prohibiting direct restraints on the alienation of property held in fee simple to the gradual loosening of such rules in certain instances, this is an area of law heavily determined by public policies. Initially, the rule against restraints on alienation developed to promote primarily economic ends. As background, establishment of the right to convey property as one of the essential incidents of fee simple ownership can be traced to the British Parliament's enactment of the Statute Quia Emptores in 1290.<sup>310</sup> The statute established the principle of the free alienation of possessory estates and marked the beginning of the end of the feudal system.<sup>311</sup> In the shift from feudalism to market economies, as the free alienation of land came to be viewed as essential to fostering economic and commercial development, English courts established common law rules prohibiting direct restraints on alienation.<sup>312</sup> Absolute restraints on the alienation of a fee simple interest, whether labeled as a disabling, forfeiture, or promissory restraint under the traditional classifications, came to be held void in all instances.<sup>313</sup>

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<sup>308</sup> Robert C. Ellickson, *Property in Land*, 102 *YALE L.J.* 1315, 1345 (1993).

<sup>309</sup> As the technology of the law has developed ever more sophisticated legal forms of ownership to respond to the needs of people who would like to live in residential communities of one sort or another, it becomes more difficult to describe the precise manner in which individuals hold property under many of these forms of ownership merely using the categories “individual” or “common” ownership. I have used the phrase “property subject to group control” to capture the notion that—under these forms of ownership—individuals typically agree to cede to the group some of the rights they would be entitled to as individual property owners in order to further the group-ownership scheme. I have borrowed the phrase “the technology of the law” from Heinz Klug, who helped flesh out my ideas on the different treatment that emerging forms of ownership have received under the rule on restraints against alienation.

<sup>310</sup> *Chianese v. Culley*, 397 F. Supp. 1344, 1345 (S.D. Fl. 1975).

<sup>311</sup> See, e.g., *DUKEMINIER & KRIER*, *supra* note 41, at 152–3.

<sup>312</sup> *City of Oceanside v. McKenna*, 264 Cal. Rptr. 275, 279 n. 4 (Cal. Ct. App. 1989); *Seagate Condominium Ass'n v. Duffy*, 330 So. 2d 484, 485 (Fla. Dist. Ct. App. 1976); and *RESTATEMENT (FOURTH) OF PROPERTY*, 2129–33, 2379–80 (1944). However, the ascendancy of the principle of free alienation was somewhat counterbalanced by common law rules that responded to the aristocracy's desire to transfer their landholdings intact from one generation to another. See generally, Charles J. Reid, Jr., *The Seventeenth-Century Revolution in the English Land Law*, 43 *CLEV. ST. L. REV.* 221, 261–282 (1995).

<sup>313</sup> *RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS)* §§ 4.1-4.3 (1983); see also *CUNNINGHAM ET AL.*, *supra* note 36, at § 2.2, at 30.

In addition to the predominant economic justification for the rule against restraints on alienation, some courts and commentators suggest the rule serves a political purpose. Greater alienability of land serves a decentralized market system that in theory promotes the values of democracy by preventing concentration of land (and the wealth it represents) in a hereditary aristocracy.<sup>314</sup> Subjecting concentrated wealth in the hands of dynastic families to market pressures promotes democratic ends. Providing for unrestricted rights of alienation under all circumstances, however, does not always increase democratic participation, to the extent that such goals are promoted by landownership. In fact, unfettered rights of alienation may in some circumstances redistribute property away from people with fewer resources to those with more resources. To this end, Joseph Singer writes that:

Under some market conditions, alienability may actually concentrate ownership in the hands of the wealthy since such corporations or individuals are able to bid higher amounts for property and may thereby induce others to sell. Restraints on alienation of low-income housing, for example, may serve to ensure its continued availability to poor families.<sup>315</sup>

The rule against restraints on alienation is policy driven, and “[c]ompeting policy considerations . . . have, almost from the inception of the rule, caused exceptions to be carved out of it.”<sup>316</sup> According to one court in a leading case, the development of the rules against restraints on alienation “is not a mathematical science but takes shape at the direction of social and economic forces in an ever changing society. . . .”<sup>317</sup> As it pertains to various forms of group ownership of real property, the economic policy underlying the dislike for restraints on alienation often collides with policies or practices that support the social and economic interests of groups or political goals of civic participation.

The value the law assigns to stable group ownership under a particular form of ownership can be measured in part by the degree to which the law allows the group to restrict the rights of individual members to alienate property interests. Depending upon the form of ownership, the law accords groups greater or lesser ability to restrict the individual member’s powers to alienate. In more specialized cases, the law may provide one group with more authority than another group vis-à-vis restricting the right of individual alienation, despite the fact that both groups own property under the same form of ownership.

Some groups come to own land through consensual agreements, such as condominiums; others come together through the operation of the law, as in the case of groups that acquire land under the rules of intestacy. Where common ownership arises by intestacy, the law assigns the group a form of ownership, the tenancy in common, that is not very “group friendly.” If the law makes it difficult for a group to change the form of ownership under which it owns property from one that permits the group little power to restrain the rights of alienation of the group’s individual

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<sup>314</sup> *Burdick v. Burdick*, 33 F. Supp. 921, 928 (D.D.C. 1940) (stating that: “Permitting unreasonable restraints on alienation are inconsistent with the principles of democracy. They are the concomitants of an aristocracy. Such restraints are the relics of feudal society, are obsolete and are repugnant to our institutions and conditions”).

<sup>315</sup> SINGER, *supra* note 287, at 573.

<sup>316</sup> *Seagate Condominium Ass’n*, 330 So. 2d at 485.

<sup>317</sup> *Gale v. York Ctr. Community Coop.*, 171 N.E.2d 30, 33 (Ill. 1960); *see also* *McInerney v. Slights*, 1988 Del. Ch. LEXIS 47 \*19 (Civil Action No. 1096-S April 18, 1988) (stating that “the rule against unreasonable restraints on alienation is based solely on social policy, not on the rights of the party on whom the restraint is imposed”).

members to one that is more “group friendly,” the law effectively adjudges stability within the particular community as unimportant. The same analysis applies to situations in which the law prevents a group that owns property under a form of ownership that permits few restraints on alienation from establishing its own set of rules regulating entry and exit into or from the group that diverge from the default rules under the particular form of ownership. Such barriers to private ordering also promote unstable ownership.

The following discussion reveals that with respect to condominiums, cooperatives, and similar forms of residential ownership the law allows property-owning groups to limit the rights of individual owners to alienate their property interests in order to promote “community.” Judicial recognition of the overriding value of community in this context contrasts starkly with the unbounded economic values of individual wealth maximization that drive the common law rules governing partition of tenancies in common in most circumstances.

In recent times, legislatures and judges have created liberal exceptions to the rule against restraints on alienation “in connection with sales of residential property, particularly condominiums and cooperatives, and on the transfer of corporate stock.”<sup>318</sup> In terms of forms of common ownership developed to meet the demand for residential housing, courts give credence to the social and economic justifications offered by the group seeking to impose the restraints (typically on transfers of ownership interests and use) even though the restraints cause economic harm to individuals. Although some courts engage in a rigorous analysis of the proffered purposes for the restraints, other courts accept bare assertions that the challenged restraints serve a beneficial purpose for the community of residential owners or society as a whole.<sup>319</sup>

Some of the most important decisions limiting application of the rules against restraints on alienation as applied to residential communities generally have been made in the context of cooperative housing schemes. In a cooperative housing arrangement, the members of the cooperative own stock in a nonprofit corporation, and such stock ownership entitles a member to occupy individual apartments.<sup>320</sup> In this type of cooperative housing structure, just as in tenancy in common, the members of the cooperative are financially interdependent. The Restatement on Property states that:

It is essential to the financial stability of such a corporation that the members each contribute their share of the taxes, maintenance and mortgage expenses of the premises, because the only source of corporate income is usually the assessments levied on individual member-stockholders, and the entire premises, including the interests of all the members of the corporation, are subject to foreclosure sale in the event that the corporation defaults on its obligation.<sup>321</sup>

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<sup>318</sup> RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS), Notes to Part II, at 4 (1983).

<sup>319</sup> As discussed *infra*, recent opinions demonstrate that judges accept rather bare-boned statements that certain restrictions on the transfer of an ownership interest or on the use of the property owned in residential communities serves some socially beneficial purpose. Such judicial solicitude for those groups seeking to impose these restrictions on transfer and use is similar to the relaxation of judicial standards for granting partition sales. In many partition cases, judges now simply accept conclusory averments that the land at issue cannot be equitably divided. *See* Cassagrande, Jr., *supra* note 35, at 766. Of course the relaxation of the judicial standards in these two areas serves contrasting policies.

<sup>320</sup> RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS), § 4.1, at 40 (1983).

<sup>321</sup> *Id.*

Due to such financial interdependence, the corporate bylaws of such cooperatives normally require the board of directors or a majority of the members to consent to transfers of the lease and stock of individual members.<sup>322</sup>

In the leading case of *Penthouse Properties, Inc. v. 1158 Fifth Avenue, Inc.*,<sup>323</sup> a case of first impression in New York State, the court considered the lawfulness of a restraint on alienation that required tenant owners of a cooperative apartment to receive approval from the board of directors or from two-thirds of the stockholders prior to transferring stock ownership or assigning a lease. In a decision upholding the restraints, the state court focused almost exclusively on the needs of the group. The court considered “the residential nature of the enterprise, the privilege of selecting neighbors and the needs of the community”<sup>324</sup> as important factors outweighing the need of individual tenants for unfettered rights of alienation. In holding that “the special nature of the ownership of co-operative apartment houses by tenant owners requires that they be not included in the general rule against restraint on the sale of stock in corporations organized for profit,”<sup>325</sup> the court determined that there was a social value to promoting stable residential communities organized under cooperative housing forms of ownership.

Twenty-one years later, the Supreme Court of Illinois considered the lawfulness of a restraint on alienation in a suit against an association that developed and maintained a cooperative subdivision “as a carefully planned, nonspeculative, attractive community.”<sup>326</sup> The challenged restraint gave the association one year to purchase the interest of a member wishing to withdraw from the association either at an agreed upon price or at a price set by an appraiser.<sup>327</sup> In considering the restraint, the court established a broad rule for determining the lawfulness of restraints on alienation that many courts throughout the country have followed. The court held that:

“[T]he crucial inquiry should be directed at the utility of the restraint as compared with the injurious consequences that will flow from its enforcement. If accepted social and economic considerations dictate that a partial restraint is reasonably necessary for their fulfillment, such a restraint should be sustained.”<sup>328</sup>

Because the court believed that the restraints included in the membership agreements provided “the only way to keep [such] co-operative housing co-operative,”<sup>329</sup> the court was faced, at least implicitly, with weighing the value to society of such residential communities. Arguably, the cooperative housing arrangement should be protected from the unchecked forces of the market only if such residential communities serve some useful purpose for the society. In deciding that the restraints were reasonable, the court recognized that legal instruments designed to promote

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<sup>322</sup> *Id.*

<sup>323</sup> 11 N.Y.S.2d 417 (N.Y. App. Div. 1939).

<sup>324</sup> *Id.* at 422.

<sup>325</sup> *Id.* at 423.

<sup>326</sup> *Gale v. York Ctr. Community Coop.*, 171 N.E.2d 30, 31 (Ill. 1960).

<sup>327</sup> *Id.* at 32. The association’s membership agreement also placed certain restraints on the ability of those acquiring a membership interest under either a will or the laws of intestacy to becoming members of the association. *Id.*

<sup>328</sup> *Id.* at 33.

<sup>329</sup> *Id.* at 32.

stability within such communities serve important social ends—*viz.* creating stable residential communities.

Just as courts have recognized the societal value of communities organized into cooperative housing developments, courts have determined that condominium arrangements represent an increasingly important type of residential living.<sup>330</sup> Though individual members of a condominium are not as financially interdependent as members of many housing cooperatives, courts have determined that the same kinds of restraints on transfer and use that are upheld in cooperative agreements are lawful when included in condominium agreements. In addressing the nature of condominium living, the Florida appellate court wrote in a much-cited opinion:

“ . . . inherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property.”<sup>331</sup>

Instead of focusing on the financial sustainability of such communities, many courts consider whether the restraints serve a state’s public policy goals or, more narrowly, contribute to promoting the “community life” of the condominium community.

In 1989, in a case involving a publicly subsidized condominium development, the California court of appeals upheld restrictive covenants designed to promote affordable housing for persons of low and moderate income and to sustain a community of owner-occupiers.<sup>332</sup> In this case, the private developers, who purchased the land from the City of Oceanside in order to construct replacement dwellings for low- and moderate-income people displaced due to an urban renewal project, agreed to covenants, conditions, and restrictions that required condominium owners to occupy their units as their principal place of residence and prevented such owners from renting or leasing their units.<sup>333</sup> The restrictions were to be maintained for ten years after completion of the construction of the condominiums.

In upholding these restrictions, the appellate court first determined that in judging the lawfulness of the restraint, “the court must balance the justifications for the restriction against the quantum of the restraint” with more restrictive conditions requiring stronger justifications.<sup>334</sup> To this end, the court viewed the restraints as consistent with the public policy of California to promote affordable housing for all families within the state. The court maintained that the restraints on alienation promoted the state policy because they directly “related to the stated purposes of maintaining a stabilized community of low and moderate income residents and discouraging speculation by real estate investors.”<sup>335</sup>

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<sup>330</sup> Laguna Royale Owners Ass’n v. Darger, 174 Cal. Rptr 136, 143 (Cal. Ct. App. 1981).

<sup>331</sup> Hidden Harbour Estates, Inc. v. Norman, 309 So. 2d 180, 181–2 (Fla. Dist. Ct. App. 1975).

<sup>332</sup> City of Oceanside v. McKenna, 264 Cal. Rptr 275 (Cal. Ct. App. 1989). The individual grant deeds stated that the restrictions were designed “to achieve a stabilized community of owner-occupied dwelling units, to avoid artificial inflation of prices caused by resales by speculators and to prevent scarcity caused by vacant homes awaiting resale by speculators. . . .” *Id.* at 278.

<sup>333</sup> *Id.* at 278.

<sup>334</sup> *Id.* at 279.

<sup>335</sup> *Id.*

Although the California appellate court considered whether the restraints on alienation in *McKenna* served public policy, other cases merely consider the needs of the community of condominium owners. For example, the Florida appellate court considered the lawfulness of restrictive conditions contained in a declaration of condominium that, like those in *McKenna*, forbade unit owners from leasing their units, except for very limited time periods.<sup>336</sup> Although the case did not involve affordable housing or any other noteworthy public policy of the state, the court upheld the leasing restrictions because it viewed protecting the very character of the condominium community as a reasonable goal. The court stated that:

Given the unique problems of condominium living in general and the special problems endemic to a tourist oriented community in South Florida in particular, appellant's avowed objective—to inhibit transiency and to impart a certain degree of continuity of residence and a residential character to their community—is, we believe, a reasonable one. . . . The attainment of this community goal outweighs the social value of retaining for the individual unit owner the absolutely unqualified right to dispose in any way and for such duration or purpose he alone so desires.<sup>337</sup>

In some instances, courts seek to preserve the character of a particular community by upholding restraints that limit the class of people that may purchase property in planned residential developments from individual owners who would like to sell their property. For example, the Florida court of appeals recently upheld restraints on alienation that sought to preserve the character of a planned development for military officers.<sup>338</sup> The Indian River Colony Club restricted prospective purchasers to members of the club—a club for people who had served in the military as commissioned or chief warrant officers. In addition, the deeds contained a provision that mandated the purchase price a property owner would be entitled to receive upon resale.<sup>339</sup>

In terms of the restriction on the persons to whom they could sell their property, the court noted that holding this restriction to be unreasonable would destroy the primary purpose of the planned development, a development that was planned to serve a community of military officers. As it pertains to the restriction that required owners to forego the right to sell their property at market prices, however, the court merely parroted the language from the deed of restrictions that stated that the restrictions were made “for the mutual and reciprocal benefit of each and every residential lot and apartment in the subdivision.”<sup>340</sup>

State courts throughout the country uphold restraints imposed upon owners who live in residential developments because the courts seek to preserve and promote stable communities, whether these are communities of people of low and moderate income or communities of former military officers. Although the federal government's history of dispossessing Indian tribes of their land is well known, since the time of the Indian Reorganization Act the restrictions on alienation of Indian-owned trust land have played a useful role in stemming land loss in the American Indian community.

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<sup>336</sup> *Seagate Condominium Ass'n, Inc. v. Duffy*, 330 So. 2d 484, 485 (Fla. Dist. Ct. App. 1976).

<sup>337</sup> *Id.* at 486–7.

<sup>338</sup> *Indian River Colony Club, Inc. v. Bagg*, 727 So. 2d 1143 (Fla. Dist. App. 1999).

<sup>339</sup> *Id.* at 1144.

<sup>340</sup> *Id.* at 1145.

## 5. PROPOSAL

Over the course of the past thirty years, the decline in rural black landholdings this century has been called a “crisis” and black farmers have been referred to as an “endangered species” in reports that exhibit an increasing tone of desperation. However one chooses to describe the phenomenon, today the number of black farmers and the number of rural acres under black ownership stand at historic lows for this century. If the losses are not reversed or at least halted, African Americans will enter the twenty-first century effectively shut out of the agricultural sector as producers and rural black people will own less land than rural black people owned in the years immediately following the Civil War. Addressing the issue of land loss by itself, however, will not do much to improve the standing of black farmers and rural landowners. At present, many rural African Americans are not able to use land they own productively. As the *Pigford* lawsuit made plain, many black farmers have been denied credit unlawfully. In other instances, African Americans who hold an interest—no matter how large—in heir property have not been able to use the land as collateral to secure financing to build homes or to improve their agricultural operations.<sup>341</sup>

Just as the USDA and its county agents systematically discriminated against black farmers for decades, driving many of these farmers out of business, meaningful policy reform must be just as systematic and far-reaching.<sup>342</sup> Simply allowing some of the members of the *Pigford* class to collect limited damages will do next to nothing to ensure that black people will have the opportunity to participate as producers in the agricultural sector of the economy into the next century. The moral imperative to redress fundamental acts of injustice applies with equal force to those thousands of rural black landowners who lost their land due to the unethical, sometimes illegal, practices of white attorneys and land speculators who used the rules governing partition actions as a lever to force the sale of black-owned land.

Policymakers must take an organic approach to restoring meaningful ownership to rural African Americans. Such an approach requires at least three elements: land consolidation, land restoration, and community legal education. Further, both the state and federal government must develop a policy directed at these three ends. In addition to these three core measures, federal and state officials should assist African American landowners who own land of special historical significance to place such land in trust. Protection of such African American land not only will help the current owners and their descendants maintain ownership of such land, but also will provide future generations of African Americans with an opportunity to keep alive and learn firsthand about an important part of their heritage.

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<sup>341</sup> C. Scott Graber, *Heirs Property: The Problems and Possible Solutions*, Sept. 1978 CLEARINGHOUSE REV. 273, 278 (1978) (“Those who describe the ‘equity base’ that blacks have in Southern farmland refuse to recognize that much of this equity base cannot generate credit. This land will not finance a home or farm equipment or serve as collateral for an emergency loan”).

<sup>342</sup> The need for far-reaching policy reform also applies to the problem of heir property for American Indians who hold fractionated interests in allotted land. See Carl G. Hakansson, *Allotment at Pine Ridge Reservation: Its Consequences and Alternative Remedies*, 73 N.D. L. REV. 231, 256 (1997) (stating that “[i]t is difficult to envision a policy as radical as assimilation and allotment being implemented presently in the United States. It may, however, take the implementation of a policy more radical than Congress has thus far been willing to consider to effectively address the problems at hand”). See also, *Hodel v. Irving*, 481 U.S. 704, 712 (1987) (stating that the “fractionation problem on Indian reservations is extraordinary and may call for dramatic action to encourage consolidation”).

Land consolidation initiatives could help improve the security of tenure of present heir-property holders. At a bare minimum, the law should enable groups of African Americans who hold heir property to reorganize their ownership of the land under rules that would not require unanimous consent of all interest holders. If either a majority or a supermajority of the interests in a tenancy in common is permitted to change the default rules governing the tenancy in common or to convert to another form of ownership altogether, land can be managed more effectively to the benefit of the majority.

Under such modified rules, the group could lawfully place restrictions on alienation of individual interests of the type definitional of other common property forms such as the condominium and the cooperative. These relatively newer forms of residential ownership—together with their restrictions on alienation—are well established in law because they respond to the demand in the market for community-oriented group living. Likewise, the law should affirmatively recognize that the continued black ownership of rural lands serves a higher purpose—it promotes a more democratic union.

In addition to helping African American landowners as a group stabilize their common property holdings, the federal government should restore land to black farmers who lost their land due to foreclosure by the U.S. Department of Agriculture. The settlement of the *Pigford* class action lawsuit provides for limited land restoration, even in those cases in which the USDA played a significant role in driving successful black farmers into bankruptcy. Such broader land restoration would be consistent with the recent efforts made by countries such as South Africa to return land to individuals and communities who lost their land due to unjust governmental actions in a prior period in the country's history.

Even if land is restored to African Americans or tenants in common are given the right to reorganize their landownership under another, more stable form, poor landowners often do not have access to lawyers who can help them manage their land effectively or fend off those who seek to acquire ownership of their land against their wishes. Congress should expand the mission of legal services to allow poor landowners access to legal-service lawyers. Such an expanded vision would recognize that there is as much value in preventing those on the cusp of distress from falling into the ranks of the economically disenfranchised as there is in trying to help those already destitute survive on the margins.

The ensuing discussion develops each of the proposed policy reforms. However, given the complexity of the heir property problem, it should be emphasized that an approach that solely seeks to implement on one or two of these proposals will likely provide only temporary relief.

## 5.1 LAND CONSOLIDATION

In many parts of the world, rural land has fallen into unproductive use. This normally occurs once the ownership becomes fragmented physically or the number of people or entities who may hold a legal interest in the land grows beyond a certain critical point.<sup>343</sup> Such fragmentation of land or

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<sup>343</sup> Although land fragmentation is typically considered from the standpoint of spatial patterns, “legal” fragmentation occurs once the number of people or entities holding overlapping—and often conflicting—legal interests in a parcel of land exceeds the point at which these different people or entities can effectively manage and utilize the land productively. Cf. Heller, *supra* note 50, at 624 (discussing problem in which an initial distribution of property rights gives too many

ownership or both often arises due to “the application of rigid inheritance rules.”<sup>344</sup> Clearly, the heir property phenomenon in rural, African American communities and amongst American Indians provides paradigmatic examples of fractionation caused, in part, by inheritance law.

In an effort to return such land to productive use, a number of countries have enacted land consolidation legislation.<sup>345</sup> Under classic land consolidation, legislatures seek to aggregate spatially fragmented landholdings into as few new consolidated holdings as possible.<sup>346</sup> In Norway, at least, the law also enables those charged with consolidating the land to attempt to improve the landownership pattern by introducing rules designed to improve cooperation between those stakeholders with an interest in the land.<sup>347</sup> In all state-sponsored consolidation efforts, those enacting or implementing land consolidation initiatives must balance the interests of the individual, the landowners as a group, and of the society.<sup>348</sup> Even so, a fundamental principle underlying consolidation is that no individual should suffer economic loss in the consolidation process.<sup>349</sup>

Almost all proposals offered to cure the problem of fractionated, heir property in Indian country and in the landholdings of rural blacks assume that the tenancy in common form must be upheld. Much like “classic land consolidation” measures, these proposals seek to reduce the levels of fractionation by aggregating the interests in particular parcels of heir property in order that fewer people would retain a legal interest in the property. This may be done by intestacy reform,<sup>350</sup> modification of partition laws,<sup>351</sup> and changes in adverse possession laws.<sup>352</sup>

owners a right to exclude others from using the scarce resource. Heller claims that when “there are too many owners holding rights of exclusion, the resource is prone to underuse—a tragedy of the anticommons”).

<sup>344</sup> Pedro Moral-López, *PRINCIPLES OF LAND CONSOLIDATION LEGISLATION* 115 (UN Food and Agriculture Organization Legis. Study No. 3, 1962) (in collaboration with Erich H. Jacoby).

<sup>345</sup> See, e.g., Jian-Ming Zhou, *Land Consolidation in Japan and Other Rice-Based Economies Under Private Landownership in Monsoon Asia*, *LAND REFORM*, 1998/1, at 23 (primarily proposing changes to Japan’s land consolidation initiatives); Torgeir Austenå, *Agrarian Land Law in Norway*, in *AGRARIAN LAND LAW IN THE WESTERN WORLD* 134, 138–40 (Margaret Rosso Grossman & Wim Brussard eds., 1992); Philip Oldenburg, *Land Consolidation as Land Reform, in India*, 18 *WORLD DEV.* 183 (1990); Otto Schiller, *Aspects of Land Consolidation in Germany*, in *LAND TENURE* (Kenneth H. Parsons et al. eds., 1956).

<sup>346</sup> Oldenburg, *supra* note 344, at 183.

<sup>347</sup> Austenå, *supra* note 344, at 138–40.

<sup>348</sup> Cf. Hans Sevatal, *Land Consolidation in Norway*, pp. 1–2 (unpublished paper delivered at the Conference on Subdivision, Redesign and Neighborhood Pooling, Fort Myers, Florida (1986)) (on file with author). Particular national policies and the needs of the national economy provide the basic framework for government officials vested with authority to consolidate private landholdings. See Austenå, *supra* note 344, at 138–40.

<sup>349</sup> Oldenburg, *supra* note 344, at 183. Put differently, Oldenburg states that “while land consolidation programs reallocate land, they require the *preservation* of the distribution of wealth in land.” *Id.* at 14 (emphasis in original). See also cf. Hugo A. Pearce, III, Note, “*Heirs’ Property*”: *The Problem, Pitfalls and Possible Solutions*, 25 *S.C. L. REV.* 151, 157–8 (1973).

<sup>350</sup> See, e.g., Williams, *supra* note 95, at 726–7 (1971) (highlighting some of the intestacy reform proposals offered to solve the problem of heir property for American Indians).

<sup>351</sup> See, e.g., Chris Kelley, *Stemming the Loss of Black Owned Farmland Through Partition Action—A Partial Solution*, 1985 *ARK. L. NOTES* 35 (1985). Kelley proposes that in partition actions in Arkansas, tenants in common who do not wish to sell their interests be given the right to purchase the interests of those who indicate a willingness to sell their interests in the property for its appraised value at a private sale. *Id.* at 40. Further, Kelley proposes that only tenants who own a simple majority of the interests in a tenancy in common should be permitted to seek a judicial sale of the property. *Id.* See also Harold A. McDougall, *Black Landowners Beware: A Proposal for Statutory Reform*, 9 *N.Y.U. REV. L. & SOC. CHANGE* 127, 135–6 (1980). McDougall proposes that, in certain circumstances, heirs be given the right

In order to address African American heir-property problems, some proposed changes to the partition and adverse possession laws would reallocate many rights in the tenancy in common to the tenants in possession and greatly reduce the rights of the tenants not in possession. For example, Graber proposes both that a co-tenant in possession be able to constructively oust other co-tenants after twenty years with the exception of “those who derived their interest by devise or inheritance from the same source as the claiming co-tenant” and that a co-tenant in possession be able to force a sale of the interests held by unknown heirs.<sup>353</sup> McDougall proposes, *inter alia*, that an heir who has been in possession for a long time be given the right to purchase the property at a private sale once a partition act is initiated with proceeds of the sale held in escrow for the other heirs and any unclaimed portion refunded to the purchasing heir in possession.<sup>354</sup> He also proposes that the adverse possession laws should be changed to make it easier for a tenant in possession to adversely possess the property against absentee heirs.<sup>355</sup> As part of his proposal that would make it easier for a tenant in possession to constructively oust a tenant not in possession, McDougall would permit a tenant in possession to tack the occupancy of the immediate predecessors in title in order to reduce the amount of time it would take to satisfy the statutory, adverse possession period.<sup>356</sup>

To provide “in” tenants with greater rights at the expense of “out” tenants would benefit rural African Americans who want to continue to farm agricultural land. Such proposals are, however, problematic for a number of reasons. First, an overarching problem for many of these proposals is the lack of individual fairness afforded to certain co-tenants. Requiring that individuals with vested property rights suffer economic loss in the process of consolidation should be avoided if there are more just alternatives. Such proposals, moreover, violate a central tenet of international land-consolidation programs that mandates that individuals should not suffer economic loss in the process of consolidation.

Second, these proposals do not provide a long-term remedy.<sup>357</sup> For example, under the constructive ouster proposal, the problems of fractionation will recur if the tenant in possession dies intestate. Given the overall rate of will-making for both rural African Americans landowners and other poor rural Americans, this is more likely than not. In addition, vesting a tenant in possession with the right to force a sale of the property assumes that this tenant may be well positioned to maintain the property. To the extent that much of heir property has been underutilized, however, there may be instances in which the tenant in possession elected to remain in possession in order to live rent-free in a dwelling on the family property due to their poor financial circumstances. If this person is given the power to force a sale of the property, she could be susceptible to land speculators who would agree to finance the sale provided that the land is

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to buy out their fellow co-tenants’ interests prior to the filing of a partition action and absent the consent of the other co-tenants. One such circumstance he identifies would be when more than two-thirds of the heirs petition for such a forced private sale. *Id.* at 136.

<sup>352</sup> See, e.g., Graber, *supra* note 63, at 282. See also McDougall, *supra* note 350, at 136.

<sup>353</sup> See Graber, *supra* note 63, at 282–84.

<sup>354</sup> See McDougall, *supra* note 350, at 135–6.

<sup>355</sup> *Id.* at 136.

<sup>356</sup> *Id.* See also Graber, *supra* note 63, at 282.

<sup>357</sup> See Moral-López, *supra* note 343, at 119 (stating that preventing “future excessive subdivision and fragmentation is as important as the consolidation of fragmented holdings”).

transferred immediately thereafter. Even if this tenant in possession could acquire the property for herself, she may lose the property through foreclosure, tax sale, or distress sale unless her financial status significantly improves.

Intestacy reform proposals that seek to reduce the further fractionation of heir property may be unfair to the extent that certain individuals in the ownership group have more restricted options to pass their property than others. Even absent such fairness concerns, intestacy reform alone offers too mild an approach to address the magnitude of the heir property problem. For example, proposals to restrict the class of people eligible to inherit under a will or to restrict the class takes by the laws of descent will not consolidate the number of tenants in common in a timely or effective manner.<sup>358</sup> In those instances in which land has become highly fractionated with large numbers of people holding an interest in the tenancy in common, changes in the laws of inheritance no matter how far-reaching would not consolidate the number of interests in any reasonable period of time. The most aggressive intestacy reform proposals allow just one person to inherit the land. However, resurrecting the law of primogeniture, or some gender-neutral variation, faces the likely political opposition of the heirs who would lose the right to take under the laws of descent.<sup>359</sup> Primogeniture was rejected in America from the founding as a vestige of feudalism. Given this historic revulsion, the general public will not likely support a law of primogeniture—even a modern version designed to promote democratic interests antithetical to feudalism.<sup>360</sup>

Existing proposals to ameliorate the heir property problem assume the tenancy in common as a starting point. Such proposals would improve the status quo by paring down the number of people with an interest in a given heir-property tract. Some of the worst symptoms of the heir property problem are addressed by this strategy, including inability to manage land productively with many remote, passive interest holders and the increased risk of partition action when a tenant acquires an interest in the common property from a remote heir. The resulting tenancy in common still would be unstable as any one tenant could seek a partition sale no matter how small an interest. In addition, these proposals do not help those who remain in the tenancy to better manage their common property.

A better approach is to restructure the tenancy in common along the lines of newer forms of ownership such as condominiums/cooperatives or the limited liability company. These have advantages over tenancies in common or the general partnership form. Allowing those in tenancies to restructure better balances the goals of strengthening the rights of the common ownership group and protecting the rights of individuals within the group than other approaches discussed.

The real focus of effective policy reform must be the default rules governing relations amongst tenants in common by operation of law, that is, not voluntary and consensual communities. Unlike

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<sup>358</sup> See, e.g., Williams, *supra* note 95, at 741.

<sup>359</sup> See *Heirship the Indian Amoeba*, at 60. Lawson states the following:

“[A]ny attempt to resolve the issue by limiting the number of persons entitled to inherit would be resisted by prospective heirs. Even though the value of their interests may be paltry, forced disinheritance would only create resentment and, ideally, should therefore be avoided.”

*Id.* at 95. This observation obviously proved to be prescient in the light of the Supreme Court’s decisions in *Hodel v. Irving*, 481 U.S. 704 (1987) and *Babbitt v. Youpee*, 519 U.S. 234 (1997).

<sup>360</sup> On an international level, one commentator has noted that in many countries it is very difficult to change inheritance laws in order to consolidate or prevent fragmentation of rural landholdings because inheritance law “often derives from ancient social and religious custom.” See Moral-López, *supra* note 343, at 103.

tenancies in common formed by voluntary agreement, members of nonconsensual tenancies in common lack direct control over the formation of the tenancy in common or the composition of the initial members of the ownership group.<sup>361</sup> Given such uncertainty, in almost all instances, the prospective “co-tenants by law” cannot preplan their tenancy-in-common relationship by entering into an agreement that allocates the rights and responsibilities of members prior to the moment that the law declares them to be tenants in common.<sup>362</sup> Therefore, the moment the tenancy in common is formed by operation of law, the tenancy in common is most likely to be subject to the default rules.<sup>363</sup> Theoretically, the members of a nonconsensual tenancy in common can develop a new set of rules allocating the rights and duties of each co-tenant that would supercede the default rules. However, negotiating after-the-fact agreements is practically impossible for “co-tenants by law” because the law requires each of the co-tenants to enter into the agreement.<sup>364</sup> Not only must the co-tenants by law overcome significant transactions costs in some instances, but also those individual co-tenants who believe that the default rules benefit them have little incentive to negotiate away such an advantage without receiving major concessions from their fellow co-tenants.<sup>365</sup>

These obstacles to private ordering become nearly impossible barriers as the number of co-tenants grows. And this describes many heir-property cases, whether in the rural African American community or in other communities. Transactions costs may prevent even those holding nearly all of the interests in any given heir-property parcel to restructure their ownership arrangement by private management. This suggests that government intervention be required to overcome the intransigence of individual “holdouts.”

The goal is to allow majorities to act without unanimity but to protect individual interests by assuring exit from the group as well as fair value for their interest. What follows are two proposals that could be pursued either independently or as a package. One would require states to spend little, if any, money; the other more comprehensive proposal would require states to establish land consolidation courts that would cost some money in the short term, but would be likely to produce more economically productive landholdings that would benefit the wider economy.

## **5.2 ALLOW EITHER A MAJORITY OR A SUPERMAJORITY OF THOSE HOLDING COMMON TENANCY INTERESTS TO RESTRUCTURE AS A LIMITED LIABILITY COMPANY**

Those who own an interest in heir property are often locked into an ownership structure that denies them the normal benefits of a fee simple interest. And heir property exacerbates some of the structural problems of the tenancy in common. The limited liability company, described below, provides more stability, better mechanisms to allocate management responsibility, and reasonable exit options as compared to the tenancy in common.

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<sup>361</sup> Evelyn Alicia Lewis, *Struggling With Quicksand: The INs and OUTs of Cotenant Possession Value Liability and a Call for Default Rule Reform*, 1994 WISC. L. REV. 331, 390 (1994).

<sup>362</sup> *Id.*

<sup>363</sup> *Id.* at 390–91.

<sup>364</sup> *Id.* at 391.

<sup>365</sup> *Id.*

The limited liability company (“LLC”) was developed for the management of unincorporated business organizations. Unhappy with the general partnership’s rules concerning vicarious liability,<sup>366</sup> interest groups representing those in the accounting and legal professions helped in the 1980s to develop and introduce the LLC.<sup>367</sup> Members in LLCs are subject only to limited liability irrespective of how active a role they play in management, but are taxed as partnerships.<sup>368</sup> These features have provided businesses organized as general partnerships with incentives to convert their form of ownership; so many general partnerships have converted that some commentators have pronounced the general partnership a dead business form.<sup>369</sup> The LLC form is also more responsive to the interests of the ownership group in maintaining continuity of the business upon the withdrawal of individual members than the general partnership. A brief comparison of the laws governing general partnerships and the Delaware LLC statute—chosen because of Delaware’s historic role in shaping the law of business organizations—is instructive.

A general partnership in many ways, resembles a tenancy in common. Many of the default and immutable rules governing general partnerships work best for small firms with limited numbers of partners who know and trust one another.<sup>370</sup> Analogous to each co-tenant’s equal rights to possession of the whole property, a general partnership consists of partners with equal rights to the management and profits of the enterprise.<sup>371</sup> As in a tenancy in common, conflicts may arise between the partners in a partnership if the individual owners contribute substantially different amounts of money, service, or time to the business.<sup>372</sup> Further, the rules governing the exit of individual partners from a partnership are almost identical to the common laws rules governing partition actions. The filing of a partition action by an individual tenant in common usually results in a judicial sale of the property. In most cases, “any partner can withdraw from the partnership at will, force a liquidating sale, and receive the net value of her partnership interest in cash.”<sup>373</sup> Although the ability of any individual partner to force a liquidation of a general partnership makes a general partnership an unstable business form, a general partnership is more stable than a tenancy in common because partnership default rules prevent partners from transferring their full partnership interests to third parties without the unanimous consent of the other partners.<sup>374</sup>

As compared to the general partnership, LLC statutes allocate more control to the ownership group than to individual members. At the same time, these statutes protect the economic interests

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<sup>366</sup> Members in an LLC face far less exposure to liability based upon the actions of their associates than do partners in a general partnership, who are each subject to vicarious liability for the actions of their fellow partners.

<sup>367</sup> CHARLES R.T. O’KELLEY & ROBERT B. THOMPSON, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS 62 (3<sup>rd</sup> ed. 1999).

<sup>368</sup> Cf. LARRY E. RIBSTEIN, UNINCORPORATED BUSINESS ENTITIES 286 (1996). In addition, by 1996, all fifty states and the District of Columbia had enacted LLC statutes. *Id.*

<sup>369</sup> O’KELLEY & THOMPSON, *supra* note 366, at 64. Not only are partners in a general partnership able to limit their liability if the partnership converts to an LLC, but also LLC statutes typically minimize the conversion costs that other entities must bear to convert their entities into LLCs. *See, e.g.* DEL. CODE ANN. tit. 6, § 18-214 (1998).

<sup>370</sup> O’KELLEY & THOMPSON, *supra* note 366, at 56.

<sup>371</sup> *Id.* at 57.

<sup>372</sup> *Id.*

<sup>373</sup> *Id.* at 121.

<sup>374</sup> LARRY D. SODERQUIST ET AL., CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS 100 (4<sup>th</sup> ed. 1997). However, partners may freely assign their financial rights to third parties, including their rights to their share of the profits and losses and their right to receive distributions. *Id.* at 96.

of individual members. Examining certain provisions of the Delaware LLC statute demonstrates the degree to which at least one state legislature sought to reallocate power within unincorporated business enterprises. Like a corporation, LLCs in Delaware are deemed to have a perpetual existence unless an operating agreement specifies otherwise.<sup>375</sup> Such continuity of life is normally unaffected by an individual member's withdrawal from the entity.<sup>376</sup> In order to dissolve an LLC, members holding two-thirds of the interests must consent to the dissolution unless the operating agreement provides otherwise.<sup>377</sup> Although the LLC normally continues after a member resigns for any reason, such member is entitled to receive fair value for his or her interest as of the date the membership ceased.<sup>378</sup> However, the LLC also has the unilateral right to acquire the interest of any member provided that fair value is paid.<sup>379</sup> Like a general partnership, a member may assign only their financial interest, but not their right to manage an LLC.<sup>380</sup>

Just as a member may seek a partition sale of property owned under a tenancy in common, an LLC may be dissolved upon application of a member or manager if the court determines that "it is not reasonably practicable to carry on the business in conformity with a limited liability company agreement."<sup>381</sup> Although the specific judicial dissolution provision of the Delaware LLC statute may appear to allocate a great amount of power to an individual member seeking liquidation, the overall scheme of the Delaware LLC statute makes it clear that court-ordered dissolution should be ordered only in unusual circumstances. As indicated above, LLCs are deemed to have perpetual existence and the default statutory rules require two-thirds of the members to consent to a dissolution in cases in which a court-ordered dissolution is not sought.

Mechanisms for allocation of management responsibilities within an LLC provide flexibility. Absent agreement otherwise, decisions are made by those holding more than 50 percent of the interests in the profits of the company.<sup>382</sup> However, the members of an LLC in Delaware may

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<sup>375</sup> DEL. CODE ANN. tit. 6, § 18-801(a)(1) (1998).

<sup>376</sup> DEL. CODE ANN. tit. 6, § 18-801(b) (1998). This section provides:

Unless otherwise provided in a limited liability company agreement the death, retirement, expulsion, bankruptcy or dissolution of any member or the occurrence of any other event that terminates the continued membership of any member shall not cause the limited liability company to be dissolved or its affairs to be wound up, and upon the occurrence of any such event, the limited liability company shall be continued without dissolution.

<sup>377</sup> DEL. CODE ANN. tit. 6, § 18-801(a)(3) (1998). This section of the statute provides that an LLC may be dissolved in the following way:

Unless otherwise provided in a limited liability company agreement, upon the affirmative vote or written consent of the members of the limited liability company or, if there is more than 1 class or group of members then by each class or group of members, in either case, by members who own more than two-thirds of the then-current percentage or other interest in the profits of the limited liability company owned by all of the members or by the members in each class or group, as appropriate.

<sup>378</sup> DEL. CODE ANN. tit. 6, § 18-604 (1998).

<sup>379</sup> DEL. CODE ANN. tit. 6, § 18-702(e) (1998).

<sup>380</sup> DEL. CODE ANN. tit. 6, § 18-702(a)-(b) (1998).

<sup>381</sup> DEL. CODE ANN. tit. 6, § 18-802 (1998).

<sup>382</sup> DEL. CODE ANN. tit. 6, § 18-402 (1998).

agree to vest complete or partial management of the entity in a manager or managers,<sup>383</sup> or may establish different classes or groups of members with different voting rights.<sup>384</sup>

Interestingly, the Delaware statute includes several provisions that facilitate the ability of businesses organized under other forms of ownership to convert their ownership to LLC form (and, for that matter, for LLCs to convert to other forms of ownership). Other enumerated entities<sup>385</sup> may convert to an LLC by filing a certificate of conversion<sup>386</sup> and a certificate of formation as an LLC.<sup>387</sup> Prior to converting, however, these other entities must comply with the rules that govern the preexisting ownership arrangement—including rules that determine what proportion of members must agree to convert to another form of ownership.<sup>388</sup> Both certificates are simple in form, requiring limited information such as the names of the entities. In addition, LLCs may convert to other forms of ownership or may merge or consolidate with other entities provided more than 50 percent of those holding an interest in the profits of the company agree, unless the LLC agreement provides otherwise.<sup>389</sup>

Limited liability statutes such as the one in Delaware aim to minimize the transactions costs of converting ownership form, and thus promote the ability of those who own equity jointly to adapt to changed circumstances. Those businesses not organized as LLCs may easily convert ownership; LLCs may be easily converted to other forms of ownership. Present state law should be changed to permit those holding a majority or supermajority of common tenancy interests to convert to an LLC and to establish the basic framework of the operating agreement. However, such operating agreements should not permit those vested with management authority to acquire an interest of an individual member without the consent of such member. In addition, homestead protections would ensure that those living in a dwelling on property primarily suited for economic uses retain the right to possession of such dwelling.<sup>390</sup> Though individuals would lose the right to simply liquidate the ownership at will (by filing for a partition sale, for example), their economic interests would be protected as they could choose to exit the LLC upon the payment of fair value.

Such revised statutes that would allocate more power to the majority interest holders in a tenancy in common in order to provide them with more ability to control the disposition and use of the land do not raise takings issues. Individuals retain their economic interest in the property

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<sup>383</sup> DEL. CODE ANN. tit. 6, § 18-402 (1998).

<sup>384</sup> DEL. CODE ANN. tit. 6, § 18-302 (1998).

<sup>385</sup> DEL. CODE ANN. tit. 6, § 18-214(a) (1998). These entities include “a business trust or association, a real estate investment trust, a common-law trust or any other unincorporated business, including a partnership (whether general (including a registered limited liability partnership) or limited (including a registered limited liability limited partnership)) or a foreign limited liability company.” *Id.*

<sup>386</sup> DEL. CODE ANN. tit. 6, § 18-214(b)(1) (1998).

<sup>387</sup> DEL. CODE ANN. tit. 6, § 18-214(b)(2) (1998).

<sup>388</sup> DEL. CODE ANN. tit. 6, § 18-214(h) (1998). Of course, under current law, such a provision would prevent for all practical purposes those holding heir property to convert their ownership to an LLC because all of the interest holders would have to agree to the conversion.

<sup>389</sup> DEL. CODE ANN. tit. 6, §§ 18-209, 18-216 (1998).

<sup>390</sup> Such a provision would allow the members of the newly formed LLC who were tenants in common in possession for a period of time to remain in possession. In the operating agreement, however, the members of the LLC can allocate the duties and rights of the members based upon whether they are in possession or live away from the property. Such an allocation could provide for the amount of rental money, if any, the “in” tenants would owe to the “out” tenants. *See generally* Lewis, *supra* note 360.

and such interests would likely increase in value. In the past two years, Congress has enacted laws that now enable the owners of a majority of the undivided interests in Indian allotments located on either the Fort Berthold Indian Reservation in North Dakota or the former reservations of several tribes in Oklahoma to enter into mineral leases or agreements.<sup>391</sup> Prior to enactment of these statutes, all of the interest holders on these Indian lands had to consent to the mineral leasing agreement.<sup>392</sup> Congress indicated that the Indian owners of the land had suffered significant economic losses due to the fact that the land had not been able to be explored and developed by mining companies because of the previous requirement that all of the interest holders consent to the mining of the land.<sup>393</sup>

Assuming for the sake of argument that the conversion of heir property to another form might raise takings issues, the states clearly have the authority to take such interests because the Supreme Court has greatly expanded the circumstances under which property may be taken for a “public use.” In *Hawaii Housing Authority v. Midkiff*,<sup>394</sup> the Supreme Court held that a state seeking to exercise its powers of eminent domain need demonstrate only that the taking of private property is rationally related to achieving a public purpose. In addition, the Supreme Court in *Midkiff* did not view a taking that would transfer property from one private individual to others as inconsistent with the public use requirement because the Court determined that “it is not essential that the entire community, nor even any considerable portion, . . . directly enjoy or participate in any improvement.”<sup>395</sup> Further, in the unlikely case in which an individual’s interest would decline in value due to the change in ownership form, such an individual should be entitled to receive from the ownership group the difference in the value of her interest prior to the conversion as opposed to the value within a reasonable period of time after the conversion.

### **5.3 STATES SHOULD ESTABLISH LAND CONSOLIDATION COURTS TO AID RURAL PROPERTY OWNERS LOCKED IN INEFFICIENT PATTERNS OF OWNERSHIP AND IMPROVE THE PRODUCTIVITY OF THE LAND BASE**

Allowing those holding a majority interest in common property to convert to an ownership form that allocates more control to the group will stabilize the ownership of such land. Once ownership is stabilized, many current owners will need to clear title before the land can be used productively. For example, one of the more insoluble heir-property problems has been the issue of the unknown heir. Given the existence of these unknown heirs, much of heir property holdings are subject to clouds on title, rendering it nearly impossible for those holding such property to use the property as collateral to secure loans to build or improve housing on the land or to improve farming operations. Even if the majority interest holders could convert the tenancy in common to an LLC, the unknown heir problem would still need to be addressed in order to provide the known heirs with clear title. In short, enabling the majority interest holders to convert to an LLC would

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<sup>391</sup> Act of July 7, 1998, Pub. L. No. 105-188, 112 Stat. 620 (Fort Berthold Reservation); Act of October 7, 1999, Pub. L. No. 106-67 (amending Pub. L. No. 105-188 to include Indian lands located in Oklahoma).

<sup>392</sup> H.R. REP. NO. 106-338 (1999).

<sup>393</sup> *Id.*

<sup>394</sup> 467 U.S. 229, 241–2 (1984).

<sup>395</sup> *Id.* at 244 (quoting *Rindge Co. v. Los Angeles*, 262 U.S. 700, 707 (1923)).

represent just one step in a process of “legal consolidation” that would enable the ownership group to use the land productively.

In this country, those who own an interest in heir property that has fallen into unproductive use have few options to improve the prevailing ownership structure, rendering exit through initiation of partition actions an attractive option.<sup>396</sup> Other countries, in contrast, have developed institutions that would enable such owners who value the land for more than its mere exchange value to play a role in improving the ownership structure so that the land could be used more productively. Norway, for example, has created specific legal institutions that seek to consolidate land in a manner that is beneficial to all of those who may be affected by such consolidation. These Norwegian institutions provide a good model that could be replicated in this country with certain modifications.

In the eighteenth century in Norway, as in many other parts of Europe, enclosure resulted in intense fragmentation of much of the rural land due to successive subdivision practices.<sup>397</sup> After first enacting significant land consolidation legislation in 1821, the Norwegian philosophy that drove land consolidation changed from the notion that fragmented landholdings should be aggregated on a one-time basis to a view that land consolidation “[must be] a continuous process, constantly readjusting the ownership structure to changing economies, technology and patterns of land use.”<sup>398</sup> To achieve this end, Norway established a permanent Land Consolidation Service (“the Service”) in 1859.<sup>399</sup> From the beginning, the Service’s decision-making body was organized as a court of law; since 1950, these specialized tribunals have been called land consolidation courts.<sup>400</sup> Currently, throughout the country, there are 41 such district, consolidation “trial” courts and 5 land-consolidation court of appeals.<sup>401</sup> The land consolidation “judges”(who are not required to be attorneys) must have a degree from the Agricultural University of Norway with substantive coursework in land law, surveying, mapping, and land consolidation.<sup>402</sup> In addition, the land consolidation courts can call upon the expertise of the Service, which employs 275 people, many with specialized training.

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<sup>396</sup> In Albert Hirschman’s lexicon, the heir property owners have greater incentives to exit than to use their “voice” to improve the prevailing ownership structure. *See* ALBERT O. HIRSCHMAN, *EXIT, VOICE AND LOYALTY* (1970). In distinguishing “voice” from “exit,” Hirschman states that:

To resort to voice, rather than exit, is for the customer or member to make an attempt at changing the practices, policies, and outputs of the firm from which one buys or of the organization to which one belongs. Voice is here defined as any attempt at all to change, rather than to escape from, an objectionable state of affairs, whether through individual or collective petition to the management directly in charge, through appeal to a higher authority with the intention of forcing a change in management, or through various types of actions and protests, including those that are meant to mobilize public opinion.

*Id.* at 30.

<sup>397</sup> Sevatdal, *supra* note 347, at 7.

<sup>398</sup> *Id.* at 9.

<sup>399</sup> Jørn Rognes and Per Kåre Sky, *Mediation in the Norwegian Land Consolidation Courts*, Working Paper No. 14, North America Series, Land Tenure Center 2 (May 1998).

<sup>400</sup> *Id.*

<sup>401</sup> *Id.*

<sup>402</sup> *Id.*

Land consolidation cases in Norway normally must be initiated by at least one landowner or person holding a legal interest in the land subject to potential consolidation.<sup>403</sup> The courts use a two-prong test to determine whether the land may be consolidated. First, there must be a “dependency of some sort between the holdings in an area, with regard to efficient economic use.”<sup>404</sup> The “dependency” is defined broadly.

The dependency could be due to *location*; the holdings are so physically situated in relation to each other that the use of one affects the use of others, and *vica versa* (sic). It could also be due to other physical or practical factors. The dependency could also be rooted in the prevailing *type of ownership* from a purely judicial point of view, for instance various sorts of joint (common) ownership, rights of use and so on.<sup>405</sup>

Second, it must be demonstrated that the prevailing ownership structure hinders the current or potential economic use of the land.<sup>406</sup> The land consolidation courts can design remedies taking one of two different approaches. First, the judges can attempt to eliminate or minimize the dependencies. Or the judges can introduce or formalize “rules for cooperation where no such rules exist, to regulate the dependency, minimizing the disadvantages, maximizing the advantages.”<sup>407</sup>

Along the lines of Norway, states with a significant amount of rural farmland should establish land consolidation services with trained professionals in land use planning, land assessment, and land consolidation. Such state land-consolidation services should include courts staffed by judges with legal training (in property, real estate, business organization, and environmental laws)—as well as substantive training in surveying, mapping (including mapping with high-technology geographic information systems), and land consolidation. Those who own property in which the ownership form or physical pattern of tracts limits the productive use of the land may initiate an action for legal or spatial restructuring. By definition, this would include parcels under fractionated heir ownership.

Not only the specialized land courts but the land consolidation service generally would assist those who own heir property. Professionals in the service could, for example, appraise land and survey land at a cost reflecting ability to pay.<sup>408</sup> Unlike the courts in Norway,<sup>409</sup> the state

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<sup>403</sup> Austenå, *supra* note 344, at 139. However, in specific circumstances, the Ministry of Agriculture may also initiate a land consolidation case. *Id.*

<sup>404</sup> Sevatdal, *supra* note 347, at 3.

<sup>405</sup> *Id.* (emphasis in original).

<sup>406</sup> *Id.*

<sup>407</sup> Austenå, *supra* note 344, at 139.

<sup>408</sup> See Graber, *supra* note 63, at 284 (noting that those who own heir property often need surveys done of their land); see also letter from Jennifer Binkley, second-year law student University of Wisconsin Law School, (Sept. 30, 1999) (in the course of participating in a legal externship with the Land Loss Prevention Project in Durham, North Carolina, in the summer of 1999, Jennifer noted that poor people almost always need surveys when they are either involved in property disputes or trying to clear title) (letter on file with author).

<sup>409</sup> In an interview with Judge Per Kåre Sky of the Norwegian Land Consolidation Court, Judge Sky informed me that the Norwegian land consolidation courts are increasingly handling consolidation cases addressing those who own undivided interests under a form called “personal joint ownership,” a form of ownership analogous to a tenancy in common. Electronic interview with Judge Per Kåre Sky, Norwegian Land Consolidation Court of Nord- and Midhordland, (Sept. 21, 1999). Although the courts have the power to divide the land in kind, the judges sometimes try to assist the common owners to make agreements that regulate the ownership of the land or to enter into buy-sell

consolidation courts should be vested with the authority to order fractionated tenancies in common converted into other forms of ownership that are more stable and provide better management mechanisms with the concurrence of a majority of those holding an interest.

Like the proposal permitting those who own rural, heir property to convert their form of ownership with less than unanimous consent, the establishment of state land-consolidation courts would break unproductive ownership patterns weakening the rural land base. Although it is my concern for the disproportionate impact of rural heir property on African Americans, meaningful legal reform would strengthen the position of all rural landowners.

#### **5.4 RESTORATION OF LAND THE USDA FORECLOSED UPON OR PROVISION OF ALTERNATIVE, IN LIEU LAND**

The *Pigford* settlement provided for limited land restoration to black farmers whose land was foreclosed upon by the Department of Agriculture. Certain farmers who prevail under the more risky and arduous arbitration procedure set forth in the settlement, the so-called Track B, are entitled to return of formerly owned property that remains in the USDA inventory.<sup>410</sup> If the USDA has already transferred the land to a third party, the consent decree provides no other mechanism for land restoration or, alternatively, for provision of other land. In approving this narrow land-restoration remedy, the judge reviewing the settlement assumed the federal government has limited ability to restore land, stating: “[n]othing can . . . restore lost land or lost opportunities to Mr. Beverly or to all of the other African American farmers.”<sup>411</sup>

This is simply not true. Throughout this nation’s history the federal government distributed land to individuals, states, and private entities with less individualized claims than those of black farmers who lost land directly resulting from the federal government’s discrimination. For example, the government allocated huge tracts of federal land to mostly white homesteaders in the latter part of the nineteenth century and the first half of the twentieth century in order to help these people enter into the economic mainstream of society. Further, the many land-grant universities throughout the country came into operation only after the federal government provided the necessary land. In these instances, land in the government’s inventory was transferred in order to serve specific federal policies.

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agreements with one another. However, in answering a follow-up question, Judge Sky later informed me that the consolidation courts in Norway do not have the power to force buying and selling amongst the common owners or to convert the personal joint-ownership holdings into other forms of ownership. Electronic interview with Judge Per Kåre Sky, Norwegian Land Consolidation Court of Nord- and Midhordland, (Sept. 24, 1999).

<sup>410</sup> The *Pigford* Consent Decree provides that if an arbitrator rules in favor of a class member who elects to proceed under Track B, that the class member is entitled to relief including the following:

The immediate termination of any foreclosure proceedings that have been initiated against any of the class member’s real property in connection with the ECOA claim(s) resolved in the class member’s favor by the arbitrator, and the return of any USDA inventory property that was formerly owned by the class member but which was foreclosed in connection with the ECOA claim(s) resolved in the class member’s favor by the arbitrator.

Consent Decree, at 10(g)(iv).

<sup>411</sup> *Pigford v. Glickman*, 185 F.R.D. 82, 103–4 (1999).

The change in federal Indian policy in this century provides further proof that the government can act to restore land to people who have lost their land unjustly due to discriminatory acts of the government. In the early part of this century, federal Indian policy sought to assimilate American Indians, in part by stripping them of much of their land. Modern federal Indian policy aims to improve the land tenure security for many Indians and tribes, and enables tribes to add to their land base. From passage of the Indian Reorganization Act in 1934 to the present, American Indian lands held in trust by the federal government have increased by nearly 8 million acres. These examples demonstrate that the federal government can, if it chooses, use federal lands to help rural African Americans stabilize and increase their landholdings. Of course, this would require that the government adopt a policy that specifically promotes rural African American landownership.

Given the demonstrated significance of African American landownership and the acknowledged, widespread discriminatory conduct of the USDA, the USDA should return any formerly black-owned land in its inventory to its prior owners who are members of the *Pigford* class. Additionally, the USDA's inventory obviously includes land that was not foreclosed upon or land that was foreclosed upon for reasons wholly unconnected to the discriminatory conduct established in the *Pigford* lawsuit. Consistent with the charge of the Freedmen's Bureau to distribute "abandoned lands," lands from the USDA's inventory should be allocated to black farmers in the *Pigford* class whose land was foreclosed upon but subsequently transferred to another party. Such provision of in lieu land would be consistent with land reform measures adopted by other countries that have attempted to make whole individuals and groups who were unjustly dispossessed of their land.<sup>412</sup> In short, if the federal government adopted a policy that recognized the importance of black, rural landownership, land restoration and acquisition could be assured.

## **5.5 LEGAL SERVICES ATTORNEYS WITH SPECIALIZED TRAINING SHOULD BE HIRED TO PROVIDE ASSISTANCE TO HEIR PROPERTY OWNERS**

Congress should expand the mission of legal services in order that legal services attorneys can begin providing legal assistance to poor landowners, including those who own an interest in heir property. Such an expanded mission will necessarily require additional funding for legal services offices to meet the needs of the newly eligible clients. For example, the local legal services would need to hire attorneys with training or experience in estate planning, real estate transactions, property, tax, business organizations, and environmental law.<sup>413</sup> In order to begin building a cadre of lawyers interested in work with poor, rural landowners, these legal services office should establish internship programs that allow law students to acquire specific expertise in land-related cases.

In addition to handling individual cases, these legal services offices should conduct regular community legal-education workshops to educate poor, rural landowners about the laws that impact their ability to retain ownership of their land. These workshops could address issues such

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<sup>412</sup> For example, South Africa adopted the Restitution of Land Rights Act in 1994. Under the Act, those successful claimants who lost land due to the discriminatory acts of the government, dating back to 1913, are entitled to relief that may include restoration of their original land, the provision of in lieu land, or monetary compensation.

<sup>413</sup> See Graber, *supra* note 63, at 284.

as land records, tax obligations and tax redemption, liens and foreclosure, adverse possession, mineral, mining, water, and timber rights. The legal services attorneys could also address legal problems that normally crop up in tenancies in common such as how to allocate responsibility between co-tenants for costs associated with maintaining the property and how to redeem property after a tax sale. Further, local community activists (or in some instances landowners themselves) could be trained to conduct title searches at local county courthouses so that those who own an interest in land can figure out who else has a claim to the property. There must be continuous education about the importance of making wills. Legal services offices should develop form wills that can be modified with little effort. More broadly, such community legal-education programs could also help rural landowners begin to do financial planning that would help landowners avoid losing their land—as so many poor, rural landowners have lost their land—due to financial distress.

## 5.6 PLACING INTO TRUST AFRICAN AMERICAN HERITAGE LAND

Just as the federal government, the courts, and the general public recognize that certain Indian-owned ancestral land constitutes a vital part of the American Indian heritage, the federal government should recognize that there is small amount of rural land still under black landownership that represents a part of the African American heritage.<sup>414</sup> At a minimum, land currently owned by African Americans that was initially acquired by black people either prior to or within a generation of the close of the Civil War should receive special federal protection. According to a report by the Emergency Land Fund in 1980, there is only a small percentage of land that was acquired by black people from the close of the Civil War until 1910 that remains in the families of the original black landowner.

In addition to this land, land set aside for specific black communities during the New Deal resettlement programs should be eligible for special federal protection. Although the total number of rural acres set aside for these black communities was small, these communities served as a beacon for many rural black people who believed that landownership could transform their lives. Recently, rural sociologists and other academics have begun to study anew the important role of these communities in uplifting the hopes of rural African Americans across the South. Given the unique status of the two categories of land described above, the federal government should recognize this land as African American heritage land.<sup>415</sup> Owners of such heritage land should be eligible for federal support that could include financial assistance earmarked to helping restore historically important buildings on the land, either federal management of the property under a trust relationship or federal assistance in helping these landowners establish private land trusts, and the building of museums or archives that would document the history of the acquisition and use of the land by the black landowners.

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<sup>414</sup> See, e.g., *Flooded Black Town Decides to Rebuild*, N.Y. TIMES, Nov. 24, 1999, at A21 (discussing recent flooding of historic town that was the first in the nation to be chartered and governed by blacks after its was founded by freed slaves after the Civil War).

<sup>415</sup> Other land that could be categorized as African American heritage land would be land still under black ownership that once served as the sites for historic black colleges and universities that were opened after the end of the Civil War, but have now ceased operation.

## CONCLUSION

At the end of the Civil War, the federal government failed to redistribute land to African Americans. Without such governmental assistance, many African Americans made heroic sacrifices to purchase land on their own. However, the 15 million-acre land base that many black families built up in the South between the end of the Civil War and 1910 has almost been wiped out. In recent times, thousands of black families have lost their land due to partition sales of black-owned land, many of which have been initiated by those outside of the family who have managed to acquire an interest in a tenancy in common with the sole desire of forcing a sale. Although heir property continues to represent a form of ownership that is especially unstable, those who own such property find it nearly impossible to reorganize their ownership of land under a form that provides better mechanisms to foster continued ownership by the group because the law requires all of the “co-tenants by law” to agree to any change in the default rules governing tenancies in common.

Recently, President Clinton has spoken passionately about the threat to the health of our society by the growing divide in access to technology between those who are more wealthy and those who are less privileged. The inability of certain groups to participate fully in our society—and in the global society—due to their inability to access the Internet and other computer technology represents but one example of a technological divide separating more privileged groups from others. Those who own heir property are essentially locked into a substandard form of ownership that presents a large target for those intent on dispossessing people of their land. The newer forms of ownership that the technology of the law has developed in order to assure greater continuity of ownership for those owning equity is beyond the reach of those owning heir property. Just as policymakers should be concerned about providing wider access to computer technology for all groups in our society, such policymakers should respond to the crisis in land loss in African American communities given the established links between landownership, community, and democratic participation.