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Inequity In Equity: The Tragedy of Tenancy in Common for Heirs' Property Owners Facing Partition in Equity

Faith R Rivers, Vermont Law School

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INEQUITY IN EQUITY
THE TRAGEDY OF TENANCY IN COMMON FOR HEIRS' PROPERTY
OWNERS FACING PARTITION IN EQUITY

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ABSTRACT
This article considers the impact of the default intestacy estate of tenancy in common on African American heirs’ property. This piece considers the evolution of the heirs’ property conundrum in the Lowcountry of South Carolina – the birthplace of the dream of African-American land ownership – and explores the implications of this form of property ownership on tenants in common facing partition in courts of equity, particularly in developing Sunbelt communities. Comprehensive property law reform is critically needed. I propose a new legal framework to better regulate the externalities that plague the commons of heirs’ property and achieve more equitable results in actions to partition heirs’ property. Specifically, courts of equity should take affirmative steps to better manage the economics of partition actions so that external costs are appropriately assessed and valuations accurately compensate partitioning cotenants who hold fractionated interests. These steps would ameliorate the distorted economics that make partition actions so attractive to developers who benefit from the exploitation of heirs’ property. In addition, I consider a recent line of state supreme court cases that utilized alternative partition remedies to preserve sentimental and historic family homesteads. These cases offer a sound legal theory that can and should be applied in the heirs’ property context. Finally, I offer concrete legislative reform proposals that will enable legislators and judges to provide more equitable consideration of partition actions, thereby preserving the historic land legacy of African Americans.
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I. INTRODUCTION

While looking toward Bohicket Creek, Wadmalaw Island, she told us, “We used to own all of this land from the river to the road.” All of the treks to the Island in one hundred degree plus heat, all of the interviews searching for information, all of the many hours of research, analysis, and meetings, suddenly had a meaning far beyond the creation of a model to be used in helping an indigenous people understand the modern meaning and importance of land ownership.

These are real people, with a real problem—how to keep family land in the family, and how to economically benefit from land ownership … [T]hey are slowly losing the land—some loss is the result of ignorance of real property laws that have developed over time, some to unscrupulous developers, but some loss is the result of actions that some folk consider “legal theft.”

The story of African-American land loss is a complex tale of the evolution of property law. From a robust beginning as a “land of opportunity” for land-seeking colonists, to the birthplace of land ownership for African-American freedmen, the colony of Carolina tells an important story about the evolution of American property law and its impact on African Americans. In large measure, this property was passed down through the default intestacy statute as tenants in common and is commonly known as "heirs' property." The tenancy in common estate is characterized by "unity of possession." Tenants in common share "undivided fractional interests in property." Each heir has the right to possess the entire parcel of property, meaning an "undivided" interest, but their ownership interests are only "fractional" shares of a whole parcel of land.

By contrast, the other main form of co-ownership is joint tenancy. Although individuals who share tenancy in common interests as well as those who share interests as joint tenants are commonly considered "cotenants," the nature of the two estates differs significantly. Joint tenants are regarded as a single owner; they share undivided interests in the whole of a parcel of property. Thus, a joint tenant's interest cannot be devised or inherited, as the interest disappears at the owner's death. Nothing passes to the surviving joint tenant who continues to enjoy...

1 Shirley Washington of the Trident Urban League summed up the importance of efforts to preserve heirs' property as she relayed a grandmother's tragic story of how the family's inheritance had fallen from 100-acres to a sole one-acre plot on this pristine land in the Sea Islands. See Plastrik Report at 4 (citing "From the River to the Road," Phase II – Pilot Project of the Coastal Community Foundation and the Trident Urban League, Inc. (1999)).
4 See JOSEPH SINGER, INTRODUCTION TO PROPERTY (2d edition) 353 (2005).
5 See SINGER, supra note __, at 353 (2005).
6 See ROGER J. SMITH, PLURAL OWNERSHIP 26 (2005).
7 DUKEMINIER & KRIER, et al., PROPERTY (6th ed.) 276, POWELL, supra note __, at §615. Creation of a joint tenancy requires the four unities of time, title, interest and possession.
8 See DUKEMINIER, supra note __, at 279, also citing Huff v. Metz, 676 So. 2d 264 (Miss. 1996).
ownership of the whole parcel. Tenants in common, however, do not share ownership of the whole parcel, nor do they enjoy the right of survivorship. Rather than being regarded as a single owner, tenants in common are acknowledged as multiple owners of the a single piece of property. The automatic transfer (via disappearance) of a decedent's interest helped to preserve joint estates intact, and the estate is characterized as "well suited for family settings." By contrast, tenancy in common interests are transferable, devisable and descendible. Rather than consolidate, tenancy in common property fractionates upon the death of each interest holder.

The English common law favored joint tenancies over tenancies in common. That presumption was reversed in the United States, where land policy favored dissolution, rather than consolidation of land parcels in order to provide market access to real property. The preference for tenancy in common resulted in selection of this estate as the default statutory provision for property that passes through intestacy. This estate selection has created enormous challenges for families that have inherited land through intestacy.

Scholars and judges have struggled with the concept of plural owners sharing equal rights to the same piece of property, and tenants in common have grappled with the practical difficulties of owning land in this particular form of concurrent ownership. Professor Joseph Singer has pinpointed the trouble with heirs' property: "[c]otenants have to work out among themselves how the property will be used. If they cannot agree on how the property is to be used, the main legal remedy is partition." The duplicative right to possession presents substantial challenges. Cotenants find that they "cannot exercise that possession without coming into conflict with the reciprocal right of his cotenant." These scholarly observations are borne out by the experience of heirs' property owners in the rural South where African-American property ownership traditionally was strongest, particularly in coastal areas which are now experiencing Sunbelt growth pressures. This piece sets out to consider the evolution of the heirs' property conundrum in the crucible of the Lowcountry of South Carolina where property dreams were born and are being dashed on a daily basis.

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9 See Smith, supra note __, at 27.
10 See Dukeminier & Krier, Property (5th edition) 340.
11 Singer, Introduction to Property 353 (2nd ed. 2005).
13 Powell, supra note __, at §602, Dukeminier & Krier, supra note __, at 277.
14 Powell, supra note __, at §602, Dukeminier & Krier, supra note __, at 277.
15 Dukeminier & Krier, supra note __, at 277.
16 Dukeminier & Krier, supra note __, at 291.
17 See discussion infra at Sec II(c)(3).
18 Singer, p. 365 (2nd ed. 2005).
A. The Lowcountry: Birthplace of African-American Land Ownership

First inhabited by Native Americans,22 and later settled by the English,23 Carolina was established through grants of land made by the Lords Proprietors pursuant to huge land grants received from King Charles II of England.24 Charleston was the first English settlement and developed as the heart of the colony.25 During the antebellum period, Charleston became a major seaport, second only to Baltimore in population and commercial prominence.26 The city and surrounding Lowcountry area were built on the commerce of enslaved Africans and the crops which these enslaved Africans produced.27

South Carolina imported the highest number of slaves of any colony.28 Due to the primacy of slave commerce and continuous importation, the Lowcountry of South Carolina and Georgia became one of the most Africanized communities in the nation.29 While Ellis Island was the port of entry for eager European immigrants, Sullivan's Island, just north of Charleston, was a grim quarantine for Africans pressed into slavery on this nation's shores.30 A substantial number of African Americans can trace their heritage back to ancestors who disembarked from slave ships at Sullivan's Island and were sold in Charleston's slave marts.31 Most of the slaves

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22 See generally WALTER EDGAR, SOUTH CAROLINA: A HISTORY 11-34 (1998), MICHAEL N. DANIELSON, PROFITS AND POLITICS IN PARADISE: THE DEVELOPMENT OF HILTON HEAD ISLAND 7 (1995). "Native American settlements on the island (Hilton Head) date to the second millennium B.C." citing Trinkley, Michael. "Archaeological Survey of Hilton Head Island, Beaufort, South Carolina." Research Series 9. Prepared for the Town of Hilton Head Island, S.C. and the S.C. Department of Archives and History. Columbia, S.C.: Chicora Foundation, 1986. "When Europeans reached Port Royal Sound early in the sixteenth century, they met Indians who hunted, farmed and fished the area of the coastal island. For the next two hundred years, Indians were its most numerous occupants. Eventually the encounter with the white explorers and settlers proved fatal for the various tribes that inhabited the sea islands. The last tribe in the area was the Yemassee, which was decimated in the struggle between colonists early in the eighteenth century." DANIELSON, 7.

23 Property in Carolina was granted to proprietors who sought settlers to occupy and develop their possessions. Through a series of land grants, property in Carolina was distributed to proprietors who sought settlers to occupy and develop the land. These settlers established a plantation economy based that produced indigo and cotton through the labor of slaves. See generally, DANIELSON, supra note __, at 7-8, Rivers, supra note __.

24 See Coburg Dairy v. Lesser, 318 S.C. 510, 512 n. 1, 458 S.E.2d 547, 548 n. 1 (1995) ("From 1672 until 1730, grants of land were made by the Lords Proprietors who were granted enormous tracts of land in America by Charles II, King of England. The Lords Proprietors owned all of Carolina and acted in the stead of the sovereign in making land grants."); see discussion infra at Sec. II.

25 EDGAR, supra note __, at 2.

26 POWERS, supra note __, at 2.

27 See POWERS, supra note __, at 2-3. ("As a major seaport, Charleston had always been a center for the importation and distribution of slaves.")

28 KENNETH MORGAN, Slave Sales in Colonial Charleston, The English Historical Review, (Vo1. 113, No. 453) (Sept. 1998) at 908. (available at http://links.jstor.org/sici?sici=0013-8266%28199809%29113%3A453%3C905%3ASSICCC%3B2.0.CO%3B2-O&size=LARGE) (Reporting that 93,000 Africans were imported through the Port of Charleston between 1700 and 1776.) See also, POWERS, 3. ("South Carolina was the only southern state to reopen the foreign slave trade from 1803-1807. During this period it is estimated that forty thousand Africans were brought to the city.")

29 See POWERS, supra note __, at 3.

30 EDGAR, supra note __, at 67.

who came through the port of Charleston were sold to owners of Lowcountry plantations, where their skills and labor generated the cash crops that drove the state and national agrarian economy.

While the Lowcountry was the place of lost freedom for thousands of enslaved Africans, Charleston was also home to the fourth largest enclave of free Blacks in Colonial America. 32 "A free black community emerged in Charleston by the 1690s, and by 1850 it had grown to 3,441 persons."33 Some were born into freedom, a number of skilled artisans purchased their freedom, and the vast majority received manumission from long-served masters, paramours or parent-owners. 34 Within the free Black community, there were a variety of social classes, the most privileged of which acquired substantial amounts of property. 35 Charleston's free Black community played a leading role in public policy development and the political process of Reconstruction. 36 Enslaved or free, African Americans appreciated the importance of land ownership as a tool of economic self-sufficiency in the region's agrarian economy.

Accordingly, at the dawn of Reconstruction, the dream of African-American land ownership flourished. Through public and private initiatives, more land was made available to Black Carolinians than in any other Southern state. 37 These lands were primarily parcels of low, coastal lands that were carved out of former Lowcountry plantations. For generations, the land was a source of sustenance and sanctuary for thousands of African Americans who cultivated and maintained their tidal tracts and culture in relative isolation. 38 But the land legacy of generations of the descendants of enslaved Africans is imperiled by the legal system. Denied actual, if not effective, access to the legal system, the vast majority of African Americans in the Lowcountry did not devise their property through the formal probate process. Rather, property remained "in the family" through what I believe African Americans perceived as an effectual "poor man's trust," holding the land as heirs' property, which they mistakenly believed could not be lost or sold. Those misperceptions continue to the present day. In the words of one Lowcountry community leader:

[W]e always assumed that heirs' property couldn't be touched….We have always assumed that if one person didn't want to sell, then the property couldn't be

32 See POWERS, supra note __, at 36, 308 (reporting that "[i]n 1790, there were 1,801 free Blacks in the state, in 1860 there were 9,914, one-third of whom lived in Charleston.").
33 POWERS, supra note __, at 36.
34 See POWERS, supra note __, at 37-38 (noting that many urban slaves were able to hire themselves out and accumulated sufficient funds to purchase freedom for themselves and their families, and indicating that the largest group of emancipated slaves gained freedom by the last will and testament of their masters for "faithful service," and large scale manumission of children sired by slaveholders.).
35 POWERS, supra note __, at 3.
36 "Blacks achieved greater political power in South Carolina than in any other Southern state." EDGAR, supra note __, at 388.
37 EDGAR, supra note __, at 396. See discussion infra, Sec. II(B)(7).
sold…. What's happening could destabilize this entire community.39

B. Heirs' Property: Turning the Tide

The deed to heirs' property is registered to a deceased family member.40 The land has been handed down from generation to generation through the intestacy laws. The multi-generational group of heirs owns the land as tenants in common, with the attendant conceptual and practical difficulties41 that this estate entails. While partition is described as the "main legal remedy" for cotenants,42 it is also the main legal problem for heirs' property owners. Heirs’ property owners are at constant risk of losing their land pursuant to partition orders. Scholars, lawyers, legislators and journalists have acknowledged and documented that partition actions are a mechanism for outsiders to acquire heirs' property that is otherwise not for sale.43 Ironically, legal history reveals that the law of partition once governed the disposition of slaves and their offspring as tenancy in common personal property exchanged between slaveholders.44 150 years after emancipation, the law of partition continues to be used as a tool of subjugation against African Americans in their quest to exercise one of the fundamental rights of freedom – the opportunity for real property ownership.

For decades, a chorus of practitioners, scholars and community advocates have decried the pernicious consequences of the laws governing tenancy in common ownership on African-American land ownership. A number of scholars have proposed various legal reforms that challenge us to re-conceptualize heirs’ property. Some of the solutions proposed would in fact further damage the already limited bundle of rights for heirs’ property owners,45 while others have not fully assessed the prohibitive transactional costs that make implementation of these concepts impracticable.46 While community advocates have enjoyed a measure of success in reforming a few partition statutes in Southern states most affected by heirs’ property, some of these solutions have encountered constitutional problems of their own and in total only represent

40 See Peter Plastrik, An Heirs’ Property Collaborative Initiative for Coastal South Carolina, Coastal Community Foundation Report, 1 (2001) [hereinafter the Plastrik Report]. The property is typically owned and inhabited by indigenous families, a significant number of whom can trace their ownership back to purchases by former slaves during the Civil War and the Reconstruction. This is the context in which I discuss heirs' property in this article. See also, Faith Rivers, The Public Trust Debate, supra note __.
41 DUKEMINI ER & KRIER, supra note __, at 291.
42 SINGER, supra note __, at 365 (2nd ed. 2005).
43 See generally Casagrande, Jr., supra note __, at 756 n.18; Craig-Taylor, supra note __, at 751; Mitchell, From Reconstruction to Deconstruction, supra note __, at 511; Todd Lewan and Delores Barclay, Torn from the Land (pt. 1), THE SEATTLE TIMES, Dec. 2, 2001, at A20 [hereinafter Farmland Taken]; Todd Lewan and Delores Barclay, Torn from the Land: Robbed of Their Legacy (pt. 3), THE SEATTLE TIMES, Dec. 9, 2001, at A22 [hereinafter Robbed of Their Legacy]; Rivers, The Public Trust Debate, supra note __.
44 See discussion infra at Sec. III(A): History Built the System and the Law That Went With It.
the first step in the long journey to retain heirs’ property. For too long, lawmakers have turned a deaf ear to the warnings about the deleterious consequences of the partition laws. Comprehensive property law reform is critically needed. Fortunately, the tide is beginning to turn.

This work examines the development, proliferation and impact of heirs’ property from both the historical and socio-legal context. Working from this perspective, I examine the legal contrivance and economic miscalculations that plague the disposition of heirs’ property in the courts of equity. Courts are beginning to recognize the importance of protecting this fragile form of land ownership. In several recent cases, enlightened benches have heard the clarion call to justice for cotenants forced into partition sale actions in other contexts. These cases hold promise for African Americans who possess heirs’ property as tenants in common. Legislative initiatives are beginning to provide opportunities for moderate and higher income heirs to maintain family land by providing the first opportunity to buy out other co-tenants seeking partition by sale. These seeds of reform are beginning steps in the quest for equitable land policies and procedures that will protect African-American land ownership. Acknowledging the legal history of heirs’ property and considering steps to prevent the exploitation of this group of land owners, I suggest a series of legal and legislative reforms that offer an enhanced level of protection for heirs’ property owners. From these bases, policy analysts, judges and lawmakers can stem the tide of African-American land loss – not only coastal South Carolina, but throughout the nation.

II. LEGAL HISTORY OF AFRICAN-AMERICAN LAND ACQUISITION & LOSS

In the history of African-Americans, property law functioned as a dehumanizing enslaver and gate keeper of plantation society. Governed by a legal system to which they did not have access, a century’s worth of new African-American land owners fell victim to the system’s default provision for intestate succession. The historical development and application of property law to African Americans and their property created the labyrinth of problems that plague heirs’ property.

In an insightful essay, “The Nature of the Judicial Process,” Judge Benjamin Cardozo reflects upon the role of history in the development of property law:

Some conceptions of the law owe their existing form almost exclusively to history. They are not to be understood except as historical growths. In the development of such principles, history is likely to predominate over logic or pure reason... [H]istory, in illuminating the past, illuminates the present, and in illuminating the present, illuminates the future.... I think the law of real property supplies the readiest example. No lawgiver meditating a code of laws conceived the system of feudal tenures. History built up the system and the law that went with it. 48

47 See discussion infra Section IV(B): Legislative Reform.
48 CARDozo, supra note __, at 174.
History explains the legal status and plight of heirs' property ownership. It is a history of injustice – and sadly, the law went with it. Judge Cardozo's warning that “there can be no progress without history,” particularly “in the forest of the law of land” where the “heads of law are intelligible only in light of history, and get from history the impetus which must shape their subsequent development” is well taken. A view of the history of heirs' property is a critical component in the mission to unravel the knot that plagues relations among so many African American families who hold property as tenants in common.

A. LAND OWNERSHIP -- THE ROAD TO ECONOMIC FREEDOM

In the early days of the Civil War, Union forces occupied Port Royal in Beaufort County. Sea Island planters fled the occupied territory, leaving thousands of African Americans behind. Not slave but not yet free, these African Americans were considered "contrabands of war." Along with federal troops and other government officials, northern teachers and missionaries known collectively as Gideon’s Band descended upon the Beaufort area. An important component of the plan for emancipation was to assist freedmen in their efforts to advance economically in an independent manner. A combination of short-term charitable support and opportunities for economic self-determination were intended to help the freedmen to gain and maintain independent economic status. Many freedmen were anxious to become landowners in order to establish a foothold in the agrarian economy. The effort to gain economic autonomy and independence, and a sense of due compensation for past labor inspired the quest for land, particularly upon the land of their previous owners. From their African traditions, the freedmen were said to imbue land with intense personal and social meaning. These connections to their homeland provided a sense of place and formulated African-American views of property and land ownership.

The desire and opportunity for land ownership converged in Beaufort and led to the institution of the Sea Islands Experiment. Economic hardships during and after the Civil War made the acquisition of property very difficult. Even when African Americans were able to

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49 CARDOZO, supra note __, at 55.
50 CAROL BLESER, THE PROMISED LAND: THE HISTORY OF THE SOUTH CAROLINA LAND COMMISSION, 1869-1890, at 1 (1969). Bleser puts the number of slaves left behind at 10,000. See also (CONTRA?), DANIELSON, at 8. Danielson reports that slaves accounted for 80 percent of the area's 40,000 inhabitants – an estimated 32,000 slaves.
51 EDGAR, supra note __, at 366. Decisions about the fate of these African Americans reflected both social and war policy.
53 BLESER, supra note __, at xiii. “The importance of land to the former slaves cannot be exaggerated …. Since land was the principal form of wealth in the South, owning property was the only effective means by which freedmen could achieve lasting economic equality.”.
54 FONER, supra note __, at 46.
57 WILLIE LEE ROSE, REHEARSAL FOR RECONSTRUCTION: THE PORT ROYAL EXPERIMENT 205-211 (1964). Although northerners disagreed over whether discounts were in order, all generally accepted that land should be made available to the freedmen by sale.
58 BERNARD E. POWERS, BLACK CHARLESTONIANS: A SOCIAL HISTORY 1822-1885, at 121 (1994). In his review of
garner sufficient funds, they were often “confronted by a white community unwilling to advance credit or sell them property.” 59 Moreover, the threat of violence intimidated freedmen in their attempts to buy or rent land and stimulated fear of reprisal for recording their deeds.60 Yet, despite these challenges, the Sea Islands Experiment fueled the passion of African Americans for land ownership and planted the seeds for land distribution policies during Reconstruction.

B. LAND DISTRIBUTION PROMISES & PROGRAMS

1. CONFLICTING LAND DISTRIBUTION POLICIES

Several attempts were made to promote land distribution through various Federal initiatives. These policies were rooted in other land distribution models taken from United States history. This record reveals widely varying means of acquiring property and indiscriminate methods of distributing land through erratically evolving government policies. In colonial theory, all land devolved to the imperial government, which then determined how the land was to be distributed.61 In the seminal case Johnson v. M'Intosh,62 Chief Justice Marshall articulated this "discovery" principle which "gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments."63 This, he continued, gave the discovering nation "the sole right of acquiring the soil" from the native inhabitants, who merely had a "right of occupancy."64 The native inhabitants' right of possession could be "extinguished" by “discoverers” through "purchase or by conquest."65 Thus, under this theory, European exploration and colonization of North America came at the expense of the property interests of Native American Indians.

Once acquired by England, real property in the American colonies was distributed through proprietary charters from English monarchs and subsequent land grants which were dispensed to encourage settlement of the land.66 Chief Justice Marshall concluded that the British government's rights "passed" to the new government of the United States.67 The United States was then empowered to determine its own theory of land distribution. "Once land was taken from American Indian nations, they were held by the United States government as public lands."68 Through a series of conflicting policy objectives and means, land was distributed for public purposes, including colleges and railroads, as well as for homestead settlement.

During exploration of the Western frontier, many settlers simply squatted on federal lands. Lawmakers eventually recognized these settlers' interest in the land and passed laws "giving

the post-war economy, historian Bernard Powers indicates that “[f]orced to work at low wages in a city that remained economically depressed throughout the period, black workers had great difficulty accumulating property.”

59 FONER, supra note __, at 47.
60 FONER, supra note __, at 53.
61 JOSEPH SINGER, PROPERTY LAW, 3.
64 See Johnson v. M'Intosh, 21 U.S. (8 Wheat) 543, 573 (1823).
66 See generally, DANIELSON at 7-8.
68 JOSEPH SINGER, PROPERTY LAW, 26.
preferences (pre-emption rights) to actual settlers, including illegal settlers....” 69 This preference gave settlers who occupied the land in person and improved the property the first claim to buy the land – thus preempting (or "coming before") other claims for the land. 70 Under the Homestead Act of 1861, non-rebelling heads of families, persons over 21 and veterans had the right to enter and occupy "unappropriated public lands." 71 Settlers could buy the land at the outset at the minimum price (generally $1.25 per acre), or receive a patent for the land at no cost after five years of settlement. 72 Of the various policies, "the 'homestead principle' of 'giving land free to the landless poor' was the 'weakest of all, and the first to go.' " 73

It was against this backdrop of concurrent federal land distribution policy for western lands that the issue of land distribution to freed slaves would be considered. Initially, the Freedmen's Inquiry Commission recommended that freedmen “be given every opportunity to buy confiscated estates in the South.” 74 Through the war-time “Reconstruction Rehearsals” facilitated by missionaries and government officials in the Union-occupied Sea Islands, South Carolina freedmen were the first in the nation to have significant opportunities to acquire property in substantial quantities. Consequently, it was in South Carolina that the post-war expectation of federal distribution of land was greatest. 75

The major question in land distribution policy was whether conquered or confiscated lands in the South would be distributed on the same basis as "unappropriated" public lands in the West. While acquisition of lands in the nation had been justified under the legal principle of conquest of Indian Nations, the question was whether the federal government would apply similar concepts of conquest against property in the conquered South. 76 The operation and success of African-American land ownership policies would be determined by the socio-economic prejudices and political factors that influenced this policy conflict.

2. DIRECT TAX SALE COMMISSION

The first large-scale opportunity for African-Americans to acquire property during the war arose pursuant to federal tax policy. An 1861 direct tax on each state and subsequent acts of forfeiture for the non-payment of the federal tax led to 76,775 acres of captured property in the areas of Beaufort County, including Port Royal and St. Helena Island being placed for sale due to delinquent taxes in 1863. Through the Direct Tax Sale Commission, the federal government itself made claim to over 60,296 acres, but individuals bought the remaining 16,479 acres. Freedmen were able to pool resources and purchase 2,000 acres, including plantations on Ladies Island and Port Royal Island, as well as townhouses of the former white residents who had fled the area. 77 Half of the tax sale acreage was purchased on St. Helena Island by Edward S. Philbrick, a missionary

69 JOSEPH SINGER, PROPERTY LAW, 26.
70 See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW (19__) , 233-234.
71 See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW, 233-336
72 See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW, 363.
73 JOSEPH SINGER, PROPERTY LAW, 27, citing LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW, 364.
74 ROSE, supra note __, at 239.
75 BLESER, supra note __, at 11.
76 See discussion supra Sec. II(B)(1).
77 ROSE, supra note __, at 239. Symbolically, Reconstruction leader Robert Smalls purchased the Prince Street house of Henry McKee, where he had been enslaved as a child.
from Brookline, Massachusetts. Though later challenged, these tax sale titles were upheld.

3. THE PROMISE AND LESSONS OF PRE-EMPTION

In furtherance of the land distribution aims, federal officials and missionaries urged the U.S. government to set aside a portion of the 60,000 acres acquired in the 1863 direct tax sale for the “charitable purpose” of selling land to freedmen at $1.25 per acre. This would have mirrored the Homestead Act provisions implemented on public lands in the west. After reservation of land for military and educational purposes, President Lincoln agreed to allow 16,000 acres on specified plantations to be sold to the freedmen through the Direct Tax Sale Commission. Instructs went out to surveyors to divide the land into twenty and forty acre tracts to be sold to selected heads of African-American families. This plan for pre-emption homesteads extended credit terms, with 50 cents per acre due at the outset and 75 cents per acre required upon receipt of the deed. Preferential credit terms were to be extended to African American soldiers.

General Saxton was charged with implementation of the plan which envisioned establishing integrated settlements, with “every alternative quarter section” being sold to freedmen, while the remaining acreage would be sold to whites. Saxton embarked upon a campaign of meetings among the freedmen. Saxton encouraged freedmen them to stake out sites (apparently without limiting the subject area to plantations identified in Lincoln's order) and build homes on lots located on plantations where they had lived. He noted that if a home were built on the property, the owner would “be considered as having a pre-emption right in equity to the soil.” Saxton further opined that it would be “highly probable that no person would feel disposed to interfere with this right.”

General Saxton's outreach efforts apparently were successful. More than one thousand people submitted claims for pre-emption in twenty to eighty-acre tracts. This suggests that requests had been submitted for at least 20,000 acres and that the 16,000 acres allotted for “charitable” sales would not be sufficient to meet the needs of settling freedmen. Direct Tax Sale Commissioner Brisbane objected to this plan. Early in 1864, he articulated a different theory of land distribution and expressed his view that the pre-emption policies utilized on the open lands of the West were not “appropriate” for the improved agricultural lands of the South. Under

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78 See generally, DANIELSON at 10, supra note ___. According to Danielson, land sales were supposed to be limited to 20, 40 or 80 acres (depending upon status), but “the rules were poorly enforced, and there were no restrictions on resale.” As evidence, Danielson notes that a company organized by "speculators" was able to acquire four of Hilton Head's plantations (5,000 acres), [it is not clear if Danielson is including the Philbrick experiment in these calculations] and that Freeman Dodd, a northern "carpetbagger" bought the 1,000 acre Honey Horn Plantation for $200 in 1863 and later resold the property for $10,000.

79 FONER, supra note __, at 397. See also De Treville v. Smalls, 98 U.S. 517, 521-22 (1878). The Smalls tax sale purchase was challenged, but the U.S. Supreme Court upheld the validity of the tax sale titles.

80 See discussion supra at Section II(B)(1).

81 ROSE, supra note __, at 272. These opportunities for property purchase where to be extended to African American families who would be preferred by “their good conduct, meritorious services or exemplary character” and who would be “examples of moral propriety and industry.” Id.

82 Soldiers were to pay 25 cents at the outset, and were to be given three years to pay the balance. Id. at 272, 280.

83 Id. at 274, 282.

84 Id. at 274.

85 Id. at 293.

86 Id. at 276.
Brisbane's view, land would not be made available to freedmen who sought to settle on property under federal control because it was valuable land that had been improved. Commissioners took their opposing views to Washington. Notwithstanding the fact that plantations had been improved by formerly enslaved African Americans who sought the opportunity to claim pre-emption homesteads, and disregarding input from other influential leaders who supported the concept of the Sea Island experiment, Secretary of War Chase accepted Commissioner Brisbane's theory, reversed the distribution policy and withdrew the pre-emption instructions. New instructions were submitted advising Commissioners that “[p]reemptions don’t count, sell by auction.” The Commission was directed to proceed with public sale. Only the named plantations, totaling 16,000 acres, would be made available for sale generally to the highest bidder, and the $1.25 homestead price limit was stripped. Notwithstanding the less “charitable” terms under this sale plan, 347 African Americans purchased land on St. Helena Island by June 1865. The $11 average price per acre significantly exceeded the proposed $1.25 per acre homestead acreage rate.

While “charitable” sales of the government’s land acquired through tax sales were intended to benefit freedmen, the majority of the beneficiaries of these policies were Northern whites. Historians have surmised that “probably of the 2,300 purchases of tax lands on Port Royal and St. Helena Islands no more than 500” were to African Americans. While the federal government accepted Brisbane's theory that distinguished between land distribution policies for freedmen and the “open” lands in the West, without land as a base for economic growth, African Americans seemed destined to fall behind in the quest for economic independence in an agricultural economy.

The change in the pre-emption policy disappointed thousands of freedmen who had busily staked out properties and in some cases already made the requisite “down payment” amount for preempted land. The limitation of available lands to stated plantations also denied freedmen the opportunity to establish homes on plantations where they had tilled the ground, established crops and built communities. Freedmen felt betrayed by the reversal of the pre-emption plan, and expressed their disappointment, “complaining that their land – that they had pre-empted – had been sold away from them, and declared that they wouldn’t work for the purchaser” who bought the property through the government. Nevertheless, the pre-emption experience planted seeds of hope with Freedmen who had tasted the experience of land ownership.

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87 Id. at 288. Commissioner Brisbane viewed the “charitable purpose” of the Lincoln settlement plan as generating revenue. He and Commissioner Wording turned to policymakers in Washington to object to Pre-emption's proposed implementation of the instructions. Using his skills as a jurist, Brisbane noted their objection to promotion of a squatters' rights campaign by raising a series of legal questions posed by the wording of the instructions and the potential confusion that could stem from an open squatters' rights campaign. They also reported that a number of white missionaries were “gobbling up the lands at the expense of the freedmen.” Id.

88 Bleser, supra note __ at 7.

89 See id. (reporting that “[t]he majority [of these sales] (243) bought ten acres; 166 paying $1.50 an acre and 72 paying $1.25, the other paying from $2.00 to $6.50 an acre.” The highest price paid for any tract was $350 for twenty acres. In only two instances did purchasers buy land as low as $1.00 an acre. MSS, Heads of Families Certificate Books, U.S. Treasury Department Archives, cited in Johnson, p. 187; Holland (ed.), pp. xv-xvi, cited in Bleser. It is unclear whether these statistics reflect the 1865 private sales of the Philbrick lands to African Americans. See discussion infra Section II(B)(4).

90 See Rose, supra note ___ at 294.

91 Rose, supra note __, at 294-95.
4. THE PHILBRICK EXPERIMENT

Representing a Boston joint-stock company, missionary Edward Philbrick purchased one-third of St. Helena Island at the initial 1863 tax sale. Philbrick set out to develop a "free labor experiment" that would test the enterprise’s ability to produce crops at competitive profits. He hired superintendents to manage production, contracted with freedmen as laborers, and created an incentive based pay scale. From 1863 to 1865, Philbrick operated thirteen Beaufort area plantations with paid labor. Although there were varying productivity rates, in part due to environmental conditions, the venture was said to have been profitable.

The Missionary program came under fire from freedmen who complained that Philbrick would not sell land to them. They sought the intervention of federal officials to have the government direct sale of the Philbrick lands pursuant to government land distribution programs. Philbrick did not turn his lands over for redistribution through a federal initiative, but he later directed a surveyor to divide and sell his land at $5 per acre – some sold to white men, but more to freedmen. This represented a substantial profit over the less than $1 per acre purchase price that Philbrick paid, but the price was below market rates, and significantly below the $11 Direct Tax Sales Commission average price. The Philbrick Experiment is credited with demonstrating that freedmen could successfully be integrated into the free labor force. Although pressed into land sales by political pressure and extenuating circumstances, Philbrick presented an opportunity for freedmen to purchase at least 4,000 acres – an opportunity that freedmen could not otherwise buy at any price, as many white landowners refused to sell land to the freedmen.

5. FORTY ACRES & A MULE: BREACH OF FAITH

As the end of the war drew near and General Sherman’s troops came through the Lowcountry, Union leaders focused new energies on the post-Emancipation challenge -- incorporating former slaves into a free labor system. Through the experience of land ownership made available through tax sales and the disappointment generated by the reneged pre-emption promise, African-American leaders developed clear land distribution policy objectives for the Reconstruction government.

In January 1865, Secretary of War Edwin M. Stanton urged General William T. Sherman to convene a meeting with African-American leaders in Beaufort. The group of twenty leaders, including ministers, pilots, sailors, barbers and former plantation overseers, engaged in a significant discussion regarding the multiplicity of problems involving the welfare of the freedmen. A key recommendation was that land acquisition was critical for the freedmen’s economic self-determination. Minister Garrison Frazier – who had purchased his own freedom in 1857 – advocated that the freedmen should “have land, and … till it by our own labor.”

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92 See generally, id. at 310-13.
93 See generally BLESER, supra note __, at 12-13. (Noting that, in the 1864 tax sale, the average price was $11 per acre).
94 Id. at 6 (citing WILLIAM H. PEASE and JANE H. PEASE, BLACK UTOPIA: NEGRO COMMUNAL EXPERIMENTS IN AMERICA 139-41 (1963). But see, DANIELSON, at 10. Danielson indicates that former slaves bought property "at rock bottom prices." (Danielson provides no citation support for this assessment.))
95 FONER, supra note __, at 32. General Stanton inquired whether the freedmen preferred to live in integrated
The observations of these African-American leaders played an important role in the development of Reconstruction land distribution policies for the state of South Carolina, and the nation. Four days after this meeting, General Sherman issued Special Field Order Number 15 which designated the entire Sea Island region, from Charleston southward to the St. John’s River, and the coastal lands thirty miles to the interior (which constituted the core of the Lowcountry rice coast) for freedmen. Freedmen families were to receive “possessory” titles to tracts not exceeding forty acres. Sherman’s land directive led to the development of the land provision of the first Freedmen’s Bureau Act, which contained a similar “forty acres” land distribution provision that was thought to “legalize” Sherman’s military order.

General Saxton, who had vigorously embraced and encouraged freedmen to select land during the initial pre-emption plan, was tasked with allocating land to the freedmen on a much larger scale. Although he feared that the freedmen would later be disposed of the land (as they had been when the pre-emption plan was reversed within six months), Saxton oversaw the settlement of 40,000 freedmen on 400,000 acres. Saxton’s fears later became reality. Compromise was the order of the day with regard to Reconstruction policy. In the legislative process, the promise of landownership subsided. Within a few months of President Johnson’s administration, liberal pardon requirements were instituted and former plantation owners made entreaty to the President to restore their property, as they had no where else to go. Beginning with Edisto Island, the “forty acres and a mule” promise began to unravel. General Howard was tasked with establishing a compromise – between the original plantation owners and the freedmen now settled on the promised 40 acre tracts. In compromise, Howard merely suggested that the freedmen “make the best terms they could” and to establish labor contracts with the plantation owners who held “legal” title to the Edisto plantations.

Freedmen’s Bureau provisions to validate the Sherman titles were replaced with a mere three-year possession period provision. President Johnson later objected to the entire Freedmen's bill and vetoed the first measure in February 1866. The final version of the legislation only provided an opportunity for freedmen to lease government owned land (tracts that the government acquired through the nonpayment of taxes provision) with a six-year option to buy.

settlements or in an area restricted to freedmen. With the exception of missionary James Lynch – who may have observed integration in his native North – all of the African-American leaders agreed that they preferred to live by themselves. They explained “there is a prejudice against us in the South that it will take years to get over,” apparently preferring the safety and sanctuary of separate settlements. See generally, Mitchell, From Reconstruction to Deconstruction, supra note ___, at 524-525.

96 Id. at 327-328; FONER, supra note __, at 32. Sherman later authorized the army to lend the freedmen mules, thus the origin of the promise of “forty acres and a mule.” Id. This did not apply to property sold through the Direct Tax Law. See generally, Mitchell, From Reconstruction to Deconstruction, supra note ___, at 524-525.
97 See ROSE, supra note __, at 337-39.
98 Id.
99 Id. at 252.
100 Id. at 353.
103 ROSE, supra note __, at 374.
The process of restoring land to former plantation owners was particularly disruptive in the Lowcountry of Georgia and South Carolina where some freedmen armed themselves, barricaded plantations and drove off owners attempting to dispossess them of the land. General Howard was ordered to rescind the order setting aside forty-acre tracts and General Saxton, who had allocated land under the Sherman order, was removed from his post in the Lowcountry. In the winter of 1866, federal troops were called in to seize control of lands and to restore the property to the original owners. Freedmen who refused to make labor contracts with their former masters were physically forced to leave.

The governments’ reclaiming of Sherman lands for plantation owners was met with outrage, disappointment and a sense of betrayal. One spokesperson expressed the discontent of the freedmen in a meeting with General Howard:

General, we want Homesteads, we were promised Homesteads by the government. If it does not carry out the promises its agents made to us, if the government having concluded to befriend its late enemies and to neglect to observe the principles of common faith between its self and us its allies in the war you said was over, now takes away from them all right to the soil they stand upon save such as they can get again by working for your late and their all time enemies…we are left in a more unpleasant condition than our former….You will see this is not the condition of really freemen.  

The federal government abandoned land distribution efforts on behalf of the freedmen, who were left to negotiate the terms of their new freedom with their former owners. Out of 40,000 freedmen who had been settled on "Sherman lands" and who had planted and worked crops for months, only about 2,000 South Carolina and Georgia freedmen actually received the Lowcountry lands that they had been promised.

6. FEDERAL FAILURE

The federal government's unwillingness or inability to reach consensus on a policy to make land available to former slaves exposes a fundamental fault line that tremors through the nation's legal and socio-economic history. African-American leaders of the day felt that freedom without the means of economic support through land ownership "consigned the freedmen to a tenuous future." The future was tenuous indeed. Freed slaves who had the skill and knowledge to farm needed land to gain economic independence. Instead, throughout the South, vast numbers were consigned to sharecropping on the land of former owners. This despotic system of sharecropping endured for nearly a century.

Historian Eric Foner reflected upon the implications of the failure of broad-scaled

\[104\] _Id._ at 74.

\[105\] _FONER, supra note ___, at 73.

\[106\] _Id._

\[107\] _POWERS, supra note ___, at 91.

\[108\] _EDGAR, supra note ___, at 380. "Blacks wanted to rent land outright, but whites were reluctant to do so, at least initially. Most contracts for labor involved some sort of sharecropping arrangement."
Reconstruction-era land distribution efforts.

Yet while hardly an economic panacea, land redistribution would have had profound consequences for Southern society, weakening the land-based economic and political power of the old ruling class, offering blacks a measure of choice as to whether, when, and under what circumstances to enter the labor market, and affecting the former slaves' conception of themselves. Blacks' quest for economic independence not only threatened the foundations of the Southern political economy, it put the freedmen at odds with both former owners seeking to restore plantation labor discipline and Northerners committed to reinvigorating staple crop production. But as part of the broad quest for individual and collective autonomy, it remained central to the black community's effort to define the meaning of freedom. 109

Juxtaposed against the liberal land distribution policies embraced for western, largely European settlers, the failure to make "conquered" Southern lands available to former slaves for purchase at comparable low homestead rates or for free pre-emption years of settlement was inconsistent with the legal system's justification for British and later American ownership of property in the first place. 110 The "back and forth" of promised, revised, reinstated and revoked land distribution programs was indifferent, at best, to the social, economic and political plight of the freedmen. The abandonment was inexplicable to African Americans who sought comparable opportunity for ownership of grounds to which they felt entitled "through 250 years of unrequited labor." 111 This fissure is at the source of the intense policy debates and litigation over the question of reparations 112 and other affirmative means of making economic opportunities available and accessible to the slaves' descendants of these enslaved African Americans.

7. SOUTH CAROLINA LAND COMMISSION

While Federal Government efforts to facilitate large scale land distribution ultimately failed, the Reconstruction government of South Carolina charted a different course. At the close of the war, South Carolina adopted the 1865 Constitution (which still denied African Americans the

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109 FONER, supra note ___, at 48.
110 See Johnson v. McIntosh, 21 U.S. (8 Wheat) 543 (1823).
111 FONER, AT FREEDOM'S DOOR, (____) xviii.
112 See generally, Charles J. Ogletree, Jr., The Current Reparations Debate, 36 U.C. DAVIS L. REV. 1051; Charles J. Ogletree, Jr., Reparations Symposium: Addressing the Racial Divide, 20 HARV. BLACKLETTER L.J. 115 (2003), (Ogletree discusses the historical roots of the reparations movement, citing Vincent Verdun's description of the Civil War era land distribution proposals as the first "wave" of the reparations movement. Vincent Verdun, If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans, 67 TUL. L. REV. 597, 600); See also, Verna L. Williams, Reading, Writing and Reparations: Systemic Reform of Public Schools as a Matter of Justice, 11 MICH.J.RACE & L. 419, 422-426. (Spring 2006). (Williams discussed the plethora of theories, deep divisions, extreme views and political stigma prompted by the concept of reparations.); Pamela D. Bridgewater, Ain't I A Slave: Slavery, Reproductive Abuse and Reparations, 14 UCLA WOMEN'S L.J. 89 (Fall/Winter 2005). (Bridgewater notes the "approximately ten books, forty-one law review articles, and countless websites and manifestoes have been written on reparations for slavery in the United States.); Suzette Malveaux, Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation, 74 GEO. WASH. L. REV. 68, 71. (Nov. 2005) (Malveaux cites the plethora of scholarship of the issue of reparations).
right to vote and hold political office). The provision was accompanied by the infamous 1865 Black Codes. While the Black Codes provided African Americans the right to "acquire, own and dispose of property," it restricted their means of obtaining the resources to acquire property.

Shortly after adoption of the inequitable 1865 constitution, a statewide Colored People's Convention was held in Charleston. This was the first significant opportunity for African Americans to express their views on social and public policy, and the forum laid the groundwork for the 1868 Constitutional Convention (convened because the 1865 constitution failed to meet the requirements of the federal Reconstruction Act) and the Republican Party platform. Chief among the policy objectives was land ownership.

African Americans appreciated the significance of land ownership. Free Blacks had acquired substantial property holdings in Charleston before the Civil War. During the war, the Sea Island experiment and even the abandoned federal pre-emption plans, planted the seeds of hope for land ownership among the freedmen. Though the Sea Island experiment did not deliver fully on the promise of land, it was "part of a continuing process" that "set the South Carolina Negroes apart from other southern Negros, and out of their short-lived experience in property holding came the determination to acquire land on their own initiative. The social experiment had unleashed forces that would find expression in the Reconstruction Land Commission."

While national legislators were debating the provisions of the Federal Freedman Bureau's legislation, South Carolina delegates to the 1868 South Carolina Constitutional Convention -- a majority of whom were African American -- focused on land distribution policies. The initial

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114 See JAMES UNDERWOOD, "The South Carolina Constitution of 1868," in AT FREEDOM'S DOOR, 5. Practicing skilled trades or maintaining shops or other businesses were restricted by the imposition of license requirements, which required exorbitant fees and were dispensed at the discretion of a district court judge. See generally id. at 4-6; see also, POWERS, supra note __, at 81, 109, citing Act No. 4732 of 1865, 13 S.C. Statutes, 254, 279. Powers reports that many free and enslaved African Americans practiced skilled trades before the war. See id., 10-13, 41-43. The earning capacity of these individuals would have been severely impacted by the Codes. The Black Codes were set aside in early 1866 by the federal military commander. UNDERWOOD, supra note ___ at 7, POWERS, supra note ____ at 85, 109, EDGAR, supra note ___, at 384. Nevertheless, the measure exemplifies the prevailing sentiment among South Carolina lawmakers regarding the economic horizons of African Americans.
115 See generally POWERS, supra note ___, at 82-87, UNDERWOOD, supra note ___, at 5.
116 See UNDERWOOD, supra note ___, at 6, citing the Reconstruction Act of 1867, ch. 153, sec. 5, 14 Statutes 428, 429 (1867).
117 See POWERS, supra note ___, at 87, 91.
118 In 1860, Charleston had 299 free Black taxpayers who owned a total of $759,870 in real property. The group's median property holding was $1,655. Powers also catalogs many examples of "elite" free Blacks who engaged in real estate speculation and investment. This category of free Blacks owned 50 percent of the total real property owned by free persons of color. Id., 47-48. See also, WALTER EDGAR, SOUTH CAROLINA at 308, noting that "[i]n the eve of the Civil War the city's black taxpayers owned real and slave property worth a bit more than $1.5 million ($27.2 million)."
119 BLESER, supra note ___, at 14.
120 See WALTER EDGAR, SOUTH CAROLINA at 386. "There were 124 delegates, 73 of whom were black (closely reflecting the percentage of the black population)."
121 See generally James Underwood, supra note ___, at 4-6. "Many African American delegates to the 1868 convention believed that meaningful freedom required a secure economic base, such as land ownership, as well as political freedoms such as the right to vote." Citing, supra note ___ at Bleser (no page cited).
effort, led by delegate R.H. Cain, called upon the federal government to provide $1 million to the state to purchase land for distribution to the freedmen. When Northern legislators heard about consideration of the petition, state delegates were advised to drop the resolution because it would be defeated in Congress. Heeding to this warning, a substitute bill (patterned after the Homestead Act) was proposed and an ordinance embodied in the Constitution of 1868 provided for the creation of a state land commission as an alternative to the original Cain proposal. The adopted measure instructed the legislature to bond finance the purchase of lands to be sold to "actual settlers." Purchasers would be required to place one half of the land under cultivation within three years. All principal and 7 percent interest would be paid by the purchasers within three years, and taxes would be due annually.

The initial S.C. Land Commission appointees were accused of mismanagement, conflicts of interest and corruption. Moreover, the principle concept of making land affordable was violated. Large landowners were able to sell less desirable and often agriculturally unproductive low coastal lands – often at premium prices – at a time when purchasers would have been difficult to identify in the free market during the post-war economic downturn. In a report to the General Assembly, Secretary of State Francis L. Cardozo revealed that “many tracts of land were purchased at prices

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122 R.H. Cain, a free native of Virginia, came to South Carolina after the Civil War. He established Emmanuel African Methodist Episcopal (A.M.E.) Church – the largest African American church in Charleston. Throughout his political career as a state senator and as a Congressman, Cain advocated distributing land among the former slaves. Cain also supported private efforts to buy and redistribute land to former slaves. Presciently, his private endeavor went bankrupt because the former slaves did not have the resources to purchase land. See Foner, At Freedom's Door, 172-173. (After Reconstruction, Cain left the state and eventually became a bishop in the A.M.E. church.)

123 See generally Bleser, supra note ___, at 19-21. It should be noted that two delegates, Stephen Swails and William Whipper, who had come to South Carolina to work with the Freedmen's Bureau, voted against the measure. Apparently fully informed by the failure of previous Federal land distribution efforts in the Beaufort area, Swails, Whipper and Robert Smalls did not want to raise expectations that could disappoint freedmen's hopes for land ownership yet again. See also, James Underwood, supra note ___, at 7. Another considerable policy issue was whether debts against large plantation owners would be forgiven during the post-war period. Francis Cardozo advocated that the Reconstruction government should not forgive those debts, but rather break up the large land holdings into smaller farms which would be within the means of lower income blacks and whites. Cardozo advocated the break up of the plantation system to the convention, noting the "freedom will be of no effect if we allow it [the plantation system] to continue." Bernard Powers, supra note ___, at 92.

124 Bleser, supra note ___, at 23.

125 Bleser, supra note ___, at 24. During the period, Republican tax policies were said to be structured intended to promote division of large estates through heavy taxation. Subsequently, vast quantities of land were forfeited to the state annually due to landowners' inability to meet their tax obligations.

126 See generally, Bleser, supra note ___, at 47-82 (recounting numerous aggrandizing transaction), Burke at 93-94, (noting that under the direction of Secretary of State Francis Cardozo USC Law graduate Walter Raleigh Jones prepared "a mammoth report" on corruption at the Land Commission); Underwood, supra note ___, at 7 and accompanying note 57 at 185 (reporting that former Ex-Land Commissioner C.P. Leslie was charged with breach of trust after a House Report investigation “found evidence that substantial sums had ended up in Leslie’s hands, that he took bribes in return for facilitating transactions, and that he agreed to leave office only if the state purchased stock he owned in the Greenville and Columbia Railroad.”)

127 For example, Commissioners recognized the impossibility of selling the Schley lands – Wythewood and Awendaw. The Land Commission had purchased the alligator-infested land (commonly referred to as "Hell Hole Swamp") for $60,000 at $3.66 per acre. Unable to sell the land, the Commission reduced the price to $1 per acre and sold two 111-acre tracts to Jack and George Manigault, who are thought to have been slaves on the Awendaw plantation. Eventually, the Commission sold the remaining 10,909 acres of Awendaw and 6,100 acres of Wythewood to John Remfry for $10,000. See generally Bleser at 139-142.
far above their actual value,” and many people “were unable and unwilling to pay two and three times the value of the land....”128 Progress was slow until Cardozo himself took over the land distribution program and reformed the agency in 1872.129 Although successful in efforts to distribute land, management problems plagued the Commission throughout its existence. Nevertheless, the Commission provided a critical service by acquiring and breaking up large landholdings into more affordable tracts.

It should be noted that the Land Commission provision did not place any limitations on persons who would be able to purchase land through the Commission; notably, the vast majority of the Land Commission's beneficiaries were whites.

The story ended as it had begun in 1860 with the restoration of the plantations; by 1890 much of the land commission holdings were concentrated in the hands of a few white families. Of the 118,436 acres purchased by the Land Commission, 68,355 acres had been conveyed to whites, whereas the Negroes owned only 44,579 acres.131

The vast majority of these properties (44 percent) were located in the Lowcountry counties of Charleston, Beaufort, Colleton, Georgetown and Williamsburg, where nearly 50,000 acres were purchased by the Land Commission. 132 Though the Land Commission experienced many difficulties and challenges and fell short of the goal of redistributing plantation holdings at affordable rates for the benefit of freedmen, no other Southern state was as successful in making land affordable for its former slaves.133 The South Carolina Land Commission represented the most comprehensive Southern state effort to promote the redistribution of land for the benefit of

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128 Report of the Secretary of State to the General Assembly of S.C., at the regular session, 1872-1873, reprinted in S.C. Reports and Resolutions (1872-1873), 43, 49, cited in UNDERWOOD Note 57 at 186. This report was prepared for Cardozo by Walter Raleigh Jones, who was born free in Charleston and the first African American to enroll at the University of South Carolina School of Law. See LEWIS BURKE, “The Radical Law School” in AT FREEDOM’S DOOR, 93-94 (2000), citing Report of the Secretary of State to the General Assembly of S.C., at the regular session, 1872-1873, reprinted in S.C. Reports and Resolutions (1872-1873), 50.

129 See EDGAR, SOUTH CAROLINA 396. See also Lewis Burke, “The Radical Law School” in AT FREEDOM’S DOOR, 101 (2000). Burke notes that earlier, Cardozo, an 1876 graduate of the University of South Carolina School of Law, had resigned from the advisory committee of the Commission “to protest corruption in the agency.” Later, when elected Secretary of State, Cardozo “reorganized the land commission and is credited with eliminating the corruption and thievery that had been rampant there.” After serving as Secretary of State and State Treasurer, Cardozo was later charged with corruption after Democrats gained control of the state and led a “campaign” to tarnish the reputation of Reconstruction-era elected leaders. See EDGAR, SOUTH CAROLINA, 409, cited in Burke, 101. Later pardoned by Gov. William Simpson, Cardozo, a native Charlestonian, left the state and moved to Washington, D.C., where he worked with the U.S. Treasury Department and as a principal in the District public schools until he died.

130 Historians differ on their accounts of the volume of land sales. Bleser explains that Commission correspondence estimates were uncertain, but accepting the estimate of 14,000 Negro families (or approximately 70,000 persons) had participated in the distribution program. BLESER at 157-158, see also FONER at 161. More recently, Walter Edgar reports that “by 1877 some two thousand small farmers, most of them black, had purchased commission lands. EDGAR, SOUTH CAROLINA at 396.

131 BLESER, supra note ___, at 144.

132 Report of Secretary of State Francis Cardozo, Reports and Resolutions, 1872-1873, p. 134, reported in BLESER, supra note ___, at 167.

freedmen, and the majority of this was located in the Lowcountry region.

C. HEIRS’ PROPERTY: LAND LEGACY & LAND LOSS

Despite the disappointments of wartime and Reconstruction land distribution policies, land acquisition in the Lowcountry spurred the dream of property ownership across the country. Thomas Mitchell has offered important observations about this historical appreciation for land.

The history of those individual African Americans who purchased land in states throughout the South following Emancipation remains largely unknown and uncelebrated. In total, this group acquired approximately fifteen million acres of land in the region in the fifty years following the Civil War. As much as any group of Americans in the 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.

This was certainly the hope in the Lowcountry of South Carolina. A compilation of historian reports discussed above indicate that over 16,000 African Americans acquired at least 50,000 acres through private and federal efforts, and through the landmark state Land Commission program. Hundreds more were able to purchase thousands of acres in private transactions and tax sales of forfeited property.

Holding on to land acquisitions was no small feat for African-Americans. Beginning in 1861, the South was plagued by a war-induced depression. Economic hardships increased the difficulty that African Americans encountered in the quest to acquire property. While the economic downturn encouraged plantation owners to sell their tracts, often through the S.C. Land Commission, the poor state of the economy hampered African American land acquisition efforts. Bernard Powers reports that neither skilled nor unskilled workers saw a significant increase in property acquisition between 1870 and 1880.

Ten years after the Civil War…it would not have been unusual for a person who was working as an agricultural hand to have made perhaps only $10 or $12 in a month, and … sharecroppers often time ended up the year – not with any

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134 BLESER, supra note ___, at xiii.
135 BLESER, supra note ___, at 165, 167.
137 According to Bleser, 14,000 families purchased 44,579 acres through the Land Commission, See BLESER at 157-158; Foner reports that 2,000 Georgia and South Carolina freedmen were able to maintain Lowcountry "Sherman Lands." FONER, supra note ___, at 73.
138 See discussion supra, Sec. II(B): Land Distribution Programs and Promises.
139 See POWERS, supra note ___, at 120-121.
140 See POWERS, supra note ___, 120-121.
141 Six percent of unskilled workers owned property in 1870; eight percent of skilled workers owned property in 1871. By 1880, the percentage of landowners in this category increased just 5 percent. See POWERS, supra note ___ at 120-121.
currency in their hands but, in fact, ... indebted; so the acquisition of land, even in small amounts, was the result of heroic efforts mounts by Black Carolinians during this time period.\footnote{Bernard Powers Interview, Rivers, Faith (Producer) & Holland, Warren (Director), (2003). *Heirs’ Property* [Videotape]. South Carolina Bar Foundation.}

1. LAWYERS & LAND LOSS

Just as economic instability made it difficult for free African Americans to acquire and hold land, the legal system made it difficult for African Americans to keep land within the family. By operation of de jure and de facto discrimination, coupled with slavery-imposed and subsequent illiteracy\footnote{See EDGAR, supra note __, at 299 (noting that “South Carolina had some of the most stringent laws in the nation outlawing the teaching of blacks, slave or free” and reporting that several schools for free Blacks in Charleston were forced to shut down in the aftermath of the Nullification Crisis.); at 421 (noting that fifteen years after the war, 78.5 percent of the black population was totally illiterate.)} and economic limitations, throughout most of the 20th Century, generations of African Americans did not enjoy meaningful access to legal counsel. This had an important and lasting impact on African-American property owners.

Though African Americans began to acquire Lowcountry property as early as 1863, no African Americans were admitted to the bar until 1868, at which time only three were admitted. In the quarter century of the post-war period, only 61 African Americans were admitted to the bar, and the pace of integration was incremental, averaging 2-3 admissions per year. During this period, African American constituted the majority of the state’s population, remaining around 60 percent 1775 to 1880, when South Carolina had the highest percentage of black citizens of any state.\footnote{See EDGAR, supra note __, at 78 and 413. South Carolina lost population due to significant out migration, particularly among African Americans. As a consequence, the White population did not enjoy majority status in the state until World War II.} The number of black lawyers was woefully inadequate to serve the needs of the vast African-American population, particularly along the coast,\footnote{See JOHN OLDFIELD, “The African American Bar in South Carolina,” in AT FREEDOM’S DOOR, 127-128 (2000). According to Oldfield and Burke’s research, 30 African Americans were admitted to the bar during the 1870’s. Eighteen were admitted during the 1880’s, and 17 were admitted in the 1890’s. The figures dropped dramatically at the turn of the century; only two African Americans were admitted between 1900 – 1913. The overall number of black lawyers declined precipitously after Reconstruction until the state opened South Caroline State College Law School in an effort to respond to demands and legal challenges to segregation. See W. Lewis Burke and William C. Hine, *The School of Law at South Carolina State College: Its Creation*, (Work in Progress – paper on file with the author).} and surely the vast majority managed their property affairs without legal assistance.

The first African Americans to be admitted to the South Carolina Bar came to South Carolina during the Civil War, either with the Union army or the Freedman’s Bureau.\footnote{OLDFIELD, supra note __, at 116. (Jonathan Jasper Wright (Pennsylvania), William Whipper (Michigan) and Robert Brown Elliott (north, specific location not know).} However, most of the African-American bar was native born by 1877.\footnote{OLDFIELD, 117} The majority came from the Low Country and returned there to practice, as Charleston was the financial and legal
Between 1864 and 1913, only twenty-eight African Americans practice in the Lowcountry, where the African-American population and land ownership was greatest. At the highest point in 1895, seven African-American attorneys practiced in the city. After the turn of the century, more African-American lawyers established practices in Columbia. The University of South Carolina and Allen University Law Schools educated the majority of African-American students, but forty percent of the attorneys read law in the offices of other lawyers, and a few were educated at Howard and Atlanta Universities.

The law business was slow and difficult because the newly freed— but largely impoverished—black clientele could not afford to engage counsel. Nevertheless, a number of African-American lawyers were able to maintain law practices, though few were said to have "enjoyed financial security." Those that practiced handled real estate matters, as was typical for black lawyers in the South. In a column extolling the virtues of the legal profession, the Palmetto Leader noted that the African American lawyer played an important role in the protection of property:

Very often [African-American] lawyers are doing things in defense of their people which do not comment the light of publicity. Many a humble negro's property has been saved from economic rape by the honesty and loyalty of some Negro lawyer.

In the modern context, the records are replete with stories of heirs' property owners seeing valuable property taken by legal maneuvers from their friends, family and community members by land speculators, developers and unscrupulous businessmen. Thus, many landowners are distrustful of private attorneys and are reluctant to seek legal assistance. Moreover, most low and moderate-income heirs' property owners cannot afford representation when legal problems arise involving their land. Despite even limited access to lawyers,
community advocates, legal aid providers and observers alike have noted that many heirs’ property owners distrust strangers – both black and white – who come into their community showing an interest in or asking questions about their property. Commenting on the reluctance of heirs’ property owners to take advantage of title clearing assistance offered through a Hilton Head developer in the early 1970’s, Danielson observed that "[b]lacks both welcomed and worried about efforts to clear title to their land. With clear title land could be sold, but native islanders distrusted outsiders who participated in this process." 158 A 1979 Clemson University sponsored study of heirs’ property noted that "there is some reason to believe … that holders of intestate real property may have been more reluctant” to reply to inquiries about their property "due to fears of unwarranted legal entanglements," and "possible confiscation of land." 159 In the absence of a community understanding of the importance of legal documentation of clear title and without meaningful access to the legal system through trustworthy lawyers who are accessible to the community, heirs’ property owners are impaired in their ability to protect their property interests.

2. TAKING BY TERRORISM

Post-war gains in land holdings decreased notably during the Post-Reconstruction era when some whites resorted to terrorist tactics to undermine African-American landownership. African Americans who acquired land often did so in the teeth of threatened violence. 160 Some refused to officially record their deeds for fear of reprisal. 161 Professor Charles Ogletree notes that "[t]hroughout the country, after the Civil War, the Ku Klux Klan organized a violent, repressive resistance aimed at stealing land, property, and humanity from African Americans.” 162 This was certainly the case in the South, particularly in South Carolina where significant quantities of land had been purchased by African Americans.

It is reported that some African Americans who were able to purchase property through the Land Commission were forced to leave the land idle due to "threats and intimidation by the Ku Klux Klan [that] drove the settlers away.” 163 Rumors of the horror of these terrorist tactics spurred Reconstruction federal officials to conduct field hearings where testimony revealed that acquiring land ownership made many African Americans targets of racially motivated violence.

In an eighteen month investigation, The Associated Press (AP) documented a pattern in which African Americans were cheated out of their land or driven from it through intimidation, violence and murder. 164 According to Ray Winbush, the Director of the Fisk University’s Race

158 See DANIELSON, supra note ___, at 139-140.
164 See generally, Lewan, Todd and Barclay, Delores, Farmland Taken, supra note __.
Relations Institute, "[i]f you are looking for stolen black land, just follow the lynching trail" which shows the concentration of these acts of violence in the rural south – including a substantial number of these murders in the Lowcountry of South Carolina.165

3. ENCROACHING DEVELOPMENT

Notwithstanding these challenges, many African Americans were able to retain possession of the land acquired and passed it down to subsequent generations. This was due in part to the undesirable conditions in the low lands, physical isolation of the islands along the coast and abandonment of the large plantations in the area. Today, however, South Carolina’s coastal areas are in high demand and efforts have focused on providing access to these once-remote coastal areas. Access brought development and a variety of changes, including higher property taxes – but not necessarily improved public services.166 The influx of resort seekers and the accompanying decrease in the percentage of African American population has had dramatic political and social ramifications.167 For example, while African Americans had enjoyed a substantial majority of the population on Hilton Head for more than a century, their share of the island's population declined from over 90 percent in 1950 to less than 15 percent in 1975.168 Reflecting upon the changes on Hilton Head Island after the establishment of resort communities, community leader Emory Campbell remarked, "[a]t first it was a shock just watching the occupation."169 Vernie Singleton described the native African-American population of the island as "endangered species," in the face of threaten political, economic and cultural extinction.170

Most notably, land loss is a significant problem in communities targeted for development and experiencing such growth. In his work on the development of Hilton Head Island, Michael Danielson described the community concerns that portended a sad reality for many throughout the Lowcountry:

166 See DANIELSON, supra note ___, at 74-76, 118. "Provision of public services under Hilton Head's arrangements divided the population into a well-serviced majority with access to private and utility district services and a poorly served minority dependent on minimal public services. Blacks insisted that they were being treated unequally by town government. They had no public water or sewers. They had unpaved roads, poor police protection, and severe drainage problems." P. 284. See also RON HARRIS, "Gullahs: Whites Changing Sea Islands" Los Angeles Times, August 28, 1988, (noting that Hilton Head's then recent incorporation as a "limited service government" was unusual in that native residents paid city taxes but were the only one on the island without water and sewer service.)
167 Of particular significance is the loss of control and input in the development of land use plans and regulations. This impact is documented in Danielson's work, and the crisis is being replayed in coastal communities throughout the South. See Rivers, The Public Trust Debate, supra note __ at.
168 DANIELSON, supra note ___, at 117. Danielson notes the conflicts between native African Americans and new resort dwellers, noting the "conflicting notions of community" that created significant tensions between the groups.
169 DANIELSON, supra note ___, at 118, citing Campbell's remarks in Ron Harris, "Plantations Again." LOS ANGELS TIMES, August 28, 1988.
170 DANIELSON, supra note ___, at 293, citing Singleton, Vernie, "We Are Endangered Species" SOUTHERN EXPOSURE 10 (May/June 1982) 37-39.
Last but hardly least, African Americans worried about the implications of growth for the land they owned, the legacy from slavery that most families had tenaciously retained during many bad times. During the initial years of the island's development and the boom that followed in the early 1970s, native holdings were ignored by developers, since the most desirable land was owned by the plantation companies. The attractions of the black holdings (on Hilton Head Island), however, were bound to increase as other land was consumed, and blacks were fearful that growth would imperil their birthright.  

In the face of rapacious development, heirs' property owners even have been encouraged that the clouded status of heirs' property would protect the land from loss and development – precisely because the property could not be mortgaged or sold.  

In reality, however, the communal attributes of the common ownership scheme makes heirs’ property difficult to manage, and the fractionated nature of heirs' property title makes these land holdings more vulnerable to loss and less functional for heirs seeing to maintain or capitalize upon the equity in their property.

4. SCOPE OF THE LAND LOSS PROBLEM

During the latter years of the 19th and throughout the 20th Century, land loss depleted the land and economic resources of African Americans. Yet the scope of the heirs’ property problem has been difficult to document. According to expert opinions nearly 30 years ago, more than half of all “black-owned” property in the rural South is owned as heirs’ property.

The U.S. Department of Agriculture Agricultural Census revealed that African-American farm land holdings declined from 15 million acres in 1910 to only 1.1 million acres in full ownership and 1.07 million acres in part ownership in 2001.  

While the number of white farmers has declined during this period, African-American ownership was reported to have declined 2-1/2 times faster than white ownership.  

The decline in black landownership had a number of causes, including the migration of blacks from the rural South, foreclosures and partition sales. Land-takings also contributed to the decline in property holdings.

Observing that there is little empirical data documenting claims of African-American land loss, Thomas Mitchell suggests that "some academics and activists have made a number of unsubstantiated claims with respect to the legal phenomenon implicated in black land loss matters." Certainly, the nature of the extra-legal method of taking property by violence and

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171 DANIELSON, supra note ___, at 76.
172 See DANIELSON, supra note ___, at 139-140, "Blacks both welcomed and worried about efforts to clear title to their land. With clear title, land could be sold, but native islanders distrusted outsiders who participated in this process. Getting Sea Pines involved in clarifying titles, some feared, "might merely clear the way for the sale of those properties to established developers." (citing "NAACP Officials Tour Island Fri." Island Packet, October 12, 1972).
173 Graber, supra note ___, at 273, 276.
174 See Mitchell, Destabilizing the Normalization of Rural Black Land Loss, 2005 Wis. L. Rev. 557, at 527-528 [hereinafter “Destabilizing the Normalization”];
175 Id.
176 Id.
177 Mitchell, Destabilizing the Normalization, supra note ___ at 581, ("Claims have been made or recycled on a number of issues; many of these claims cannot be verified, as they either rely upon personal opinion alone, or are
intimidation, the lack of proper legal documentation of land ownership (due in part to the threat of violence, and the destruction of court records in the affected areas), all contribute to the lack of empirical data about African-American land loss. With regard to legal causes, Mitchell asserts that assumptions that African Americans have a lower will-making rate lack any empirical basis. In the absence of empirical data, Mitchell questions the previously accepted assertions of land activist regarding the degree of use of the partition process as a mechanism that contributes to African-American land loss, as well as the competitive sufficiency of court-ordered partition sales. While Mitchell aptly suggests that legal empirical research on land loss should be encouraged, his conclusions insinuate that the studied observations of academics and decades of practice experience of activists and lawyers are insufficient to draw accurate conclusions about land loss.

While empirical research may be an important factor to add to the scholarly dialogue about African-American land loss, discounting the oral tradition debases an important component of the African-American culture. Practitioners in the field have dedicated lifetimes to the preservation of African American land, and they have offered valuable insights into the practical difficulties that legal concepts have had on tenants in common; more significantly, many have actually handled cases for heirs who were threatened with land loss. It is this experience of advocates and practitioners that build the history that Judge Cardozo names as essential for progress in the law of land.

Mitchell indicates that his questions about the prevalence of the use of partition as a mechanism of land loss arose from his empirical research in the historic farm resettlement Town of Tillery, North Carolina. Tillery was one 113 Resettlement Farm communities established by Franklin D. Roosevelt's administration as a part of the New Deal. Tillery was one of the largest projects and is unique in that it included both an African-American section and a Caucasian section. Mitchell appropriately selected this unique area for empirical research in order to assess whether race was a determining factor in whether families received fair value through partition sale. Mitchell's research indicates that "[a]lthough there has been significant black land loss over the course of sixty years..., a review of the different types of forced sales transactions in our data set has uncovered comparatively few partition sales. Of all the various

178 Todd Lewan and Delores Barclay, Torn from the Land (pt. 1), THE SEATTLE TIMES, Dec. 2, 2001, at A20 [hereinafter Farmland Taken]. AP reported that the true extent of land - takings from black families would be difficult to determine because of significant gaps in public records, as they found many deed books with pages torn from them and records that had been crudely altered. In addition, Lewan and Barclay observed that in some cases, the courthouse fires were deliberately set; in every case, key land documents were destroyed.

179 See Mitchell, Destabilizing the Normalization, supra note ___ at 597.

180 See Mitchell, Destabilizing the Normalization, supra note ___ at 595. "As I discuss in Part V, my research project in rural North Carolina has led me to question the degree to which partition sales have been a source of black land loss, at least with respect to involuntary black land loss in the past thirty to forty years."

181 See Mitchell, Destabilizing the Normalization, supra note ___ at 597.
types of forced sales recorded in our data set, foreclosures are by far the most prevalent.”

According to Mitchell, the prevalence of loss by foreclosure sale suggests that land loss advocates "may have overestimated the degree to which partition sales have been a source of black land loss.”

While Mitchell's experience in the field of Tillery offers valuable lessons about doing empirical research on race-specific factors through case law, it also exemplifies one of the dangers of relying solely on empirical data. The experience of the farm community of Tillery is heavily influenced by the farm economy, and the data generated for this examination reflects that critical fact. Tillery sits in Halifax County, described as "the poorest of all the 100 counties in North Carolina as measured by the percentage of the people in the county whose income falls below the poverty level." (Citation omitted). The Concerned Citizens of Tillery organization indicates that eighty-five percent of the town's 1,200 citizens are senior citizens, and ninety-eight percent of the residents (primarily women) are African American. The community organization observes that "most of the farm jobs have disappeared and have been replaced by factory jobs 15 to 45 miles away from the community.” Thus, given these indicators, it is unlikely that real estate is at a premium, particularly given that town residents are primarily employed at plants that are remote from the community. Foreclosure sales that Mitchell observed may in fact be a determining factor in black farm loss; however, those observations are not broadly applicable to other growth areas where substantial land loss is driven by market demand. In developing communities along the coastal region, the experience of African-American landowners is much more influenced by the Sunbelt economy. Given the difficulty and expense of initiating partition sales, economic factors dictate that the expense would only be encountered when developers perceive an increase in value. In fast-growing sections of the sunbelt, partition sales are governed by a different set of economic factors. The Lowcountry of South Carolina presents quite a different view of partition sales than the empirical experience in Tillery reflects.

Nevertheless, these critiques of land loss claims belie the point that land held as heirs' property is vulnerable to loss. The record of reporters, advocates and practitioners verify that this estate can be and in at least some significant number of cases has been exploited and lost.

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186 Mitchell, Destabilizing the Normalization, supra note __ at 609.
187 Mitchell, Destabilizing the Normalization, supra note __ at 609.
188 One important factor in the instability of the farm economy has been discriminatory lending practices by the USDA. See Pigford v. Glickman, 185 F.R.D. 82 (D.D.C. 1999). See also, Monica Clark, So Near, Yet So Far: The Past, Present, and Future of Complaints Process Within the USDA, 32 S.U. L. Rev. 139 (The massive land loss suffered among African Americans can be directly traced, at least to a nominal degree, to the actions, inactions, and moral ineptitude of the United States Department of Agriculture (USDA), a federal agency that has historically been a bastion of racial unrest.; Mitchell, Destabilizing the Normalization, supra note __ at 565, note 26 ("Just as discrimination has driven many black farm operations out of business altogether, it has limited the ability of other farm operations to expand, making these farm operations vulnerable to the economic pressures that are forcing more and more small farm operations out of business.")
189 See Mitchell, Destabilizing the Normalization, supra note __ at 601-602.
191 Madeleine McGee, former President of the Coastal Community Foundation, observed that "as land on the coast becomes more valuable, the financial incentive to untangle heirs property conflicts increases." Bartelme, Heirs Property Tangle Leads to Loss of Land, supra note __, at A9.
Foundation researchers and community leaders have identified thousands of tracts of heirs’ property in the Lowcountry of South Carolina. This research indicates that a significant portion of land in the Lowcountry is held as heirs’ property. It is the prevalence of heirs’ property that imperils this base of African-American land holdings. Over the past thirty years, experience in the Lowcountry has shown that without intervention this tragic history of land loss beginning in Hilton Head is bound to repeat itself up the coast line. These lessons of history encourage the development of legal theories and strategies to turn the tide of land loss by restoring the bundle of rights.

IV. THE BUNDLE OF RIGHTS IS HALF-EMPTY

A. "History Built Up the System and the Law That Went With It "

The historical context reveals why so many African Americans now hold property interests as tenants in common. The prevalence of heirs' property among African Americans reflects the reality that the vast majority of these landowners were routinely denied access to the legal system. Consequently, these landowners were unable to devise estate plans to establish how family land would be passed down. Instead, property ownership was transferred through the operation of the default intestacy provisions. The development of the intestacy scheme offers insights into the role of property law in facilitating African-American land loss, and offers lessons that inform consideration of property law reform efforts.

1. A View From the Past: Family Land, Wealth & Power

The land-labor concept of the Southern plantation system was much like the feudal villeinage system in England. As it was in the English feudal system, land ownership was the source of family power, status, and wealth. In order to preserve this system, medieval dynasts created a system of land fees that facilitated preservation of family estates. The English statute de donis conditionalibus converted conditional estates into "fee tails" – enabling land-owning barons and lords to establish essentially inalienable property interests. Land conveyed to a person "and the heirs of his body" created a fee tail, with a reversion in the grantor or his heirs continuing through the end of the grantee's bloodline. While a tenant in fee tail could alienate his possessory interest, the future right of his descendents to possess the land could not be terminated. In contrast, settlement of the American colonies offered the opportunity for land accumulation and nobility status – an opportunity that Lord Ashley and his comrade proprietors

192 Rivers, The Public Trust Debate, supra note __, at __ (noting that assessors have identified nearly 2,000 property tracts of heirs’ property in Charleston County, and another 1,300 properties (involving 17,000 acres) in Berkeley County. On Wadmalaw and St. Helena Islands (two traditionally African American Sea Islands), there where 111 and 124 tracts of heirs’ property, respectively.)
193 CARDOZO, supra note __, at 55.
194 See FRIEDMAN, supra note __, at 202.
195 See 4 JAMES KENT, COMMENTARIES ON AMERICAN LAW *444 (George Comstock ed., 11th ed. 1866), cited in BLACK'S LAW DICTIONARY, (5TH EDITION)
196 POWELL, supra note __, §192-193; see also FRIEDMAN, supra note __, at 210, see also, Wightman, 1804 WL 416.
197 See also FRIEDMAN, supra note __, at 210, see also, Wightman, 1804 WL 416.
used to market settlement of the Carolina colony.198

In an early 19th century opinion, South Carolina Constitutional Court of Appeals Judge Brevard reflected upon the origin of the fee tail estate, noting that "the rule, was founded on a feudal maxim, that an heir should not take a contingent remainder of an estate as purchasers, where his ancestor took a freehold estate by the same conveyance because the [landowning] lord might be defrauded of the fruits of his tenure [obligations owned by the possessing]."199 Brevard concludes that the intent of the fee tail was "to introduce perpetuities, for the purpose of preserving the dignity and power of the nobility."200 This estate disabled future generations and collateral heirs from selling land. In effect, an owner could tie up title to property within a single family for hundreds of years.201

In England, enterprising fee tail interest holders were able to maneuver around the statute de donis and alienate property.202 The inalienable fee tail estate presented problems for commerce and family dynamics. In due course, “[t]he entail had thus become, to all intents and purposes, as freely alienable as an estate in fee simple."203 Accordingly, England's Norman feudal system eventually gave way to a system of free marketability of land in the sixteenth century. The evolution of South Carolina's property laws reflects the familiar tension between protection of family land ownership and the opportunity presented by unrestrained alienability of land.

During the waning days of the proprietary regime,204 the South Carolina Commons House of Assembly adopted dozens of English statutes into the South Carolina code; however, the fee tail provision was noticeably absent from the package of English laws that were adopted.205 The Act of 1734206 went further and specifically rejected the fee tail from the state's common law.207 The Act provided "that estates conditional, at the common law, in fee simple,
shall not be construed to be estates in fee tail." Historian Walter Edgar suggests that this "move may have been political to thwart the proprietors," but also notes that this provision made for free alienability of land. A century after the Commons House excluded adoption of the fee tail estate, in the case of Warnock v. Wightman, Judge Brevard observed that "it is against the policy of law, that estates should be tied up, and rendered unalienable for a great or indefinite length of time." On a practical level, free alienability provided "new nobility" landowners with the capital resources to finance and expand plantation operations, and consequently, the opportunity to break up and gain access to large land holdings upon the death of the current owners.

Rejection of the fee tail estate and the embrace of free alienability continued to drive land policy as South Carolina's post-revolutionary legislature adopted the Statute of 1791 and affirmatively rejected the common law estate of fee tail and the default intestate provision for primogeniture. The purpose of the statute was "to abolish the right of primogeniture, and to give an equal distribution of the real estates of intestates" as tenants in common.

That where any person shall be, at the time of his or her death, seized or possessed of any estate in joint tenancy, the same shall be adjudged to the severed by the death of the joint tenant, and shall be distributed as if the same was a tenancy in common;...and that in cases of intestacy, the personal estate of the intestate shall be distributed in the same manner as real estates are disposed of by this act.

South Carolina jurists observed that the general purpose of the Act of 1791 statute on intestacy was to "remedy" the canons of the common law of descents.

The complaint was, that the estates of deceased persons were distributed, not as it was supposed nature and affection would have prompted the owner to dispose of them, but by certain artificial rules arising out of the feudal system which had ceased to exist....The Act corrects all this, by putting all children on the same footing, and sisters on the same footing with brothers.

In the alternative, joint tenancy with the right of survivorship and automatic succession was considered “suitable for family lands.” A significant body of case law refers to the progressive nature of the intestacy statute which sought to provide "equitable distribution" of

and Rhode Island still permit use of the fee tail estate.

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208 1734 S.C. Acts 744.
209 Wightman, 1804 WL 416 (emphasis added).
210 Primogeniture is "the common-law right of the firstborn son to inherit his ancestor's estate, to the exclusion of younger siblings." BLACK'S LAW DICTIONARY (8th ed. 2004).
211 1791 S.C. Acts 162; see also Edwards v. Barksdale, 20 S.C.L. (2 Hill) 1836 WL 1515, at *2 (1836) (declaring that first cousins of the whole and half blood are equally entitled to inherit from an intestate estate).
212 1791 S.C. Acts 162; M’Meekin v. Brummet, 11 S.C. Eq. (1 Hill Eq.) 638, 640 (1837); see discussion infra at __.
214 See FRIEDMAN, supra note __, at 206. (Friedman observes that joint tenancy was less appropriate for market transactions), SMITH, supra note __, at 27.
both real and personal property.\textsuperscript{215} Notwithstanding the progressive, equitable intent, as the intestacy statute evolved, it led to quite inequitable results. While the fee tail had become an effective nullity, this estate enabled families to maintain title within the bloodline on a self-executing basis. Colonial South Carolinians embraced the free market concept of amassing and alienating land – perhaps at the expense of their own land legacy. This certainly operated to the detriment of African American landowners who did not, or could not utilize the legal system in order to preserve family lands by other means.

Just as the fee tail estate encountered difficulties because of the inalienability of the entail, tenancy in common property encounter similar marketability challenges. But while the fee tail estate preserved family lands, the tenancy-in-common estate facilitates the loss of family land because of the operation of partition. From its earliest beginnings to the current day, the concept of partition has led to tragic results for African Americans in the courts of equity.

2. Partition Principles in Equity: From People to Property

South Carolina's real property partition provisions evolved from laws related to the division of slaves held as chattel property in the courts of equity. The Chancery Courts affirmed its jurisdiction over the partition of "land and negroes" in both testate and intestate estates.\textsuperscript{216} In the case of Pell v. Ball,\textsuperscript{217} the Chancery Court affirmed a circuit court decree ordering that "the land and negroes" of Hugh Swinton Ball's estate be sold through partition in accordance with the recommendation from a panel of commissioners.\textsuperscript{218} In response to an infant heir's objections that the Court of Chancery's jurisdiction (and ability to order partition) was limited to intestate estates, the Court of Appeals of Equity admitted that prior to consideration of the instant case, the English Court of Chancery "has no power to direct the sale of lands for the purpose of partition," but implied that "much hardship and injustice have been suffered, from the want of such authority."\textsuperscript{219} Accordingly, the court cited Dinkle v. Timrod,\textsuperscript{220} noting that the Court had exercised jurisdiction "long before our Act of 1791, authorizing them in the case of intestates' estates..."\textsuperscript{221} He went on to justify South Carolina's Chancery Court's jurisdiction beyond intestate estates by reference to the Court's longstanding, "prevalent" and "established practice" of partitioning slaves, dating back to the mid-1700's:

It [Chancery Court] exercised, also, jurisdiction in making partition of slaves, for which, of course, it could derive no authority from the English law. It is not questioned but that the jurisdiction has been exercised familiarly and habitually, for the greater portion of a century, and I believe there is no lawyer at the bar, or Judge on the bench, who cannot verify the prevalence of the practice, so far as his

\textsuperscript{215}E.g., Youngblood v. Norton, 20 S.C. Eq. (1 Strob. Eq.) 122 (1846); Trapp v. Billings, 7 S.C. Eq. (2 McCord Eq.) 403 (1827).
\textsuperscript{216}18 S.C. Eq. (1 Rich. Eq.) 361 (1845).
\textsuperscript{217}It should be noted that the order provided that the negro slaves be "sold by the said Master, in lots according to families." Id. It is not clear whether "family" was defined to be nuclear units, or if extended families were to be considered in "lots."
\textsuperscript{218}Pell v. Ball, 18 S.C. Eq. (1 Rich. Eq.) 361, 379 (1845).
\textsuperscript{219}1 Dess. 109.
\textsuperscript{220}Pell v. Ball, 18 S.C. Eq. (1 Rich. Eq.) 361, 379 (1845).
recollection extends (emphasis added).

Thus, based upon the existing jurisdiction and practice of partitioning slaves, the Chancery Court gained jurisdiction to partition real property in both testate and intestate estates. This statement of the Chancery Court's power and practice of partitioning slaves was affirmed and extended in the 1848 case *Steedman v. Weeks.*\(^{222}\) In that case, Chancellor Dunkin defended the Chancery court's jurisdiction over partition proceedings. To support his conclusion that the Act of 1791 authorized both the Courts of law and equity to handle partition matters, Chancellor Dunkin cited *Pell v. Ball,*\(^{223}\) stating his interpretation of the holding:

> [It] is said to have been the practice of the Court of Equity in South Carolina, "long before the Act of 1791, to order partition not only of real estate, but of slaves, and to order a sale, when necessary for the purpose of partition."\(^{224}\)

Dunkin went on to discuss the procedural components of the partition process\(^{225}\) and reversed the lower court ruling. In the end, Dunkin approved a writ of partition for timber based upon the court's record of partitioning slaves.

While historians have noted the role of courts in slave sales for decades, the implications of common ownership was only recently explored.\(^{226}\) Legal historian Thomas D. Russell reviewed records of four decades of slave sales\(^ {227}\) in South Carolina and concluded that the state's courts "ordered or supervised" the majority of all slave sales through sheriffs' sales, equity court sales and probate sales.\(^{228}\) He projects that these statistics reflect trends among other southern states.\(^{229}\) Sheriffs' sales of slave usually resulted from credit transactions, as slaves were used as collateral for debt and formed the basis upon which creditors extended credit.\(^ {230}\) Forty-five percent of court supervised sales were sheriffs' sales which resulted from default in credit

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\(^{222}\) 21 S.C. Eq. (1 Strob. Eq.) 145, 1848 WL 2583 (1848).


\(^{224}\) See *Steedman v. Weeks*, 21 S.C. Eq. (1 Strob. Eq.) 145, 1848 WL 2583, at *2. This case also outlines the procedural requirements for partition sales, see discussion infra. [Please note that this case incorrectly cites *Pell v. Ball*]

\(^{225}\) Dunkin suggested that in contrast to the English rule that "whatever can be divided is the subject or partition," "in South Carolina, interests may be severed, and the share of each ascertained and set of, where the subject matter is not susceptible of division, as in the instance of a slave belonging to two persons." *Id.*

\(^{226}\) See Thomas D. Russell, *A New Image of the Slave Auction: An Empirical Look at the Role of Law in Slave Sales and a Conceptual Reevaluation of Slave Property*, 18 CARDOZO L. REV. 473, 482-483, citing HARRIET BEECHER STOWE, UNCLE TOM'S CABIN, Washington Square Press 1963, 172-194 (1852). Russell notes that the first auction sale described in Uncle Tom's Cabin was a probate estate sale, wherein a slave mother was separated from her fourteen year old son.

\(^{227}\) See Russell, *A New Image of the Slave Auction*, supra note __, at 481-483. Russell notes that this data was drawn from the manuscript record books of the legal officials who conducted the sales of about 2,100 slaves between 1823 and 1865 in the Edgefield, Fairfield, Marlboro, Newberry, and Union districts. See also Thomas D. Russell, *South Carolina's Largest Slave Auctioneering Firm*, 68 CHI.-KENT L. REV. 1241 at 1247.


\(^{229}\) Russell, *A New Image of the Slave Auction*, supra note __, at 481.

transactions. Judges, however, oversaw the majority of slave sales through equity actions to foreclose mortgages of defaulting owners (15%), and in probate actions, where courts ordered slaves sold to pay off debts or to divide (partition) the estate "property" between the owner's heirs (40%).

Russell observed that "[t]he South Carolina courts of law and equity acted as the state's greatest slave auctioneering firm." Consequently, nearly 1% of the slave population faced the risk of sale at the hands of South Carolina judges and sheriffs on an annual basis. For these slaves, Russell estimates that the risk of family separation was two to three times higher at court supervised sales than at commercial sales because of the principles guiding the law of partition. Russell traces the source of Courts' justification for the separation of slaves in partition sales to the jurisprudence of North Carolina Supreme Court Judge Thomas Ruffin of State v. Mann infamy. In the realm of court sales of slaves, Ruffin set the standard to require individual sales of slaves, regardless of the familial relationships between the enslaved parents and children. In Cannon v. Jenkins, Ruffin observed that "[m]ost commonly the articles [slaves] sell best, singly; and therefore they ought, in general, to be so offered." Ruffin looks to valuation as the determining factor as to whether "articles" would yield a higher price if sold individually, rather than as a whole lot:

"It is the duty of the executor to get the most he can. Sometimes, indeed, as much, or more can be had, when the property is disposed of in one, than in more parcels, as in the instance of a family of slaves, when the children are all of tender years. But he, who conducts such a sale, does it at his peril, and must answer for the true value, where the price has been materially affected by the mode of sale."

Any effort by the executor to sell slaves together (at a reduced price) was a charity which could not be "indulged" "at the expense of others." South Carolina and other southern states embraced this standard, and "the legal preference and practice at court sales throughout most of the South were for individual sale of slaves" regardless of family relationships.

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231 Russell, A New Image of the Slave Auction, supra note __, at 485-486.
233 Russell, South Carolina's Largest Slave Auctioneering Firm, supra note __, at 1241.
234 An estimated 0.85% were subject to sale annually. This constituted one half of the total volume of slave sales in South Carolina. Russell, A New Image of the Slave Auction, supra note __, at 486, Citing Russell, South Carolina's Largest Slave Auctioneering Firm, supra note __, at 1271.
236 State v. Mann, 13 N.C. (2 Dev.) 263 (1829) (forbidding indictment for battery against a slave girl by a person who had leased services from her owner; yet holding that the offending lessee could be liable to the lessor for the value of the slave).
237 Cannon v. Jenkins, 16 N.C. (1 Dev. Eq.) 376, 379 (1830).
238 Cannon v. Jenkins, 16 N.C. (1 Dev. Eq.) at 379 (1830).
239 Cannon v. Jenkins, 16 N.C. (1 Dev. Eq.) at 379 (1830). Valuation in partition continues to lead to inequity in heirs' property cases. See discussion infra, Section III(D): The Distorted Economics of Partition Suits.
240 Cannon, 16 N.C. (1 Dev. Eq.) at 380. (The administrator of the estate had sold four brothers, ages four (twins) to eight, together, but according to Judge Mann, the administrator did so "at his peril.")
241 Russell, Articles Sell Best Singly, supra note __, at 7, 1176-1177 (1996). Thomas noted that three slave states
Yet to be explored by legal scholars and historians alike is the impact of the law of partition of people on the law of partition of property. Yet, partition of people cases are the bedrock of the law of partitioning property. Partition of people cases provide the background context for the development of many legal issues pertaining to partition. Moreover, the Act of 1791 remains at the base of modern statutory provisions for inheritance of property – along with its attendant views about the concentration or dispersal of property interests, and its either nescient or dismissive view of the impacts of the tenancy in common scheme on successive generations in intestacy.

Ruffin acknowledged that "it would certainly have been harsh to separate these four boys, and sever ties which bind even slaves together." Nevertheless, he instructed the executor to disregard these ties. Yet South Carolina law books' dispassionate description of the partition of people belies the tragic consequences of the laws the courts articulated, interpreted and applied. One case of particular note to the precepts of partition is McMeekin v. Brummet, which describes the partition of a probate estate. While the court concentrated on the bland issues of construction of wills, determining the nature of the remainder interests (in slaves), as well as issues of profits and accounting (for slave labor) between tenants in common in partition an action, the opinion never notes nor considers the impact of the partition on the three generations of African Americans who were enslaved by the Spencer and Daniel Brummet. provided limited formal protection of mother-child relationships through statutory provisions, but observed a "dissidence between the discourse and the practice" of disrupting slave families in court sales.

Section 62-2-804 provides as follows:

When any person is seized or possessed of any estate of joint tenancy at the time of his death, the joint tenancy is deemed to have been severed by the death of the joint tenant and the estate is distributable as a tenancy in common unless the instrument which creates the joint tenancy, including any instrument in which one person conveys to himself and one or more other persons, or two or more persons convey to themselves, or to themselves and another or others, expressly provides for a right of survivorship, in which case the severance does not occur. While other methods for the creation of a joint tenancy may be utilized, an express provision for a right of survivorship is conclusively deemed to have occurred if the will or instrument of conveyance contains the names of the devisees or grantees followed by the words ‘as joint tenants with right of survivorship and not as tenants in common.

S.C. Code Ann. § 62-2-804 (Supp.2003). Sherman ex rel. Maddock v. Estate of Sherman ex rel. Snodgrass, 597 S.E.2d 850 (S.C. Ct. App. 2004). (concluding that the current statutory provision has been updated to allow survivorship rights for joint tenancy upon inclusion of an express provision for a right of survivorship, indicating that a separate strawman transaction would no longer be required.)


See also Jones v. Massey, 14 S.C. 292 (1880). Post-emancipation, tenant in common was liable to other cotenants for profits derived from the use of the slaves from the time of his sole possession in 1861 until
The facts reveal that the Brummet brothers declared a conditional trust of two female slaves for the benefit of Comfort Brummet. The slaves were presented to Comfort and her husband, Zadock Perry, in 1792. The trust included a condition that if Comfort died without issue, then the slaves were to be returned to Spencer and Daniel's sons. While the fate of Zadock Perry is not stated, six years later, Comfort remarried. The Brummet men again "delivered" the original two women slaves – along with the children they had given birth to since 1792. These enslaved women, their children and grandchildren were enslaved by Comfort and her second husband throughout their lives. Comfort died in 1829, and her second husband died in 1832. Upon his death, a Brummet descendant (F.K. Brummet) came to reclaim the slave family. The administrator of another Brummet descendant brought an action in trover to recover the slaves from his cousin, F.K. Brummet.

This unnamed family of slaves had been "in trust" to Comfort since 1792. Having been transported to wherever Comfort abode for forty years, three generations of this family were now before the court for "distribution" as property. After determining that the Brummet men shared interests in this family of slaves as joint property, Chancellors Harper, DeSaussure and Johnson summarily issued a writ of partition to divide the slaves between the Brummet cousins. It is within the context of this case for partition that the court reviews the nature of concurrent property interests in intestate estates. The court declared that under the Statute of 1791, the original trust document created a tenancy in common between the sons of Spencer and Daniel. The court noted that the Statute required that all joint tenancy property be "distributed as if the same was a tenancy in common." Thus, the court affirmed tenancy in common as the default form of an intestate estate and confirmed that personal property – in this case, property in people – would be distributed under the same rules as real property. The result was in accordance with the determination of property interests – and the prevailing statutory construction of the Act of 1791. But the law played a horrific role as the partitioner of concurrently held property – in people.

Russell Thomas notes that divided ownership interests in slaves triggered many sales to reconcile life estates and future interests, security interests, and the settlement of interests in testate and intestate estates. The state courts of equity were firmly ensconced at the center of the business of slave selling to satisfy divided ownership interests.

emancipation. Id. Notably, the court gave no consideration to the prospect of requiring the tenants in common to remunerating the freed slaves for their labor during slaver, but rather held the principle of accounting among tenants in common required that the profits be shared among the cotenants. Id. This accounting presents interesting issues for consideration in reparations discussion, see discussion supra at Section II(B): Land Distribution Promises & Programs.

246 See generally Brummet, 11 S.C. Eq. (1 Hill Eq.) 638, 640 (1837).
247 Id.
248 Id. Beyond the partition, the victorious plaintiff was due an "accounting" for a "moiety" or the value of the slaves' labor during the time the plaintiff was entitled to his ownership interest in them. Id.
249 Id.
250 Id. at 640 (quoting 1791 S.C. Acts 162).
251 Thomas Russell, A New Image of the Slave Auction, 477.
The dehumanization and subordination of the slave auction had direct support from legal officials and institutions. Judges, for example, were not merely complicit bystanders in the institution of slavery. Instead, they occupied managerial roles. As managers of slave auctions, judges and other legal officials participated in a process by which some of slavery’s more drastic results came to be seen as legitimate. By their participation, legal officials both strengthened and legitimized the institution of slavery.  

Ironically, the courts of equity continue to function as "managers" of the partition process, resulting in tragic consequences for heirs' property owners whose ancestors were subject to partition in the very same halls. Behind the cloak of the centuries-old intestacy statute, which was once lauded for establishing a more equitable system of property distribution, but which was the source of great human suffering for the people subjected to partition as slave property, the legal system's support of the existing partition process provides a cover of legitimacy to the marauders of African-American ancestral lands.

It is clear that "history built the system" of slave property and the law of partition “that went with it” – all in the name of equity. The important cases which articulated principles of partition, such as Pell v. Ball and Steedman v. Weeks, were grounded upon the acknowledged habitual practice of partitioning slaves in the courts of equity. The chronicle of the slaves entrusted to Mrs. Comfort Brummet Perry Barber reveals both the principles of the law of partition as well as the inequity and inhumanity of its operation. It is tragically ironic that families of slaves were divided through the very mechanism of partition which now imperils the state of heirs' property, not only in South Carolina, but throughout the South where the descendants of slaves were thrust into the tenancy in common intestacy scheme.

3. Legacy of the Slavery Regime on African-American Property

At the dawn of Reconstruction, the bulk of African-American landowners were victims of state-ordered illiteracy and state-sanctioned discrimination and were threatened by hate crimes often times motivated by property seeking terrorists. As a result, they were largely uninformed, unable, or unwilling to seek legal assistance with estate planning and they had to rely upon the tenancy in common default provisions of the intestacy statute. This was complicated by the fact that slave marriages were not legally recognized, as slaves were deemed

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254 CARDOZO supra note ___, at 55.
257 M’Meekin v. Brummet, 11 S.C. Eq. (1 Hill Eq.) 638, 640 (1837).
258 See Edgar supra note ___, at 299.
259 See Powers supra note ___, at 81 (discussing the Black Code which "regulated the activities of black workers in intricate detail to ensure employers a constant, dependable, and docile source of labor. It also seriously limited the ex-slaves' freedom while relegating them to a status of social and legal inferiority.")
260 See generally, Lewan, Todd and Barclay, Delores, Targets of Violence, supra note ___.
261 See discussion supra, Section II(C)(1): Lawyers & Land Loss.
chattel property and incapable of making any kind of contract – including marital contracts. The intestacy provision for dower, curtesy, or forced share for a spouse denied many former slaves (primarily second "wives") from inheriting property from their "partners" who purchased land during the Reconstruction era. In South Carolina, the Enabling Acts attempted to rectify some of these issues by recognizing slave marriages of couples who "entered the relation of husband and wife before emancipation and continued to occupy such relations," and legitimizing the children born during slavery, either through the mother (rather than the customary line through the father), or in the event that a "colored child" was acknowledged by his "colored father." While an attempt to "cure defects in marriages merely moral between persons who were slaves at the time the relation commenced, especially with reference to enabling their offspring to inherit from them," the Enabling Acts fell short of the goal of remedying the impact of denial of slave marriages on intestacy because the Legislature did not address the issue of divorce. While the statutory measure extended a level of recognition to slave marriages, no provision was made for the dissolution of a "moral" slave marriage. If an enslaved African American was engaged in a "moral marriage" but later entered a second such marriage while enslaved, the children of the second "moral" spouse could not be legitimized, nor could they or the second "moral" wife take under the intestacy statute because the second relationship would be considered bigamist. Caught between the awkward "moral" marriage

262 Callahan v. Callahan, 15 S.E. 727, 728 (S.C. 1892) (Summarizing the state of the law regarding marriage of slaves; quoting Chancellor DeSaussure notation that slaves were "generally speaking, not considered as persons, but as things; and referencing Judge Belton O'Neall, "[a] slave cannot contract and be contracted with," and "[a] slave cannot even legally contract marriage. The marriage of such a one is morally good, but, in point of law, the union of slave and slave, or slave and free negro, is concubinage merely." O'NEALL, NEGRO LAW OF SOUTH CAROLINA, §§ 36 (citing Gregg v. Thomson, 2 Mill. Const. 331.).

263 Act of 1865, 13 St. p. 269 §4 (recognizing "moral" slave marriages and declaring the children of such unions as legitimate), Act of 1866, 13 St. p. 393 (declaring that African Americans (both formerly enslaved and free) should have the right to make and enforce contracts); Act of 1872, 15 St. p. 183 Gen. St. §§ 2030, 2031 (providing that the "colored" child of a "colored father" is legitimate if recognized by the father).

264 1865 S.C. Acts 269, §4; see e.g., Federick v. Culler, 109 S.E. 889 (S.C 1921); Taggart v. Taggart, 71 S.E. 1081 (S.C. 1911); James v. Mickey, 2 S.E. 130 (S.C. 1887); Myers v. Hamm, 20 S.C. 522 (S.C. 1884); State v. Whaley, 10 S.C. 500 (S.C. 1879). Notably, this provision specifically excluded illegitimate children of white fathers from the conferral of legitimacy – and the attendant right to inherit in an intestate estate. The Act of 1865 was repealed by the Act of 1872, but the legitimacy provision continued to apply to children born prior to 1872. See also Callahan v. Callahan, 15 S.E. 727 (S.C. 1892).

265 See Clement v Riley, 11 S.E. 699 (S.C. 1890). (pursuant to Enabling Act of 1865, half brothers and sisters of two different fathers were legitimized by their common mother.

266 1865 S.C. Acts 269, §4; see e.g., Culler, 109 S.E. 889 (S.C 1921); Taggart, 71 S.E. 1081 (S.C. 1911). Notably, this provision specifically excluded children of white fathers from the conferral of legitimacy – and the attendant right to inherit in an intestate estate. The Act of 1865 was repealed by the Act of 1872, but the legitimacy provision continued to apply to children born prior to 1872. Callahan, 15 S.E. 727, 731

267 Id. at 731.

268 See Childs v. Childs, 77 S.E. 50, ___ (S.C. year) (no actual or moral marriage between parents, and father had another wife living); Mims v. Jones, 91 S.E. 987, ___ (S.C. year) (where a slave was living in the marriage relation with a slave woman (at the time the Enabling Act went into effect), he could not hereafter contract a valid marriage with another woman while the first wife lived, ); Pressley v. Pressley, 86 S.E. 377 (S.C. 1915) (ex-slave must show a change in relation before marriage to another woman could be found other than bigamous); but see Callahan, 15 S.E. 727 (During period of slavery, free African American man "quit" his enslaved wife and subsequently married to another free African American prior to 1865 Court held that the second marriage (between free persons capable of contracting) trumped the first "moral" marriage to a slave, where no ability to contract existed. However, children of both marriages were legitimate in accordance with the Act of 1865.), see also Callahan v. Callahan, 15 S.E. 727,
provision and the prohibition against illegitimate children inheriting through intestacy, the children of second "moral" marriages were unable to inherit property from their fathers.

Here again, the impact of the law of partition is apparent, as the division of slave families contributed to the demise of slave marriages. In the case of Childs v. Childs, the Supreme Court's review of the facts of the case indicated that Eliza and William Childs were married "according to the custom of slaves" and "cohabited until their separation upon the division of the property of their owner...." The facts relay the impact of this separation on the family unit, noting that William "visited Eliza regularly, once or twice a week" after this court ordered separation via partition. During this period, William was reported to have married another woman, Dinah; the couple had two sons. After emancipation, when William was free to choose where he would live, the facts indicate that William returned to his first wife, Eliza; and William lived with her until he died. The facts do not reveal whether the second marriage was established by choice or borne out of force (of circumstances or by the direction by the slave owners). Nevertheless, the facts reflect that William acknowledged his sons by Dinah, and the sons lived on William's property at various times. The State Supreme Court held that the second relationship with Dinah was that of "concubinage," and thus deemed the sons of the relationship as illegitimate and therefore unable to inherit land from William. The courts wrought two wrongs on William: first, through partition, the court divided his family unit with Eliza; and second, the court refused to allow his acknowledged sons to share in his estate.

While the Enabling Acts sought to reconcile the hegemonic prohibition against slave marriages with the anti-illegitimacy stance of the intestacy statute (which was deemed a violation of the equal protection clause of the Constitution a century later), the measure failed to ameliorate the effects of the law of slavery. Through various portals, the law placed African Americans in a precarious state: the law of contract prohibited slave marriages, due to their supposed state as "chattel," rather than as human beings with the ability to contract; the law of partition of personal property, preferring "articles" to be sold individually, divided slave families; and the law of intestacy penalized children who were not born in wedlock which was prohibited by statute or destroyed in the courts of equity through partition. This quandary wreaked havoc on the transfer of intestate property in the first post-slavery generation of African-American landowners. Once the law acknowledged African Americans as people, it began sputtering with the challenge of enabling these people to acquire, possess, use, exclude and transfer property – the essential elements of the bundle of rights of property ownership.

4. Impact on Heirs' Property

731 (noting that if second wife had been a slave, "possibly a question might have arisen as to which marriage should be recognized, as that with Louisa was the first in the order of time.")

269 Childs, 77 S.E. at 51.
270 Id.
271 Id.
272 Id.
274 Callahan at 728.
275 Cannon v. Jenkins, 16 N.C. (1 Dev. Eq.) 376, 379 (1830).
As noted above, lack of legitimacy prevented a significant portion of African-American children born during slavery from inheriting property through the intestacy statute. 276 While Reconstruction land distribution and purchase schemes were on a much smaller scale than the original land grants of the colonial era, the stakes of the smaller land purchases were just as, if not more important to African Americans. 277 Accordingly, current generations of African Americans stand before the courts of equity that once governed the partition of their ancestors as slave property. These courts now maintain jurisdiction over the distribution of these descendants' real property through the laws of partition. Now that history has built up an inimitable system, the question is whether the law will continue to blindly "go with it" 278 and adhere to the failed system's path, or realign itself to ameliorate the disadvantages that distorted the system of property laws which results in the disadvantaged status of heirs' property owners as tenants in common.

B. THE TRAGEDY OF TENANCY IN COMMON

In his landmark article, "The Tragedy of the Commons," Garrett Hardin challenged the "dominant tendency of thought" inspired by Adam Smith's premise that an "invisible hand" in economic affairs promotes the public interest. 279 Hardin questions the assumption that individuals will reach rational decisions that are best for an entire society. 280 Rather, he suggests that the freedom of commonly owned commodities eventually becomes a tragedy when an individual seeks to maximize his gain – at the expense of others who benefit from common ownership of the commodity. In an oft-cited passage, Hardin explains,

[t]he tragedy of the commons develops in this way. Picture a pasture open to all. It is to be expected that each herdsman will try to keep as many cattle as possible on the commons. Such an arrangement may work reasonably satisfactorily for centuries because tribal wars, poaching, and disease keep the numbers of both man and beast well below the carrying capacity of the land. Finally, however, comes the day of reckoning, that is, the day when the long-desired goal of social stability becomes a reality. At this point, the inherent logic of the commons remorselessly generates tragedy. As a rational being, each herdsman seeks to maximize his gain. 281

Given the regular occurrence of individuals seeking to maximize their gain at the expense of the commons, Hardin suggests that theorists acknowledge this fact, re-examine the laissez

276 See Maples v. Spencer, 81 S.E. 483 (S. C. 1914) Plaintiff claimed to be a tenant in common and accused defendant of wrongly refusing possession. Id. Outcome hinged on determination if there was sufficient testimony for the jury to say whether plaintiff's father [an enslaved African American] and mother were married legally…whether or not he was the son of a slave by a woman in concubinage, or whether he was the offspring of a legal marriage: and whether or not his father as a slave was morally married to his mother…", thus enabling the Plaintiff to inherit land from his father. Id.
277 See discussion supra, Section II: Legal History of Land Acquisition & Loss.
278 CARDOZO, supra note __, at 55.
279 See Garret Hardin, The Tragedy of the Commons, 162 SCIENCE, 1243-1248 (1968).
280 Id.
281 See id. Hardin has been roundly criticized for application of his thesis to population control, but the environmental movement has effectively utilized Hardin's arguments to make the case for pollution control measures in order to prevent the exploitation of public common property in clear air and other natural resources.
faire policies based upon the "invisible hand" assumption and make other arrangements to govern the commons:

Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit — in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all. 282

1. Heirs Managing the Commons

Analysts have described heirs' property as “a complex legal, family, community, economic and political problem – a deeply systemic problem.” 283 The divide between the legal status of heirs' property as tenants in common is antithetical to many heirs' perceptions of family land ownership. This confusion over land rights and responsibilities causes family disruption and misunderstandings that imperil heirs' property. 284 In the heirs' property context, the division of property rights and responsibilities can lead to results that defy generally held concepts of fairness. This unstable form of ownership grants full rights of ownership to all heirs but fails to equitably distribute responsibility for the land between heirs. 285 Instead, "cotenants have to work out among themselves how the property will be used." 286 Thus, for heirs' property owners, the bundle of rights of property ownership is half empty, as heirs must allocate the right to possess, use and exclude property with other cotenants, while every heir has a determinative right to transfer their interest – and to force the sale of other cotenant interests through partition actions in equity court.

Accordingly, the entire class of heirs' property owners – ranging from small, nuclear families of siblings who inherit family property from the original purchasers, to hundreds of cousins and relatives who inherited property over the course of 150 years – are left to "work out among themselves" 287 how property will be managed. Any tenant in common, whether a cotenant holding a minute interest or a majority interest holder, may force a sale of the land without seeking the consent of the other cotenants. Despite these broad powers, there are no corresponding obligations to contribute to the ongoing costs of maintaining the property. A tenant in common who fails to pay his or her proportional share of expenses does not lose any interest in the property. Consequently, in the absence of voluntary agreement and contribution, family members who have paid more than their pro rata share of property taxes and maintenance may only recoup expenses from proceeds after the property is sold. 288

African-American property owners are often unaware of the problems associated with

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282 Id. at 1244.
283 Plastrick, supra note __, at 1.
284 See Mitchell, From Reconstruction to Deconstruction, supra note __, at 508; Rivers, The Public Trust Debate, supra note __ at [cite].
285 Mitchell, From Reconstruction to Deconstruction , supra note __ at 508.
286 Singer, supra note __, at 365.
287 Singer, supra note __, at 365.
288 See Mitchell, From Reconstruction to Deconstruction, supra note __, at 5, 19.
heirs’ property and the disadvantages of owning such property. Legal aid providers have observed a variety of myths that are prevalent among heir property owners. These myths reflect a perception of property ownership more in line with the fee tail estate, viewing property as an asset that stays within the family. Because of the prevalent misunderstandings, it is not unusual for an heir to feel that he is entitled to more land than the law provides. It is a common misperception that the land is a community asset that should be shared equally among all descendants of the original purchasers, rather than pursuant to per stirpes distribution as provided under intestacy statutes. In addition, many heirs who have taken responsibility for the property, either by farming, maintaining the land, or paying the property taxes, mistakenly believe that they should have control over decisions about the land, or that they have earned ownership of the property – particularly in contrast to absent heirs. Most tragically, many believe that holding title as heirs’ property would protect the land against sale. Cainhoy Huger Community Development Corporation President Fred Lincoln explains that "people here are afraid" as they were forced to come to terms with the actual nature of the heirs' property estate.

Therein lies the heart of "the tragedy of tenancy in common." Reflecting upon the encroaching development and the court processes that lead to the loss of heirs' property, veteran land activist Emory Campbell declared, "[i]t's a tragedy for these families to lose that link to their culture." While state property laws maintain a laissez faire approach to the conflicting interests of cotenants, the "freedom in a commons brings ruin" to most heirs’ property owners, leading to the tragedy of massive land loss among African Americans. Without effective access to information or counsel which could have provided for consolidation of property through the right of survivorship feature of joint tenancy, or through specific devise in a will, many African Americans had no other option but to pass or inherit their property as tenancy in common.

2. REALLOCATING PROPERTY RIGHTS: INTERNALIZING EXTERNALITIES

Harold Demsetz has examined the role of property rights as an instrument that helps individuals form expectations in their dealings with others. Those expectations about the use of property are expressed in law, customs and mores of a society. Demsetz identifies a close relationship between property rights and externalities, and suggests that "[a] primary function of property rights is that of guiding incentives to achieve a greater internalization of externalities." Dukeminier and Krier clarify that externalities exist when a person makes decisions about the use of resources without taking full account of the effects of the decision –

289 See Hugh Davis, SOUTH CAROLINA BAR FOUNDATION, HEIRS' PROPERTY MANUAL (Faith R. Rivers, ed. 2001). (Series of Myths: Heirs’ property is the best form to own and maintain family property; physically living on the land gives the possessor greater rights to the use and ownership of the land than those held by absent heirs; payment of property taxes and other assessments entitles an heir to ownership of the land; all living descendants are entitled to equal shares of a tract of heirs’ property; having the land surveyed provides proof of ownership.)


291 Id.

292 See discussion infra Section II(C)(1).


294 "Externality is an ambiguous concept….the concept includes external costs, external benefits, and pecuniary as well as nonpecuniary externalities.” Demsetz, cited in DUKEMINIER AND KRIER, supra note __, at 36.

295 Id.
ignoring important costs or benefits because they would fall on others. As a precursor to Hardin’s tragic example, Demsetz suggests that the ability to impose external costs on others leads individuals to overuse common property. This overuse will continue because the costs of negotiating and policing a mutually satisfactory agreement with a large group of individuals are extremely high. These externalities lead Demsetz to conclude that there is a “great disadvantage” to group ownership of property because “[c]ommunal property results in great externalities.”

Demsetz precisely describes the dilemma of heirs’ property owners who, as tenants in common “cannot exclude others from enjoying the fruits of his efforts and because negotiation costs are too high for all to agree jointly on optimal behavior.” Under the present system, one heir assuming responsibility for taxes and maintenance of family land simply bestows a benefit on other heirs (either possessory or absent) who refuse to make a contribution. In sum, ”[e]xternalities are, in essence, a function of transaction costs, and they encourage the misuse (the inefficient use) of resources. Moreover, Demsetz surmised that property rights develop when the gains of internalization outweigh costs, which results from changes in economic values, changes stemming from the development of new technology and the opening of new markets. This is the exact nature of heirs’ property in the coastal region where “new market” resort, commercial and real estate development have exploded over the past few decades. This theoretical point undergirds the experiential understanding that coastal development presents an imperative cause and occasion for reform of property laws that govern the management and disposition of heirs’ property.

3. RECOGNIZING THE PERSONHOOD OF HEIRS’ PROPERTY

Property theorist Margaret Radin considered the relationship between property and personhood and suggests that legal thought has both ignored and taken this relationship for granted. Radin argues that "objects are closely bound up with personhood because they are part of the way we constitute ourselves," citing an heirloom or house as an example. Recognizing the personhood of property explains the importance of protecting people's 'expectations' of continuing control over property:

If an object you now control is bound up in your future plans or in your anticipation of your future self, and it is partly these plans for your own continuity that make you a person, then your personhood depends on the realization of these

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296 See DUKEMINIER AND KRIER, supra note ___, at 42.
297 Demsetz, cited in DUKEMINIER AND KRIER, supra note at 39.
298 See Demsetz, cited in DUKEMINIER AND KRIER, supra note at 39-40.
299 Demsetz, cited in DUKEMINIER AND KRIER, supra note at 40.
300 Demsetz, cited in DUKEMINIER AND KRIER, supra note at 40.
301 Due to the Great Migration, descendants of Reconstruction-era African-American landowners are widely dispersed throughout the Northeast and Midwest regions. Because of their physical detachment, absent heirs are prime targets for developers seeking to purchase heirs’ interest in order to force judicial partition sale of coastal property. See discussion infra, Section V: Conclusion.
302 See DUKEMINIER AND KRIER, supra note ___, at 44.
303 See Margaret Radin, Property and Personhood, 34 STANFORD L. REV. 957 (1982).
304 Radin, supra note ___, at 950 (1982).
In the heirs' property context, there is a melding of historically significant heirlooms and homesteads that warrant recognition of the personhood of property. Radin notes that the law considers the personhood perspective when it provides special protection for the "sanctity of the home" in contexts ranging from liberty and privacy protections to the tenant protection provisions. Radin suggests that the significance of someone's relationship with an object may be gauged "by the kind of pain that would be occasioned by its loss." Under Radin's scale, "an object is closely related to one's personhood if its loss causes pain that cannot be relieved by the object's replacement...[and] perhaps no amount of money can do so." The significance of the loss family homesteads in the heirs' property context was articulated by one heirs' property owners forced to move away from his ancestral lands.

Johnny Rivers stops for a moment and shakes his head. "Never wanted to be anywhere else...I thought I would die here."...The land is an index of memories linked to the threes, the sulphur smell of the marsh, the wind blowing through the Spanish moss. He feels that link breaking, the memories slipping away. "I feel the loss in my bones," he says. "I feel like a part of my body is gone, but I'm still living."

Radin suggests that the personhood perspective could "serve as a explicit source of values for making moral distinctions in property disputes." When property is "more closely connected with personhood," she argues there should be a higher level of protection, "so that decision makers within the social context can use the dichotomy as a guide to determine which property is worthier of protection." Radin observes that the legal system characteristically uses "standards of review and burdens of proof to shift the risk of error away from protected interests in personal property."

This theory could inform and enhance consideration of heirs' property cases in courts of equity. When occasioned to consider competing claims between descendant heirs and developers who have purchased an heirs' share, the personhood perspective should lead courts to recognize the "stronger moral claim [of personal property] than other property." Compared to the fungible monetary interests of a developer, Johnny Rivers' "loss in my bones" would have been worthier of protection. Certain state courts have begun to protect personhood property in partition proceedings in other contexts, but none have utilized this theory to protect heirs' property to date.

305 Radin, supra note ___, at 969 (1982).
306 See Radin, supra note ___, 990-993 (1982).
307 Radin, supra note ___, at 950 (1982).
308 Radin, supra note ___, at 960 (1982).
309 Bartelme, supra note ___, at A1; see also, Chandler, supra note ___, at 387 (2005).
310 Radin, supra note ___, at 957 (1982).
311 Radin, supra note ___, at 979 (1982).
312 Radin, supra note ___, at 1005(1982).
313 Radin, supra note ___, at 978 (1982).
314 See discussion, infra, Section III(A): Legal Reform: A New Trend in the Courts – Preserving Cotenant Property
As scholars and lawmakers consider reform efforts to stabilize heir property ownership; however, they should remain cognizant of the externalities that Demsetz accurately identified. Reform efforts should redefine these communal property rights so that externalities are reduced (by the internalization of costs and benefits, elimination of the free-rider and hold-out problems, and the reduction of negotiation costs and legal fees). Yet the utilitarian theory of maximizing property use should remain subject to the unique, personal nature of historic family lands to heirs' property owners.

While some law and economics theorists would suggest that the law's current solution of partition sale of heirs' property is the most efficient way of eliminating the disadvantaged nature of communal property, this approach applies a hatchet to the heirs' property conundrum, rather than the finely honed scalpel that the law provides in many other contexts. It is quite possible to meld Desmetz's utilitarian and Radin's personhood approaches to heirs' property and sculpt a series of reforms that share the burden of property responsibility commensurate with the benefits of property ownership.

C. PARTITIONING HEIRS' PROPERTY

1. Partition Sales & Land Loss

In legal terms, partition is the mechanism by which concurrent owners terminate a cotenancy. In the world of real estate development, partition is known as a mechanism to acquire land that is not otherwise for sale. While the concept of partition has its roots in English common law, the remedy took on a different character in the United States. In England, the remedy of partition operated in a different fashion. At common law, coparceners (who like heirs' property owners inherited their common interest through intestate succession) gained the right to divide land amongst themselves through partition in kind in order to "rid themselves of this unwelcome association by physically dividing the land in question into separate parcels." Eventually, joint tenants and tenants in common gained the ability to seek partition through the courts of chancery (thus empowering cotenants to impose partition through the court).

In determining whether partition would be available in South Carolina, the case of Pell v. Ball determined that the court of equity was empowered to order partition by sale for both testate and intestate estates. In this landmark decision confirming the court of equity's jurisdiction over testate and intestate estates, Chancellor Harper made observations about the nature and availability of land as the justifying context for the court's decision to partition the estate by sale:

"[i]t seldom happens that men will insist on a specific partition of land, as most people are glad, in the abundance of land, to get the proceeds of sale, and purchase for themselves. "320 This perspective of land as a freely alienable and fungible commodity does not comport with the African-American conception of land,321 and belie the current market conditions in growth areas. In rapidly developing areas, there is no longer an "abundance of land" and many tenants in common – particularly heirs in possession and those who have taken responsibility for the property – are not satisfied to get a monetary sum from sale proceeds.322 Nevertheless, South Carolina's law of partition of tenancy in common real property is built upon the foundations of Chancellor Harper's "abundance of land" perspective, the opinion's presumptive disregard of the personhood of family property remain.

Like other states, South Carolina’s modern partition statute323 authorizes equity courts to make partition in kind or by allotment. Courts may order sale of the land if partition in kind or by allotment "cannot be fairly and impartially made and without injury to any of the parties in interest."324 Case law affirms broad authority to partition in kind or by allotment,325 and places the burden of proof on the party seeking a partition sale to show that partition in kind is not practicable or expedient.326 There are a number of common circumstances that give rise to a finding that division "cannot be fairly and equally made" – such as a large number of cotenants seeking to divide a relatively small parcel of land, or the inability of the family to agree on physical division of the property.327 Additionally, heirs may disagree on whether the land should be divided among themselves or sold.

Many times, partition lawsuits are brought by outside developers who have acquired an heir’s interest, or the suits are funded by developers who have established an agreement to purchase the property pursuant to negotiations with an heir.328 Through the courts of equity,
developers can legally purchase an entire tract of heirs’ property and gain equal right to possession, no matter how small an interest they originally acquired, and without regard to the wishes of the majority of the other heirs. Tax Court judges have observed that “[t]here are few arm’s-length sales of fractional interests in property.”  

This is certainly true in the heirs’ property context. Typically, a court-ordered sale draws less than optimal market value because of the forced, timed conditions of the court sale. In these situations, developers who force partition sales are able to capture the property at bargain prices and realize high financial gains when the land is sold at a higher price with consolidated title. In these instances, heirs’ property owners not only lose their land, and often the family homestead, but also fail to capture the economic value of the land in the “fire sale” forced by the courts of equity.

According to The Emergency Land Fund, “a sale for partition and division is the most widely used legal method of facilitating the loss of heir property” within the African-American communities served by the organization. This finding has been supported by stories of both partition-seeking developers and land loss victims. In a presentation on heirs’ property to South Carolina Masters in Equity, State Representative Thayer Rivers expressed concern for the African American landowners in his district and recounted stories of developers frequenting Lowcountry nightclubs with the intention of finding heirs in a compromised state who would sign away their interests. Armed with an heir's interest, the developers could then initiate a partition sale. Having witnessed the development pressures in this community, Rivers recently remarked that heirs' property is very popular with developers – “[i]t grows Yankees and golf courses just fine.”

2. PARTITION IN KIND & BY ALLOTMENT

Subdividing land between family members through suits to partition in kind provides an opportunity for family members to maintain some or all of their property and to protect their land

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330 See generally, id.
331 See Chandler, supra note __, at 387 (2005) (Noting that the court ordered Johnny Rivers’ family to accept an offer of $910,000 for 17 acres of land along Clouter Creek on the Cainhoy peninsula. Despite claims that the offer represented “the full appraised value” for the property, the purchaser put the land back on the market eight months later for $3,000,000. Five years later, Chandler reports: “[t]he seventeen acre tract has been subdivided into ‘Pinefield Plantation.’ A recent search of properties for sale in the new subdivision turned up a five thousand square foot mansion on a .3 acre lot with a deep water dock selling for $2.5 million dollars. A second property included a .29 acre tract, a 4,900 square foot house, and a deep water dock available for just over two million dollars.”
332 Mitchell, From Reconstruction to Deconstruction, supra note __, at 511 (citing The Emergency Land Fund, The Impact of Heir Property on Black Rural Land Tenure in the Southeastern Region of the United States 273 (1984)). In a more recent article, Mitchell challenges these assertions and implores legal scholars to undertake empirical research in order to document the extent and mechanism for land loss. Nevertheless, the personal experiences of practitioners and policy leaders, as well as press stories and attendant land records provide supporting documentation of the experience noted by The Emergency Land Fund and its successor Federation of Southern Cooperatives.
333 State Representative R. Thayer Rivers, Jr., Esq., Presentation at the South Carolina Bar Masters in Equity Bench Bar Continuing Legal Education Seminar (October 11, 2002). (Materials and notes on file with the author.) Rep. Rivers established a legislative task force to explore strategies to preserve heirs’ property in South Carolina.
334 Gisick, Mike, Law ‘Waves’ as Black Families Lose Land: Problem Acknowledged, but Little Else, Advocates Say, BEAUFORT GAZETTE, August 17, 2006, at __.
by establishing clear title to the property. Courts are said to favor partition in kind over a partition by sale. Where one cotenant seeks to maintain the real property, a court may utilize partition by allotment to allow one cotenant to buy-out other cotenants through payment of the appraised value. As with partition in kind, partition by allotment is said to be statutorily preferred over judicial sale of property in concurrent ownership.

Notwithstanding the statutory preference for partition in kind or by allotment, commentators observe that most partition actions result in sale of the property. POWELL ON PROPERTY notes the conflict between the supposed preference for partition in kind over partition sale:

It is the author's considered judgment, unsupported by any actual statistical data, but amply supported by long years of practice, that division in kind has become actually infrequent of occurrence. Lip service is still given to the historical preference for physical division of the affected land, but sale normally is the product of a partition proceeding, either because the parties all wish for it or because courts are easily convinced that sale is necessary for the fair treatment of the parties.

There has been little recognition of this admitted conflict in the posture of courts as they administer the law of partition. When courts pay only "lip service" to the statutorily imposed preference, developers are able to utilize the partition mechanism to gain title to heirs' property.

D. THE DISTORTED ECONOMICS OF PARTITION SUITS

1. THE LOGISTICS OF PARTITION SUITS

The institution of a lawsuit for partition in kind or by sale can promote discord within families. In many circumstances, heirs are unaware of the impaired state of the title to their land and do not understand the risks of sharing title as tenants in common. Due to popular

335 __________, 2 AMERICAN LAW OF PROPERTY, §§pp. 112-14. See Anderson v. Anderson, 382 S.E.2d 897 (S.C. 1989) (concluding that in kind partitions are appropriate only where they may be made does not vary the statutory preference for in kind partition.); Brown v. Borger, 139 S.E.2d 577 (N.C. 1965) (partition in kind is favored and will be ordered, even though there may be some slight disadvantages in pursuing such methods; but may not be used to injure another), Anderson v. Anderson, 108 S.E. 907 (Ga. Ct. App. 1921) (partition in kind is the rule and section 44-6-166.1 constitutes the exception to that rule.).


337 BLACK'S LAW DICTIONARY (8th ed. 2004).


339 DUKEMINIER, supra note __, at 296. "Although it is usually said, as in Delfino v. Vealencis, that partition in kind is preferred, the modern practice is to decree a sale in partition actions in a great majority of cases, either because the parties all which it or because courts are convinced that sale is the fairest method of resolving the conflict."

340 POWELL, supra note __, §612 (1968).

341 See discussion, supra Section III(C): The Tragedy of Tenancy in Common, citing series of widely-held myths
misconceptions about the security of heirs' title, many heirs do not believe that they can lose their land and have done nothing when served with legal documents. In addition, both hostile and conciliatory actions require that heirs sue one another. Even where families agree to take affirmative steps to clear title to land, all non-petitioning heirs must receive summons and complaints naming them as defendants against the filing heir. The perceived hostility of these legal actions presents challenges for family dynamics. Partition cases involving dozens of heirs are time consuming and expensive. Notice must be provided through actual service to all known addresses, and unknown heirs must be notified through publication. Moreover, guardians must be appointed to represent the interests of minor children or incompetent individuals.

Heirs seeking to maintain or partition land in kind may not have sufficient capital resources to procure private legal assistance. The substantial litigation expenses required to clear title to property are more readily funded by interest holders seeking to force sale of the land for private development. Estimates of the cost of a straightforward partition suit range from $10,000 - $15,000, and the cost of contested actions can rise significantly higher. Most statutes provide that attorney's fees can be recovered from sale proceeds, either from the share allotted to the attorneys' respective clients, or from the common pool. A cotenant holding a miniscule interest can initiate suit and recover fees for legal representation from the common pool. This significant shift of externalities exploits the commons. Traditionally, a court of equity would apportion the plaintiff's attorney's fees between all of the heirs, based upon the theory that "all parties receive a common benefit from the labors of the plaintiff's attorney in

about heirs' property ownership.


343 Publication costs may be greatly reduced if the suits are maintained by nonprofit, legal aid providers. For example, the Center for Heirs' Property Preservation has negotiated a nonprofit publican rate for low-income clients from the Charleston Post & Courier.


345 See S.C. CODE ANN. 15-61-110 (2006) which provides that the court may set attorneys fees "as may be equitable" and assess fees against "any or all" of the parties in interest; S.C.R.C.P. 81(d)(3) instructs that "attorneys fees and costs may be awarded the attorney for any party(s) from any common fund generated by the partition to the extent that attorney's efforts benefited all parties; otherwise, his fee shall be paid by the party(s) he represents or from the party(s) share(s) only. The court may order the payment of costs from the proceeds of sale of the common property or may equitably assess the costs against shares of the parties." (emphasis added) (there is no emphasis—do you mean alterations?); Cashin v. Markwalter, 67 S.E.2d 226 (Ga. 1951) (court may make an award for attorneys' fees from the common fund in an equitable proceeding for partition, although applicants are not entitled to have attorney's fees awarded from the common fund in actions at law); Hinnant v. Wilder, 29 S.E. 221 (N.C. 1898) (costs in proceedings for partition, including the expenses of the partition are charges upon the several shares in proportion to their respective values); but see Walker v. Walker, 467 S.E.2d 583 (Ga. 1996) (petitioner not entitled to an award of attorneys fees and expenses since the statute providing for such actions do not provide for attorney fees and expenses and such an award was not authorized if the case was considered one at law).

346 See GA. CODE ANN. § 44-6-166.1(f) (2006) (“Petitioners and parties in interest shall be liable for costs of the sale and proceedings related thereto … in proportion to their respective shares in the property prior to that sale.”).

AL Code §35-6-54 (2006) (The probate court must ascertain the costs and expenses attending the division, and make a record thereof, stating distinctly each item of such costs and expenses; and if the same are not paid within 30 days after the allotment, an execution may be issued against each of the persons to whom the land was allotted).
effectuating the partition..." In effect, however, this theory presumes that heirs who are ejected and lose their interest in ancestral lands receive some benefit from having their interests liquidated into cash.

Some attorneys handle heirs' property cases on a contingency fee basis, akin to personal injury recovery. These fee arrangements presuppose the ultimate sale of the land in order to generate funds that can be used to pay attorneys' fees. Land preservation advocate Emory Campbell has suggested that contingency fee arrangements might discourage attorneys from working out an amicable resolution between the heirs. Interestingly, one South Carolina equity court even directed the sale of a portion of land in order to fund attorney fees in a case where family members had abandoned their pursuit of partition.

Cotenants who object to the sale of the property do so at their own financial peril, as they must finance the costs of the suit filed against them when fees are assessed against the common fund prior to allocation and distribution of cotenant interests. Given the expense and perceived futility of objecting to a demand for partition sale, many sales of heirs' property are facilitated outside of the courts because of the threat of partition inside the courts of equity. Practitioners observe that "quite often co-owners will not fight the [partition] action and usually they will agree to a sale strategy...." Instead of allowing petitioners' legal expenses to be imposed upon heirs who object to the partition sale, courts should decline to assess costs of the partitioning party against the pool that remains for the objecting heirs.

2. MARKET VALUATION OF TENANCY IN COMMON PROPERTY

Though partition is a common avenue to divide concurrent ownership, the varying concurrent estates represent distinct forms of ownership with significant implications for the establishment of fair market value of real property. Although joint tenants and tenants in common share the title of "cotenants," the nature of each estate is inherently different. These dissimilar estates should be considered separately when courts are valuing interests for the purpose of determining the "best interests" of all owners in partition suits. Joint tenants are regarded as a single owner; each tenant owns the undivided whole of the property. Consequently, joint tenants have the right of survivorship, so that when one tenant dies nothing

347 POWELL, supra note __ at §611.
348 In the Wheat family partition suit, attorney William D. King, who initiated this suit, collected $104,740 in fees and expenses, constituting 20 percent of the partition sale proceeds. Family members who contested the action also incurred attorney's fees, which were deducted from the remaining $389,170. The remainder was divided among the 96 heirs, who declined to appeal because they could not afford the legal fees." Lewan, Todd and Barclay, Delores, Developers and Lawyers, supra note __.
349 See Bartelme, supra note __, at A9 ("Because they get a percentage, some attorneys don't cooperate as much as they should and take a hard-line legal approach.").
350 Briggs v. Jackson, 273 S.E.2d 531 (S.C. 1981). South Carolina Supreme Court unanimously held that no abuse of discretion resulted from directing the sale of a portion of the property at issue in a partition action after the parties requested an indeterminate delay in the partition, rendering it indefinite as to when, if ever, the action would be concluded. "This action on the part of the parties cannot operate to deprive counsel of his fees." Id. at __.
351 Rothermich, supra note __. This observation has implications for empirical research, as court records would be devoid of any cotenant objections. Cf., Mitchell, Destabilizing the Normalization, supra note __, at 600-602, 608-609.
passes to the surviving joint tenants, who were previously seised of the whole property at the
time of the original conveyance. Thus, prior to partition, this form of ownership represents an
undivided interest in a whole, unfractionated parcel.

By contrast, each tenant in common holds an undivided share of the whole. Tenancy in
common only requires unity of possession, meaning that "each cotenant should have an equal
right of possession and enjoyment with respect to the whole tract of property" (thus termed
"undivided"). However, tenants in common are never seised of the whole property, and their
ownership interests are only fractional shares. This distinction has been overlooked by scholars
and legislatures considering partition provisions, as well as courts seeking to implement partition
as an equitable remedy – to the disadvantage of countless heirs' property owners.

Most statutes consider market value, either explicitly or implicitly, in assessing the
feasibility and efficacy of partition remedies. In the Southeastern region, South Carolina
considers the "pecuniary interest of all the parties" and Alabama similarly looks to "promoting
the interests of all cotenants;" while North Carolina and Georgia explicitly focus on fair
market value, specifying that partition by sale may be ordered if the fair market value of divided
lots is less than the fair market value of the whole parcel.

While consideration of the market value of the whole parcel would be appropriate in a
partition action between joint tenants who hold an undivided interest in the whole property,
applying this formula in equity gives a windfall to the petitioning tenant in common. The tenant
in common is never seised of the whole of a parcel of property, thus the market value to which
the petitioner is entitled should be limited to the discounted value of a fractional share of a
divided parcel. Providing for partition sale when the market value of an entire parcel would be
reduced by division essentially guarantees that small farms and moderate suburban tracts will
inevitably be sold because the value of whole typically exceeds the sum of the parts.

This distinction between the forms of concurrent interests has been noted in the estate tax
area. Calculation of estate taxes is based upon the market value of an asset. When assessing the
market value of a fractionated interest in real property, a series of discounts may be applied to

352 Dukeminier supra note __, at 276.
354 South Carolina Rule 71(f)(4), SCRCP ("... if it shall appear to the court that it would be more for the interest of
the parties interested in the . . . property that it should be sold and the proceeds of sale be divided among them, then
the court shall direct a sale to be made upon such terms as the court shall deem right."). Moreover, the S.C.
Supreme Court notes that "pecuniary interests of all the parties" is the determining factor. Zimmerman v. Marsh,
355 Ala. Code § 35-6-56 (2006) (Alabama will order a sale if that remedy would "better promote the interests of all
cotenants."); see also Ga Code Ann. § 44-6-166.1(b) (2006), (if "value of the entire
property will be depreciated by the partition ap
dled for," sale may be ordered); Stone v. Benton, 371 S.E.2d 864 (Ga. 1988).
357 Estate Tax Regulations define fair market value "as the price at which the property would change hands between
a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under
reflect the various problems that arise from this form of asset ownership as tenants in common. 359

According to the Internal Revenue Service, the valuation of interests in property is a "matter of fact, to be resolved on the basis of the entire record." 360 Property owners have claimed, and courts have recognized discounts for fractionated interests in real property held by tenants in common. 361 In Estate of Julian H. Barclay, the Tax Court acknowledged the long-standing practice of deducting a percentage for fractional undivided interests and noted the underlying rationale for the discount: "[t]he reason given for this deduction is the additional inconvenience of dealing with several owners, the possibility of minor heirs, partition suits, and disagreement of several owners." 362 From this early period, Courts have consistently allowed significant discounts to reflect the "partially locked-in position of the interest" of tenants in common. 363 In Propstra v. United States, the Ninth Circuit acknowledged that "the holder of an undivided interest in property would have to secure the consent of the owner or owners of the remaining interests before being able to sell as a unity. This factor alone could affect valuation..." 364 In recent years, the Courts have affirmed that the "locked-in position" that results from tenancy in common ownership of fractionated interest warrants a discount from the market value of a fractionated interest in real estate: "[a] fractionalization discount accounts for the fact that the sum of all fractional interests in property is worth less than the whole." 365 In addition, the discount reflects the difficulty inherent in ownership of fractionated interests in property:

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359 See Alvin L. Arnold and Myron Kove, Real Estate Professional's Tax Guide Database, Par 7 Chapter 51 §51.5: Valuation of Interests in Real Estate (updated December 2006); David J. Deitrich, Mandatory Sales of Joint Ownership Property Under the Revised Uniform Partnership Act, 18 Oct. Prob. & Prop. 9, 12 (September/October 2004).

360 TAM 199942004, 1999 WL 98077—(this is a slip opinion of the US S. Ct) (ITS TAM), citing Estate of Bonner v. United States, 84 F.3d 196, 197 (5th Cir. 1996), Cervin v. Comm’r, T.C.M. 1994-550, 558, rev’d on other issue, 111 F.3d 1252 (5th Cir. 1997).

361 E.g., Propstra v. United States, 680 F3d. 1248 (9th Cir. 1982) (Court approved fractional interest discount where appraiser's testimony showed that the value of an undivided, fractional interest in real property would be less than a proportionate share of the fair market value of the whole, and rejected Government argument that the estate should be required to prove that the interests would in fact be sold apart from the other undivided one-half interest.), see also, L. ARNOLD AND MYRON KOVE, Real Estate Professional's Tax Guide Database, Par 7 Chapter 51 §51.5: Valuation of Interests in Real Estate (updated December 2006) ("A discount which applies most frequently to real estate is the discount for fractional ownership"....which "is applicable when real property is owned by different interests as tenants in common").

362 Estate of Barclay v. Comm’r, 2 B.T.A. 696, 697 (1925) (Notwithstanding its approval of the discounting practice, the Court denied the discount because testimony disclosed that some sales of undivided fractional interests brought a value equal to or in excess of the aliquot portion of the value of the entire parcel and the Estate had not offered any “actual evidence” of value other than this practice of New York real estate dealers and transfer tax authorities.)

363 SIDNEY KESS (Consultant), ALAN D. CAMPBELL (Revision Editor), CCH FINANCIAL AND ESTATE PLANNING GUIDE (13th Ed.) §324 (2001).

364 Propstra v. United States, 680 F3d. 1248, 1252 (9th Cir. 1982).

365 Estate of Baird v. Comm’r, 416 F.3d 442, 444 (5th Cir. 2005).
A fractionalization discount… also takes into account the restrictions on sale or transfer of the property when more than one person or entity holds undivided fractional interests in the property. “Potential costs and fees associated with partition or other legal controversies among owners, and a limited market for fractional interests and lack of control, are all considerations rationally related to the value of an asset.” (Citing Bonner, 84 F.3d at 197-198.)

While the Tax Court has affirmed the fractionalization discount for tenants in common, the court has recognized that this form of ownership is intrinsically different than joint tenancy. In Estate of v. Commission, the Tax Court denied market value discounts for property held in joint tenancy. The court distinguished the nature of the two concurrent estates, noting that joint tenants acquire their interest at "the devise or conveyance by which the joint tenancy was first created…," rather than from other concurrent owners. At the moment of death, "the decedent's interest in the property is extinguished, with the joint tenancy automatically passing to the surviving joint tenant by the operation of law…"

The fractional interest discount, as applied in section 2033, is based on the notion that the interest is worth less than its proportionate share, due in part to the problems of concurrent ownership. These problems are created by the unity of interest and unity of possession. However, at the moment of death, the co-ownership in joint tenancy is severed, thus alleviating the problems associated with co-ownership.

The Internal Revenue Service has consistently recognized a discount for the cost of partition as "one method" of determining the value of fractionated interest, but had previously opposed additional discounts beyond the direct litigation costs. The Service has been soundly rebuffed by the courts, which have ruled in favor of tenants in common seeking discounts for fractionated interests, minority interest (lack of control) and lack of marketability, over and above the costs of a partition suit.

All of these valuation challenges arise in the context of heirs' property. Fractionated interests, lack of control and marketing difficulty plague heirs' property transactions – even when

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366 Id.
368 Id.
369 Id.
370 Id.
371 TAM 199942004, 1999 WL 98077 (ITS TAM).
372 E.g., Baird, 416 F.3d 442 (Court ruled that the IRS position that the discount ought be limited to the cost of partition was not "substantially justified" and ordered the Service to pay attorney's fees for the complaining taxpayer.)
373 L. ARNOLD AND MYRON KOVE, REAL ESTATE TRANSACTIONS – Structure and Analysis with Forms Database, Part IV: Ownership Concerns Chapter 19 – Valuation of Real Estate §19.34 – Fractional Interest Discount (updated December 2006) ("Although the IRS has generally opposed the discount for fractional interests in real property, the courts have been consistent in recognizing such discounts."); see also, David J. Deitrich, Mandatory Sales of Joint Ownership Property Under the Revised Uniform Partnership Act, 18 Oct. Prob. & Prop. 9, 12 (September/October 2004).
the parties are limited to families. The Tax Court forthrightly acknowledged that families may disagree about the disposition of property and applied the lack of control discount even when tenancy in common interests are shared only among family members.\textsuperscript{374} In *Estate of Baird*, the Tax Court noted that the family had experienced prior disagreement and inefficient management of the fractionated interest in the property, and applied a significant discount, repeating the court's disagreement with the IRS's "family attribution" doctrine\textsuperscript{375} that sought to consider (and reduce) valuation discounts when interests were shared among family members of a decedent.\textsuperscript{376}

Real estate development practitioners routinely encounter costs associated with assembling parcels for consolidation and development. When dealing with multiple lots, real estate developers are challenged to locate and convince all parties to agree to the transaction, and to make provision for any individuals living on the property that will be sold. Developers expend significant amounts on "leg work" to clear and prepare a parcel for development.\textsuperscript{377} In courts of equity, however, partitioning heirs and developers are able to have judges do these tasks for them. This provides increased value to the petitioning tenant in common who was not able to assemble the complete parcel outside of the compulsory court process. Moreover, the petitioner is able to assess their development costs (legal fees, surveys, and appraisals) on the common pool of resources derived from the sale. Much like the perception of events that led to the controversial *Kelo v. New London*\textsuperscript{378} case, heirs who seek to maintain their ownership of their property may object that partitioning heirs and their supporting developers are able to execute a form of private condemnation through the auspices of government courts that can force a transfer of property against an owner's will.

Outside of equity, courts have readily acknowledged the reduced value of a fractionated interest and instituted the discount method to more accurately assess the value of a parcel. Tax courts acknowledge that "the sum of all fractional interests in property is worth less than the whole,"\textsuperscript{379} but courts of equity apply this formula in a manner that disregards the nature of the tenancy in common interest in property. While tax courts assess a discount to account for the fractionalization burden \textit{at the time of valuation}, courts of equity ignore the factor of time and conversion. In partition sales, courts of equity consider the \textit{post}-consolidation value at the \textit{pre}-partition stage. Thus, heirs who seek to buy out other cotenants are required to pay a premium (for a proportion of the enhanced whole property value) that the partitioning cotenant has not yet earned by assembly parcels, nor gained in the absence of a clear deed.

\textsuperscript{374} See Lefrak v. Comm'r, 66 T.C.M. (CCH) 1297 (1993) (44% discount for lack of marketability, control and for fractional interests); DAVID L. DEITRICH, Mandatory Sales of Joint Ownership Property Under the Revised Uniform Partnership Act, 18 Oct. Prob. & Prop. 9, 12 (September/October 2004), quoting BUSCH V. COMMISSIONER (79 T.C.M. (CCH) 1276 (2000) (Court rejected IRS assumption that co-owners will participate to voluntarily dissolve or partition property: "[w]e do not accept respondent's argument that no discount should be employed because the co-owners were cooperative and jointly sought to find a buyer for the Busch property. That is a matter of conjecture, and if a buyer purchased decedent's one-half interest, there is no showing here that decedent's sister-in-law's trust would have cooperated with any co-owner, including decedent's estate." The Court affirmed a 10% discount.)

\textsuperscript{375} See Estate of Bright v. United States, 658 F.2d 000 (5th Circ. 1981)(en banc).

\textsuperscript{376} See *id.*

\textsuperscript{377} [Real Estate Text Citation.]


\textsuperscript{379} *Baird*, 416 F.3d at 444.
IV. **RESTORING THE BUNDLE OF RIGHTS THROUGH LEGAL & LEGISLATIVE REFORM**

A. **LEGAL REFORM: A NEW TREND IN THE COURTS -- RECOGNIZING THE PERSONHOOD OF HEIRS’ PROPERTY**

In recent years, three state courts have acknowledged the "tragedy of tenancy in common" in the context of landowners challenging demands for partition sales. These courts heeded the landowners' claims of personhood interests in common property. In response, these courts declined partitioners' demand for sale and provided either partition in kind or by allotment, enabling the possessory heirs to maintain their property.

1. **Family Land Preservation in Vermont**

In Wilks v. Wilks, an out of possession cotenant holding a 1/8 interest sued his brother for partition of a one acre parcel of family property. The Vermont Supreme Court upheld a lower court's order refusing a request for partition by sale and assigning one cotenant's interest to the other in exchange for fair market value compensation. Reviewing the Vermont statutory scheme of partition, the court noted that partition by "forced judicial sale" is "strongly disfavored" and last in priority of options available to the court. The court summarized the order of options, noting that "partition in kind is preferable to assignment, and assignment is preferable to sale." The court was unmoved by arguments that judicial assignment between cotenants would result in arbitrary choices, referencing the court's experience with equitable distribution in the context of divorce, one of "many occasions were courts are routinely called upon to weigh the equities and award property to one party among several, even in cases where two parties have an equal claim to the property at issue."

The Vermont Supreme Court articulated a family land preservation policy in support of its affirmation of the assignment option. The court stated that "[f]orcing partition by sale when more than one cotenant is willing to take assignment of the property could result in unnecessary forced divestment of numerous family farms." In addition, the court cited the dissenting opinion of former Hawaii Supreme Court Chief Justice Richardson discussing the importance of favoring partition in kind in Hawaii where, "because of history, the retention of land ownership in one family line is an important interest worthy of preservation and diligent protection."

Significantly, the Court acknowledged the research of Professor Phyliss Craig-Taylor regarding the disproportionately

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381 The Vermont provision for assignment is equivalent to allotment in other jurisdictions. Both remedies provide a right of first refusal for cotenants.
383 Wilks, 795 A.2d. at 1194.
384 Id. 487
387 Id (quoting Chuck v. Gomes, 532 P.3d 657, 661 (Haw. 1975)).
negative impact of forced partition sales on African American heirs' property owners. Rather than ignore the practical implications and unjust outcomes that could result from forced partition sales, the court stated:

It is not hard to imagine siblings who, although they may have limited resources which enable them to buy out a cotenant's share in the family farm, could not outbid a developer if forced to put the property up for public auction. Interpreting § 5175 to mandate such an outcome is contrary to the public's interest.

Here the court acknowledged that a lower price can and should be paid in an assignment transaction between cotenants. The court took particular umbrage to the forced partition sale development strategy and admonished that courts "should not facilitate such behavior by disregarding the preference given assignment to judicial sale in our statutory scheme." In a statement of rural land preservation policy, the court stated that the policy disfavoring forced sale "assumes more importance in the face of the increased pressures on rural landowners to sell land."

2. Protecting Ancestral Homelands in West Virginia

The West Virginia Supreme Court recently affirmed the importance of the personhood of property. In the case of Ark Land Co. v. Harper, the court reversed a lower court order forcing a partition sale of the Caudill family's ancestral home. Noting that the family had owned the property for nearly 100 years and had maintained an ancestral home on the land and observing that the Ark Land Company acquired a majority share of heirs' interests just three years prior and instituted the partition action only after the remaining heirs refused to sell their ownership rights, the court ordered an in kind division of the property, rather than sale. In so doing, the Court acknowledged the tragic realities of forced partition sale and embraced consideration of the personhood of property.

Partition by sale, when it is not voluntary by all parties, can be a harsh result for the cotenant(s) who oppose the sale. This is because "[a] particular piece of real estate cannot be replaced by any sum of money, however large; and one who wants a particular estate for a specific use, if deprived of his right, cannot be said to receive an exact equivalent or complete indemnity by the payment of a sum of money."
The court articulated the standard of proof that must be established to overcome the statutory presumption of partition in kind, holding that while it is a “fair test” to consider “whether the aggregate value of the several parcels into which the whole premises must be divided will... be materially less than the value of the same property if owned by one person,” the economic value of the property is not the only factor to be considered.

In view of the prior decisions of this Court, as well as the decisions from other jurisdictions, we now make clear and hold that, in a partition proceeding in which a party opposes the sale of property, the economic value of the property is not the exclusive test for deciding whether to partition in kind or by sale. Evidence of longstanding ownership, coupled with sentimental or emotional interests in the property, may also be considered in deciding whether the interests of the party opposing the sale will be prejudiced by the property's sale. This latter factor should ordinarily control when it is shown that the property can be partitioned in kind, though it may entail some economic inconvenience to the party seeking a sale. (Emphasis added)

(Footnote added). The court distinguished prior decisions that defined the "test of convenience" in partition as whether "any interest assigned be materially less in value than the interest undivided," and noted that the state's partition statute had been revised to add a requirement that a sale "not

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394 Harper, 599 S.E.2d at 759; see also Taylor, supra note 33, at 743–44. ("The laws in all jurisdictions 'appear to reflect this longstanding principle by providing a presumption of severance of common ownership in real property by partition in-kind . . .").

395 The court summarized the state partition statute as follows: "W. Va.Code § 37-4-3 provides that "a party desiring to compel partition through sale is required to demonstrate [(1)] that the property cannot be conveniently partitioned in kind, [(2)] that the interests of one or more of the parties will be promoted by the sale, and [(3)] that the interests of the other parties will not be prejudiced by the sale." Harper, at 759.

396 Id. at 760. (quoting, Croston v. Male, 49 S.E. 136, syl. pt. 6 (W. Va. 1904) (But see discussion of valuation in partition suits, supra, Section III(D): The Distorted Economics of Partition Suits).

397 See Harper at 760.

398 The opinion noted that other courts have also found that monetary consideration is not the only factor to contemplate when determining whether to partition property in kind or by sale, citing Eli v. Eli, 557 N.W.2d 405 (S.D.1997), (holding that the lower court "erroneously relied upon the fact that the property would be worth less if partitioned in kind," and stating that "[m]onetary considerations, while admittedly significant, do not rise to the level of excluding all other appropriate considerations.... The sale of property "without [the owner's] consent is an extreme exercise of power warranted only in clear cases... especially so when the land in question has descended from generation to generation;" Leake v. Casati, 363 S.E.2d 924, 927 (Va. 1988) ("Even evidence that the property would be less valuable if divided [has been] held 'insufficient to deprive a co-owner of his 'sacred right' to property."), (quoting Sensabaugh v. Sensabaugh, 349 S.E.2d 141, 146 (Va. 1986)); Harris v. Harris, 275 S.E.2d 273, 276 (N.C. App. 1981) ("[M]any considerations, other than monetary, attach to the ownership of land."); Schnell v. Schnell, 346 N.W.2d 713, 721 (N.D.1984) (finding sentimental attachment to land by co-owner was sufficient to prevent forced sale by other co-owner); Delfino v. Vealencis, 436 A.2d 27, 32 (Conn. 1980) ("The [trial] court's... observations relating to the effect of the defendant's business on the probable fair market value of the proposed residential lots ... are not dispositive of the issue. It 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 tenants."); Fike v. Sharer, 571 P.2d 1252, 1254 (Or. 1977) ("[S]entimental reasons, especially an owner's desire to preserve a home, may also be considered [in a partition suit].").

399 Harper, at 763, (quoting Garlow v. Murphy, 163 S.E. 436 (W. Va. 1932)).
prejudice the interests of a co-owner. Accordingly, though partition in kind would impose an additional economic burden on cotenant Ark Land Company, this fact was "not determinative" under the facts of the case. The additional cost to Ark Land Company "does not impose the type of injurious inconvenience that would justify stripping the Caudill heirs of the emotional interest they have in their ancestral home.

3. Moving Beyond "Lip Service": Partition by Allotment in South Carolina

In the case of Zimmerman v. Marsh, the South Carolina Supreme Court overturned a master in equity's order for partition sale and granted a cotenant's request for partition by allotment, thus allowing the defendant to purchase the partitioning cotenant's interest at an average of the appraised value. The court reviewed the state's partition statute and court rules which together establish the partition process, articulated the statutory preference for partition by allotment over judicial sale, and noted that the laws enable the court to determine what form of partition (by allotment or sale) is "more for the interest of the parties." The court indicated that allotment would be ordered "if it shall appear to the court that it will be for the benefit of all parties...that [the property] be vested in one or more of the persons entitled to a portion of it, on the payment of a sum of money...."

The case involved competing claims between cotenants in a single beach house and lot. The plaintiff had originally acquired the house as a cotenant with an unrelated party who subsequently sold his interest to the Zimmermans. Within minutes of recording the new deed, the Zimmerman's filed the partition action.

At trial, five differing appraisal values were introduced, along with the defendant’s testimony about the duration of her ownership and the sentimental attachment she had for the property. The court observed that Mrs. Zimmerman had been a real estate agent in the area for

400 Harper, at 763.
401 Id. at 760.
402 Id. at 762. (The majority and defense opinions note that no one lives permanently at the homestead) See id.
403 POWELL, supra note __, §612 (1968).
405 The South Carolina statute provides that the court has jurisdiction "to make partition in kind or by allotment to one or more of the parties upon their accounting to the other parties in interest for their respective shares or, in case partition in kind or by allotment cannot be fairly and impartially made and without injury to any of the parties in interest, by the sale of the property and the division of the proceeds according to the rights of the parties." S.C. CODE ANN. §15-61-50 (2006).
406 S.C. CODE ANN. §15-61-50 -- § 15-61-100 (2005); Rule 71(f)(4), SCRCP.
407 Zimmerman, 618 S.E. 2d. 898, 900; see Cox v. Frierson, 451 S.E.2d 392 (S.C. 1994) (partition by allotment is statutorily preferred over judicial sale of the property); cf. Anderson v. Anderson, 382 S.E.2d 897 (S.C. 1989) (party seeking partition by sale carries burden to show partition in kind is not practicable or expedient)).
408 Zimmerman at 900 (quoting Rule 71(f)(4), SCRCP).
409 Zimmerman, at 900 (quoting Rule 71(f)(4), SCRCP).
410 Id. The plaintiffs had attempted to purchase the other cotenant interest, but the offer was refused. Instead, the cotenant sold his share to the Zimmermans, noted as real estate agents, who recorded their deed and filed an action for partition by sale within minutes of recording the deed. Plaintiff Marsh responded by requesting partition by allotment – thereby enabling her to buy-out the cotenants’ interest.
411 The Court noted that Marsh was an artist and had created landscapes inspired by the surrounding Pawleys Island area. See Zimmerman at 899.
years and deemed the Zimmerman’s immediately filing for partition against Ms. Marsh’s wishes as “troublesome.” The master in equity found that partition in kind was not available due to the size, shape and location of the home, and denied partition by allotment “due to the wide variance of the appraised values of the property.” The master specifically denied any priority for the defendant’s length of ownership and emotional attachment to the land. Noting that the pecuniary interests of all parties remains the determining factor, the court stated that economic value is not the exclusive test and indicated that the length of ownership and sentimental attachment to property may be considered when deciding whether to partition in kind or by sale. The court stated that the master in equity could have determined the value of the property by averaging the conflicting appraisals, and ruled that the master erroneously denied partition by allotment.

B. LEGISLATIVE REFORM

Along the Southeastern Black Belt where African-American population and land ownership are concentrated, states have made limited attempts to address the inequities presented by forced partition sale of heirs’ property. The partition process is set forth in the pertinent statutes or court rules. A review of these statutes in the core Black Belt states of South Carolina, North Carolina, Georgia and Alabama reveals similar challenges that indicate the need for whole-scale reform. While each state has some improved individual provisions, each state statute falls short of the essential procedural elements required for heirs’ property owners to ward off forced partition sales and achieve the most equitable results in these actions.

1. Procedures, Timeframes & Commissioners’ Assessments

Generally, the statutes provide for the use of a panel of experts, appraisers or commissioners. The panel is charged with assessing whether and how a parcel should be divided, and imbued with the power to make recommendations on accompanying owelty payments that could be used to achieve an equitable distribution. If the commissioners do not feel the parcel can be divided fairly, the panel will recommend partition by sale.

The North Carolina statute sets forth a detailed process that empowers three disinterested commissioners to obtain a survey, plot tracts and streets for accessibility, and

412 Id. at 901 (In his dissenting opinion, Justice Pleicones characterized the Zimmerman’s actions as "acquisitive," but noted that they had done nothing illegal.).
413 Id. at 900.
414 Id. at 901.
415 Id.
416 See generally Danielle Metoyer, APPLESEED LEGAL JUSTICE CENTER: HEIRS’ PROPERTY: A SURVEY OF NEIGHBORING STATE PARTITION STATUTES (2003). This report was developed for the Heirs’ Property Preservation Project under the direction of the author.
417 It should be noted that where families pursue partition in kind, planning and zoning density restrictions should accommodate heirs occupying property in cluster settlement patterns. See Rivers, The Public Trust Debate, supra note ___.
418 See N.C. GEN. STAT. ANN. §46-7 (West 2006). The requirement that commissioners be "disinterested" guards against conflicts of interest by precluding participation by commissioners who may stand to benefit from future sale of the property.
make owelty determinations. Within 60 days, the report is filed with the court.419 In necessary, the commissioners may receive an additional 60 to file their reports.420 The property immediately becomes available for sale upon receipt of the report.421

Georgia provides that five landowners may be appointed to serve as "partitioners" who have the authority to select a surveyor and make "just and equal" partition and division of the land.422 This report is due back to the court within three months. If the court determines that a "fair and equitable division of the property cannot be made," the court is required to appoint three "qualified" persons to make appraisals of the property. The average of the appraisals will constitute the appraised price of the property.423 Within 15 days, the petitioners may withdraw the suit,424 a party in interest may become a petitioner (thus seeking to have their interest purchased), and any party may purchase the share of petitioners seeking to sell between the 16th and 90th day after the price is established.425 Should the parties be unable or unwilling to "buy out" the other interest holders within 95 days, the statute instructs the court to proceed with a public sale.

Likewise, Alabama provides for the appointment of up to five "suitable" commissioners426 to partition land. If appears from the report of the commissioners that a just and equal division of the land cannot be made, or that a "sale will better promote the interest of all the cotenants, the court shall order a sale of the land, or such part thereof."427 In the event that the land is to be offered for partition sale, the Alabama statute requires the appointment of real estate appraisers or commissioners to value the interests. These experts must report to the court within 30 days.428

South Carolina's partition statute and accompanying court rules establish a skeletal partition process that provides minimal protections for heirs' property owners. The S.C. Rules of Civil Procedure direct that writs of partition shall be issued and directed to five "persons" who are commanded to make partition of the parcel within 30 days. While the rules indicated that each party may name two commissioners, with the officer of the court naming the fifth person, the rules do not specify any qualifications for commissioner service. Recent revisions to the partition statute have provided for the involvement of qualified real estate appraisers or commissioners in the event that a nonpetitioning tenant (in common or joint) seeks to exercise a newly-provided right of first refusal.429 Notwithstanding the development of qualifications in situations where a right of first refusal

419 See N.C. GEN. STAT. ANN. §46-18 (West 2006).
420 See N.C. GEN. STAT. ANN. §46-17 (West 2006).
422 See generally GA CODE ANN. §44-6-163-164 (West 2006).
423 See generally GA CODE ANN. §44-6-166.1(b), (c) (West 2006).
424 "If no petitioner remains in the partition action...the proceeding shall be dismissed, and the petitioners who have withdrawn shall be liable for the costs of the action, including but not limited to the appraisal costs." GA CODE ANN. §44-6-166.1(d) (West 2006).
425 See generally GA CODE ANN. §44-6-166.1(d), (e) (West 2006); but see discussion supra Section III(D): The Distorted Economics of Partition Suits, regarding the appropriate valuation of tenant in common shares.
429 S.C. CODE ANN. §15-61-25(B) (2006). Upon receipt of a request, the Court must instruct at least one real estate
refusal is requested, the Rules of Civil Procedure do not require such qualifications in other circumstances.

Notably, Alabama and South Carolina allow courts to dispense with the procedural provision, through in very different circumstances. Alabama allows courts to dispense with the appointment of commissioners, but only in the context of partition in kind actions. If the court determines that intervention of commissioners is unnecessary, the court may partition the land in kind and order owelty between the parties. By contrast, South Carolina courts of equity are empowered to dispense with the procedural provisions altogether in all forms of partition actions. If a court decides that the writ process would "involve unnecessary expense," the court itself may take testimony on the issue of whether a partition in kind is "practicable or expedient." In this situation, there may not be any actual attempt to identify or negotiate a division of land for partition in kind prior to defaulting to partition by sale. Without some procedural consideration of partition alternatives, this sets the stage for heirs' property to be subject to sale, rather than division if the court of equity lacks expertise in real estate valuation and/or declines to take on the task of helping heirs and other tenants in common "work out" a proposal for allocating their property.

2. Appraising & Dividing Property

Commenting on the loss of heirs' property by forced partition sale, noted scholar Jesse Dukeminier concluded that "'[j]udges order partition sales because it's easy,'… [a]ppraising and dividing property takes time and effort." Families ought to have access to real estate practice tools to divide property in a deliberate and fair manner. Courts should provide the requisite time and opportunity for families to "work out among themselves" how they might divide their land. In addition, where the number of heirs is too large for partition in kind to be practical, judges ought to consider subdividing parcels between branches of a family tree. These subgroups should have the opportunity to reorganize common family ownership into a more secure trust or limited liability corporation form upon receipt of a court deed from the proceedings. Utilizing a combination of partition tools (both in kind and by allotment), along with owelty to allocate cash payments to compensate for parcel value differences, courts of equity can achieve fair and impartial divisions of unique property without automatically defaulting to sale. If partition statutes demand, and if equity court judges accept the responsibility of putting in the "time and effort" to consider partition in kind and by allotment

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430 Alabama allows the court to eliminate the use of commissioners only when such intervention is unnecessary to secure an equal partition in kind through division of land or with owelty. ALA. CODE §35-6-24 (2006). Courts are not empowered to dismiss the use of commissioners when a partition sale is at issue.

431 See S.C. CODE ANN. §15-61-100 and Rule 71(f)(5). In the Zimmerman case, the majority affirmed that these provisions "allow the master to dispense with the issuing of a writ of partition if it would involve unnecessary expense." Zimmerman v. Marsh, 618 S.E.2d 898, 901 (S.C. 2005).

432 Lewan, Todd and Barclay, Delores, Developers and Lawyers Associated Press, 2001

433 SINGER, supra note __, at 365(2nd ed. 2005).

434 See Mitchell, From Reconstruction to Deconstruction, supra note __, at 556-557.

options, heirs would enjoy a better opportunity to reach agreement and avoid partition dilemmas.

3. Mediation

All components of the partition process could be improved significantly with the addition of a mediation component. The goal to preserve family land should not bring with it a more destructive by-product – the dissolution of the extended family. The value of mediation in resolving conflicts between family members has been embraced in the family court system,\(^\text{436}\) as courts have acknowledged that the goals of preserving family relationships and achieving resolution of conflicts need not be mutually exclusive. Family court mediation reflects the sound judgment that intra-family conflicts deserve special consideration and justify significant efforts to preserve family relationships. Moreover, mediation can provide an opportunity for families to consider and agree on partition in kind or by allotment options, or to coordinate plans to exercise the right of first refusal (where provided), in an effort to save some portion of heirs' property.\(^\text{437}\) Community leaders can be trained to assist families in their efforts to address and resolve conflicts.\(^\text{438}\) Given these opportunities and the family dynamics involved, mediation should be mandated prior to ordering partition by sale.

Equity courts and heirs' property owners could benefit from the creation of a more informal process, outside of the courtroom, where commissioners, appraisers, and family members could work together to achieve equitable division of property. Where states have created some level of procedures for experts and commissioners to attempt partition in kind, there is no express provision requiring family involvement in deliberations. Heirs' property owners should have a seat at the table when decisions are made about division of their land assets. The commissioner process would be enhanced by family involvement, and mediation could pave the way for family involvement and resolution of family conflicts over allocation of land and resources.

4. Private Partition Sales & Right of First Refusal


\(^{437}\) See *Heirs' Property Preservation Project, Heirs' Property Brochure: Mediation* (2003) ("Heirs' Property mediation is designed to help families reach decision(s) they choose in order to preserve their land and their family heritage and harmony.")

\(^{438}\) As in the family law context, heirs property mediation services could be offered on a sliding fee scale, while nonprofit organizations could provide mediation services to low income heirs' property owners at no or limited costs. The Heirs' Property Preservation Project trained a team of community leaders to provide mediation services, helping heirs' property family members to navigate the complex legal and emotional issues involved in these disputes. *Heirs' Property Preservation Project Proposal to the Ford Foundation* (September 2002) (on file with the author).
Both Georgia and Alabama provide an opportunity for cotenants to buy out other interests through a right of first refusal and a private sale requirement, respectively. In 2006, the South Carolina joined these states when the General Assembly adopted a similar provision which was met with mixed reactions, yet acknowledged as an important "first step" in resolving the heirs' property problem in the Lowcountry. All three states require courts to give non-petitioning cotenants the first opportunity to buy out the partitioning interest holder at a private sale. Each provision requires the involvement of real estate appraisers or commissioners to establish the value of the property. North Carolina does not provide an opportunity for cotenants to purchase the interests of cotenants prior to public sale. The North Carolina legislature defeated a partition reform procedure measure proposed by heirs' property advocates in the 2006 session, but approved a measure to create a commission to study the partition statute.

While the right of first refusal or private sale may not be a viable option for many low and moderate-income heir property owners, use of this remedy does permit some cotenants to maintain real property ownership. Presently, the allotted timeframes range from a low of 30 in Alabama, to 45 days in South Carolina and 95 days in Georgia. It is important, however, that these statutes provide a sufficient timeframe that will provide heirs with a realistic opportunity to arrange financing. Given that the average single family home transaction requires 30-60 days to go from offer, acceptance, financing approval and closing, it should be anticipated that clearing title to heirs' property (which is a prerequisite to securing financing) will take additional time. Partition statutes should extend the timeframe for valuation and purchase so that heirs can make effectual use of this provision. Moreover, as discussed above, valuation should take into account the nature of the form of cotenant interest being sold. Private sales should base tenant in common private sale prices on discounted fractional interest values, rather than higher, whole parcel values for joint tenants.

State legislatures have yet to grapple with the challenge of deciding which heirs should succeed in the event that there are multiple requests to exercise the right of first refusal. In Jolly

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439 See GA. CODE ANN. Sec. 44-6-116.1 (any party may purchase the shares of the partitioning interest holder between the 16th and 90th day after the price is established by the court. If the parties are unable or unwilling to buy out other interest holders within 95 days, the court will proceed with a partition sale.); AL CODE Sections 35-6-100 through 35-6-104 (Upon receipt of notice at least 10 days prior to trial, the court must provide an opportunity for cotenants to purchase of the interests of the partitioning or other cotenants. After the report of the appraisers or commissioners, the cotenant(s) seeking to purchase the interests of the partitioning party shall have 30 days to pay the established price into the court, or the property will be made available via public sale.)

440 S.C. CODE ANN. §15-61-25 (2006). ("Upon the filing of a petition for partition of real property owned by joint tenants or tenants in common, the court shall provide for the nonpetitioning joint tenants or tenants in common who are interested in purchasing the property to notify the court of that interest no later than ten days prior to the date set for the trial of the case." After the report of "one or more competent real estate appraisers," the cotenant seeking to exercise the option shall have 45 days to the established price into the court, or the property will be made available for public sale.)


443 When heirs exercise the right of first refusal, however, it is important that courts of equity establish a private sale price that accurately reflects the discounted value of a fractionated interest. See discussion supra, Section III(D): The Distorted Economics of Partition Suits.
v. Knoph, the Alabama Supreme Court reversed a lower court holding that gave preference to the nonpetitioning party on the grounds that the choice between tenants in common violated the Equal Protection Clause of the Fourteenth Amendment. All states with a private sale / right of first refusal option might encounter similar circumstances where courts of equity must choose between cotenants. Nevertheless, the case law discussed above suggests that consideration of sentimental and historic value of family land may be recognized as a sufficient factor to justify selecting between cotenants.

V. CONCLUSION

Recounting an egregious example of the disadvantaged, fragile of heirs' property, and bemoaning developer exploitation of that fragility through the auspices of the court system, land activist Bill Jenkins gives a personal account of a typical heirs' property scenario in the Lowcountry:

There's seventy-nine acres of land down at Johns Island airport....Developers...did some research and found out who were some of the people who were involved in that property. [One of them] found a wino in New York City and just walked up to him and said, "I heard you own some property on Johns Island." The guy thought he was kidding because he had never been to Johns Island. So he just started laughing. [The developer] said, "I'm serious. You get a witness and come with me and I will give you five hundred dollars for what you own." So this guy, you know, he thought – “Santa Claus.” So he got one of his friends and they went downtown, and he had everything probated, signed it off, and the people came down here and created all kinds of problems for the rest of the family.

Eventually, they had to end up selling that land...because with this property, when the families are so large, most of the time you can't even get all of the family together, so they could agree who's going to get the swampland, who's going to get the house, who's going to get the waterfront....But the court could sell all of the land and divide the money equally. And so, when this land developer bought this land..., he came down here and he wanted his portion....He is now one of the heirs. But [he and the family] cannot agree on which piece....Then he goes back to the court and says, "We can't reach an agreement." And if you can't reach an agreement, then the court will come in and put it up for sale.

Decades later, the story remains the same. In reflecting upon the Associated Press investigation

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445 See Jolly v. Knoph, 463 So.2d 150 (Ala. 1985), Craig-Taylor, supra note __, at 781, and Cassagrande, supra note __, at 770. According to the Court's reasoning, denying a partitioning co-tenant the opportunity to purchase the other cotenants' property interests violated the Equal Protection Clause, id.
446 See discussion supra at Section IV(A): Legal Reform.
447 JONES-JACKSON, supra note __, 166-167.
of African-American land loss, Congressman James Clyburn, who represents significant portions of the Lowcountry, including a majority of African Americans who are likely to have an interest in heirs' property, offered observations about the pervasiveness of African-American land loss in the Black Belt South:

Just like many blacks with roots in the South, I grew up hearing stories of land lost by relatives and family friends. These stories were so commonplace and pervasive that I worked with Penn Community Center for many years before I came to the Congress studying these land takings. To date, Penn Center has collected reports of 2,000 similar cases that remain uninvestigated. And there are other institutions around the South collecting the same kind of information. The question now is where do we go from here?\textsuperscript{448}

The history of African-American land ownership in the Reconstruction South produced an important land legacy that must be preserved. That legacy is imperiled by the structure and application of the law of partition in courts of equity. The challenge is to move beyond hand-wringing discussions about the tragic nature of tenancy in common property and take steps to halt the tragedy that the tenancy in common estate has wrought upon African American over the past century and a half. Borne out of the repulsive practice of selling and dividing enslaved African Americans families, the law of forced partition sales remains beleaguered by its centuries-old disregard for the personhood of enslaved people and the property their descendants hold. Through legal and legislative reform efforts, the posture of courts of equity should be transformed from an historical den of inequity to a forum for equitable management of tenancy in common property.

In order to accomplish this, lawmakers should take steps to restore the bundle of rights to this disadvantaged class of property owners whose ancestors generally lacked either the capacity, legal information, protection from violence or opportunity to engage counsel to take advantage of estate planning and probate procedures that would have met their expectations about family land ownership. Cultivating the seeds of legal reform that have been planted from Vermont to South Carolina, courts should recognize the personhood of heirs' property and utilize alternative partition methods in order to honor the historic and sentimental value of this land. Partition procedures should be amended to require utilization of disinterested, qualified real estate experts and to provide realistic timeframes and mediation services for families to amicable resolve property conflicts. At the very least, if heirs' property must be sold, courts and families alike should be satisfied that family members received the full economic benefit of their land.

\textsuperscript{448} Press Statement from James E. Clyburn, Black Land Loss Must Be Addressed (Feb. 7, 2002) (on file with author).
Without a change of course, African-American land holdings will be depleted by the "ignorance of real property laws," "unscrupulous developers" and "actions that some folks consider 'legal theft'" which plague heirs' property. Heirs' property owners will continue to face an onslaught of partition demands in the fast-developing coastal Sunbelt, and the tragedy of Hilton Head Island (where the once-majority African-American population now describe themselves as "endangered species") will become the tragedy of other coastal communities of heirs' property owners. Absent legal intervention, the tragedy of tenancy in common will lead to further land loss and the attendant conflicting family dynamics, economic deprivation, community dispersion and cultural disintegration of African American communities through the courts of equity. "These are real people, with a real problem…" They deserve real solutions to help them "keep family land in the family."

449 Shirley Washington, supra note 1.
450 DANIELSON, supra note __, at 293, citing Singleton, Vernie, We Are Endangered Species, SOUTHERN EXPOSURE 10 (May/June 1982) 37-39.
451 Shirley Washington, supra note 1.
452 Shirley Washington, supra note 1.