

REMEDIATING INJUSTICES FOR BLACK LAND LOSS: TAKING THE NEXT STEP TO PROTECT HEIRS' PROPERTY

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INTRODUCTION

Imagine starting from zero and working your way through hardship and financial difficulty to own real property (“property”). You may be one of the first in your family to own property. The pride of ownership and the opportunity to transfer property to your descendants to enhance wealth for the next generation may be particularly satisfying. Now imagine that property is lost, through no fault of your own, or that ownership is so clouded as to restrict alienation. This is the reality and history of many Black property owners.

Heirs' property is generally known as property passing through generations without clearing probate.¹ In problematic cases, property is concurrently owned by multiple people at multiple generational levels.² As owners continue to multiply at each generational level, their property interest becomes more fractionalized.³ Fractionalization is a commonly cited problem for heirs' property and leads to other problems, such as unclear title and disagreement about disposition, which inhibit alienation.⁴

While issues with heirs' property are not new, scholars and government leaders still struggle to find solutions that will prevent land loss for Black owners. Conventional wisdom suggests consolidation of ownership is the best option because it maximizes each owner's profit potential.⁵ Although heirs' property ownership may be problematic, stripping anyone of property rights as a so-called easy solution proves even more problematic. Further, the Black community has experienced many obstacles to land ownership; therefore, no policy that would further contribute to land loss should be supported, even for heirs' property.⁶ This article contributes to the scholarly discord by providing solutions for state and local governments and

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1. See Jennifer Harrington, *The Problem with Heirs' Property*, IOWA ST. UNIV.: CTR. FOR AGRIC. L. & TAX'N, (Feb. 27, 2022) <https://www.calt.iastate.edu/article/problem-heirs-property> [<https://perma.cc/2NW6-ZDHJ>] (“‘Heirs’ Property” generally refers to family owned property inherited by multiple generations without the formal legal proceedings necessary to prove ownership.”).

2. Conner Bailey et al., *Heirs' Property and Persistent Poverty Among African Americans in the Southeastern United States*, in *HEIRS' PROPERTY AND LAND FRACTIONATION: FOSTERING STABLE OWNERSHIP TO PREVENT LAND LOSS AND ABANDONMENT* 11 (Cassandra Johnson Gaither, Ann Carpenter, Tracy Lloyd McCurdy, and Sara Toering eds., 2019) (“With each passing generation that dies without a will, the number of co-owners increases. After several generations, there could be hundreds of owners, many of whom may have little if any connection to the property while others may have strong emotional ties to the property.”).

3. Tristeen Bownes & Robert Zabawa, *The Impact of Heirs' Property at the Community Level: The Case Study of the Prairie Farms Resettlement Community in Macon County, AL*, in *Heirs' Property and Land Fractionation: Fostering Stable Ownership to Prevent Land Loss and Abandonment* *supra* note 2, at 31.

4. Bailey et al., *supra* note 2, at 11; see also Roy W. Copeland, *Heir Property in the African American Community: From Promised Lands to Problem Lands*, 2 *PRO. AGRIC. WORKERS J.* 1, 2 (2015) (discussing multigenerational transfers of heir property).

5. Janie F. Dyer & Conner Bailey, *A Place to Call Home: Cultural Understandings of Heir Property among Rural African Americans*, 73 (3) *RURAL SOCIO.* 317, 333 (2008) (discussing consolidation of property interests).

6. *Id.* at 326 (“Scholars who have studied land loss of African Americans estimate that heir property constitutes one-third to roughly fifty percent of all property owned by African Americans in the rural South”); see also Copeland, *supra* note 4, at 2 (discussing land loss in black communities).

the Uniform Law Commission to strategically address heirs' property, rebuild communities, and facilitate wealth mobility.

Addressing the other major underlying problem, fractionalization, is the next necessary step to rebuilding wealth for Black households. Fractionalization is a serious problem that undermines wealth mobility for heirs' property owners.⁷ State, local, and national governments should implement laws and policies to facilitate productive ownership in a meaningful way that promotes family wealth. This article will explore methods that can both address fractionalization and use heirs' property to rebuild wealth for Black households by changing intestacy laws to default into a trust instead of tenancy in common.

Section I analyzes inequalities in land ownership including the seriousness of Black land loss through a brief discussion of eminent domain, neighborhood blight, and gentrification. This section further discusses the lasting impact of redlining, restrictive covenants, and blockbusting. Section II examines problems associated with heirs' property and the limitations of the current law implemented to address heirs' property. Finally, Section III evaluates various proposals to remediate the impact of land losses and proposes new solutions, through new trust laws designed to reduce the impact of fractional ownership, eliminate the partition threat, and the government's responsibility to facilitate.

I. INEQUALITIES IN LAND OWNERSHIP

A. Black Land Loss

Land ownership has long been unequal and inequitable between wealthy and low-income households in America, but it has been especially precarious for Black households.⁸ An Associated Press investigation demonstrated how Black Americans have suffered land loss in a variety of ways, including through government-initiated or sanctioned actions.⁹ The investigation included interviews and substantial public records searches across multiple states.¹⁰

7. Copeland, *supra* note 4, at 2 (discussing fractionalization of property interests).

8. See Todd Lewan & Dolores Barclay, *When They Steal Your Land, They Steal Your Future*, L.A. TIMES (Dec. 2, 2001), <https://www.latimes.com/archives/la-xpm-2001-dec-02-mn-10514-story.html> [<https://perma.cc/9HC6-N5KV>] ("The number of white farmers has declined too, as economic trends have concentrated land in fewer hands. But black ownership has declined 2 1/2 times faster than white ownership, according to a 1982 federal report, the last comprehensive government study on the trend.").

9. See *id.* ("In an 18-month investigation, the Associated Press documented a pattern in which black Americans were cheated out of their land or driven from it through intimidation, violence and even murder. In some cases, government officials approved the land-takings; in others, they took part in them.").

10. See *id.*

The investigation found that Black landowners lost substantial amounts of property and that those properties, “valued at tens of millions of dollars,” became owned by White landowners or corporations.¹¹ Black land loss at local levels is consistent with the mistreatment of Black households by national leaders who never paid the debt of “40 acres and a mule” after the Civil War.¹² Land thefts, property purchase denials, and the overall mistreatment of Black landowners (or would-be owners) are all well documented in history; therefore, local, state, and national governments owe a debt to the descendants of these injustices.¹³ The next parts in this section summarize examples of government complicity and complacency which directly link to property loss among Black property owners and deepen wealth inequality.¹⁴

B. Eminent Domain, Neighborhood Blight, and Gentrification

An article headline reads, “Bruce’s Beach Finally Returned Back to the Bruce Family.”¹⁵ The article describes how a Black couple, in 1912, purchased beach property to provide a safe place for Black people to enjoy the beach.¹⁶ That is, until the Manhattan Beach City Council used eminent domain to seize the beach.¹⁷ Eminent Domain is a governmental entity’s

11. *See id.* (“In those cases alone, 406 black landowners lost more than 24,000 acres of farm and timber land plus 85 smaller properties, including stores and city lots. Today, virtually all of this property, valued at tens of millions of dollars, is owned by whites or corporations.”).

12. Sarah M. Johnson & Raymond C. Odom, *The Forgotten 40 Acres: How Real Property, Probate & Tax Laws Contributed to the Racial Wealth Gap and How Tax Policy Could Repair It*, 57 REAL PROP. TR. & EST. L.J. 1, 6 (2022) (explaining the numerous times the federal government and its agents broke the promise to provide reparations through land grants and set-asides for the newly freed enslaved people.).

13. *See generally id.*

14. Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505, 506 (2001) (discussing Black farmers and the lawsuit against the United States Department of Agriculture); *see generally* Zija Song, *U.S. Black Farmers Lost Billions in Land Value, Study Shows*, BLOOMBERG (May 2, 2022), <https://www.bloomberg.com/news/articles/2022-05-02/black-farmers-in-u-s-lost-326-billion-of-land-study-shows?leadSource=verify%20wall> [<https://perma.cc/7EYK-FN5J>]; Kindaka Jamal Sanders, *Re-Assembling Osiris: Rule 23, The Black Farmers Case, and Reparations*, 118 PENN ST. L. REV. 339, 341 (2013) (discussing the Black farmer’s case for reparations).

15. Mady Sackett, *Bruce’s Beach Finally Returned Back To Bruce Family*, SURFRIDER FOUNDATION (Nov. 16, 2021), https://www.surfrider.org/coastal-blog/entry/bruce-beach-finally-returned-back-to-bruce-family?utm_term=&utm_campaign=Google_Search_DSA&utm_source=adwords&utm_medium=ppc&hsa_acc=4530688483&hsa_cam=1621151447&hsa_grp=62268573795&hsa_ad=309243341687&hsa_src=g&hsa_tgt=dsa-19959388920&hsa_kw=&hsa_mt=&hsa_net=adwords&hsa_ver=3&gclid=Cj0KCCQjw3eeXBhD7ARIsAHjssr8A0qjlhNfvA1AboB_cKORjkTro9l6zbiA1nIvyqFRiQzYwA9kCWLQaAo9HEALw_wcB [<https://perma.cc/DT9H-DPUH>].

16. *See id.*

17. *See id.*

constitutionally authorized, independent power to acquire private property for public use.¹⁸ To use this power, the government must have a public purpose for the land use and pay just compensation to the private landowner.¹⁹

Under ordinary circumstances, although the landowner may not be happy, the public respects and trusts the government to administer its power in a just and fair way.²⁰ The use of eminent domain in taking the Bruce's property, and many other Black landowners like the Bruce family, was not fair or just. After the Bruces developed the beach property into a resort, it became a popular destination for Black patrons.²¹ Nearby White property owners and residents complained that the presence of Black patrons would depreciate their property values.²²

The Manhattan Beach City Council ("MBCC") used eminent domain to acquire Bruce's Beach to build a public park.²³ The MBCC further acquired other Black-owned beach properties.²⁴ MBCC destroyed the Bruce's Beach Resort and left the beach undeveloped for thirty years after its condemnation.²⁵ Instead of building a park, MBCC later transferred the property to the state government.²⁶ As the Surfrider Foundation showcases in its report on the Bruce family property, the government used eminent domain powers to purposefully oust Black property owners like the Bruce family from the beach.²⁷

18. *Kohl v. United States*, 91 U.S. 367, 371 (1875) (holding eminent domain is political necessity for the government).

19. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 235 (1897) (holding the state had the authority to seize private land for public use if the private owner were paid just compensation); see also Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 10 RSCH. IN L. & ECON. 53, 53 (1987) (discussing just compensation for governmental takings).

20. *The Civil Rights Implications of Eminent Domain Abuse*, U.S. COMM'N CIV. RTS., https://www.usccr.gov/files/pubs/docs/FINAL_FY14_Eminent-Domain-Report.pdf [<https://perma.cc/MF8F-UMCE>].

21. See Sackett, *supra* note 15.

22. HISTORY ADVISORY BOARD, CITY OF MANHATTAN BEACH, (June 7, 2021) (accessible at <https://www.manhattanbeach.gov/home/showpublisheddocument/47081/637590392738470000>) [<https://perma.cc/XCA7-RJRN>].

23. See *id.* ("On January 3, 1924, the Manhattan Beach City Council passed ordinance 263, claiming eminent domain for a public park.").

24. See *id.* ("At their meeting on August 4, 1927, the City Council¹²² of Manhattan Beach revised the minutes of the May 19th to include all of Block 9, Tract No. 8867, and Lot 1 of Block 11 in the lease to Bessonette¹²³. Block 9 was the entire beach area between 25th and 27th Streets -- or directly in front of where the Bruces' resort stood and the neighboring Black vacation homes -- and Brigham wrote that "this was another subterfuge on the part of the City whereby an attempt was made to pervert the legal process to the end that the Negroes would leave Manhattan Beach.").

25. See *id.*

26. See *id.* ("In 1948, the State took over the ownership of the property condemned by the City in 1929 under the condition "that the land be accepted for use as a public beach or park only.").

27. See Sackett, *supra* note 15.

The state of California eventually took a significant step to right this historical wrong. Senate Bill 796, legislation to transfer the beach property back to the Bruce family, was signed into law on September 30, 2021.²⁸ In addition to transferring the property, the recipients were exempted from paying income tax on the initial transfer and future property taxes are determined based on the market value as of the 1975 lien date.²⁹ The additional tax relief enables the family with time to adjust and gather resources to keep the property, which boasts an estimated value of \$75 million, since the transfer had already occurred.³⁰ Overall, the legislation addressed the impact of land loss on multiple levels and incorporated a multilevel plan to redress and repair the damage inflicted on the Bruce family and their descendants.

Neighborhood blight has provided governments with another justification to take private property for public use, under the guise of their duty to address public health and safety issues.³¹ Like traditional eminent domain, taking property to address blight does not violate the Fifth Amendment if the taking fits within a legislative plan to convert the property for public use.³² In one of the leading cases, *Berman v. Parker*, the city prepared a comprehensive plan that targeted the blighted “Project Area B,” a mostly low rent residential area with a population of 97.5% Black residents.³³

The appellant owned a department store located in the designated area and challenged the condemnation on the basis that his property was not “slum housing.”³⁴ The court explained that, “[p]ublic safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs.”³⁵ The court upheld the condemnation of the appellant’s property, and indicated that the “public welfare doctrine is broad and inclusive,” and as a result, effectively legalized the dismantling of Black communities under government authority in the name of urban renewal.³⁶

28. S.B. 796, Leg., (Ca. 2021).

29. *See id.*

30. *See* Sackett, *supra* note 15.

31. Joseph Schilling & Jimena Pinzón, *The Basics of Blight*, VPRN RSCH. & POL’Y BRIEF NO. TWO, (2016), https://vacantpropertyresearch.com/wp-content/uploads/2016/03/20160126_Blight_FINAL.pdf [<https://perma.cc/3KN3-4574>].

32. *Berman v. Parker*, 348 U.S. 26, 35–6 (1954) (“Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.”).

33. *Id.* at 30.

34. *Id.* at 31.

35. *Id.* at 32.

36. *Id.* at 33 (“Demographically, these displaced populations were disproportionately ethnic or minority communities¹⁶ and/or low-income. For example, from 1949 to 1963, urban renewal displaced an estimated 177,000 families and another 66,000 individuals, most of them poor and most of them black. Unfortunately, precise numbers are not available, and these data have been criticized for their conservatism, that is, underestimating the proportion of African-Americans affected.”).

In another case, *Kelo v. City of London*, the city government used eminent domain to force unwilling residents out of their properties to allow for economic development of their neighborhood by a private developer.³⁷ Even though the government transferred property from a private citizen to a private developer, the Court nonetheless determined that the transfer served a public purpose based on the city's economic development plan.³⁸ This broadened interpretation of public use would allow government agencies to weaponize their powers. This prompted Justice O'Connor to argue in her dissent for both return to the traditional understanding of public use and greater emphasis on just compensation requirements:

“[t]ogether they ensure stable property ownership by providing safeguards against excessive, unpredictable, or unfair use of the government's eminent domain power—particularly against those owners who, for whatever reasons, may be unable to protect themselves in the political process against the majority's will.”³⁹

While *Kelo* did not directly address blighting, it opened the doors for government agencies and developers to take property from so-called “distressed municipalities” in order to revitalize neighborhoods using *Kelo*'s more lenient, public purpose standard.⁴⁰ The public purpose holding essentially made it easier for governments to take private property as long as they provide just compensation, even if that compensation is not just.⁴¹

After *Kelo*, blight became the proxy to transfer private property for public purposes, primarily for developers.⁴² The people predominantly affected by eminent domain and displaced from their communities were racial and ethnic minorities.⁴³ This demographic was less likely to fight back

37. *Kelo v. New London*, 545 U.S. 469, 472 (2005).

38. Ann Marie Cavazos, *Beware of Wooden Nickels: The Paradox of Florida's Legislative Overreaction in the Wake of Kelo*, 13 U. PA. J. BUS. L. 685, 687–88 (2010) (discussing property being transferred from private citizen to private developer); *see also id.* at 483–84.

39. *Kelo*, 545 U.S. at 496 (O'Connor, J. dissenting).

40. *Id.* at 483.

41. *See id.* at 501.

42. See DANA BERLINER, PUBLIC POWER, PRIVATE GAIN 50 (2003), http://www.castlecoalition.org/pdf/report/ED_report.pdf [<https://perma.cc/C34A-F9NG>]; *see also* Steven J. Eagle, *Does Blight Really Justify Condemnation*, 39 URB. LAW. 833, 837 (2007) (discussing backlash resulting from *Kelo* stating, “*Kelo* granted the Court's imprimatur to increased and energetic use of a redevelopment process often based upon blight condemnation. While it certainly is possible that the popular backlash to *Kelo* will result in an overall reduction in the use of eminent domain for redevelopment, that backlash will inure to the benefit of owners of residential parcels much more than commercial ones.”).

43. DICK M. CARPENTER II, & JOHN K. ROSS, VICTIMIZING THE VULNERABLE, THE DEMOGRAPHICS OF EMINENT DOMAIN ABUSE 13 (Institute for Justice, 2007).

in a meaningful way because they lacked resources and political power.⁴⁴ The systematic way that governments used eminent domain, specifically blight, to displace racial and ethnic minority communities signals the overuse of blight as a source of land and wealth loss.⁴⁵ On the other hand, wealthier households benefit from this practice since developers build larger homes and luxury condominiums in place of the old neighborhoods.⁴⁶

C. Restrictive Covenants, Redlining, and Blockbusting

Racially restrictive covenants are another example of a government-supported barrier to homeownership.⁴⁷ Racially restrictive covenants were court-enforced under contract theory.⁴⁸ This practice continued until the United States Supreme Court declared in *Shelley v. Kraemer* that such covenants violate the Equal Protection Clause.⁴⁹ Even so, government-led efforts continued to suppress Black homeownership and keep Black would-be homeowners financially unstable.⁵⁰

Racially restrictive covenants passed the baton to redlining.⁵¹ After the Great Depression, the government created the Home Owners' Loan

44. *Id.* at 7 (“Yet, these results reveal such communities are disproportionately affected nonetheless, and these are typically communities less able to exert significant political influence in defense of their homes and neighborhoods. The results for such residents can be disastrous.”).

45. Janet Thompson Jackson, *What is Property? Property is Theft: The Lack of Social Justice in U.S. Eminent Domain Law*, 84 ST. JOHN’S L. REV. 63, 103–04 (2010) (discussing the connection between eminent domain and blight to racial inequalities.); April B. Chandler, *The Loss in My Bones: Protecting African American Heirs’ Property with the Public Use Doctrine*, 14 WM. & MARY BILL RTS. J. 387, 403–04 (2005) (discussing eminent domain and public purpose).

46. See BERLINER, *supra* note 42 (conducting a state by state analysis of the abuse of eminent domain powers and how it facilitates property development for luxury condominiums for the wealthy).

47. *1948-1968: Unenforceable Restrictive Covenants*, The Fair Housing Center of Greater Boston, <https://www.bostonfairhousing.org/timeline/1948-1968-Unenforceable-Restrictive-Covenants.html> [<https://perma.cc/5S8P-UH6S>].

48. *Corrigan v. Buckley*, 271 U.S. 323, 330(1926) (“It is obvious that none of these amendments prohibited private individuals from entering into contracts respecting the control and disposition of their own property; and there is no color whatever for the contention that they rendered the indenture void.”).

49. *Shelley v. Kraemer*, 334 U.S. 1, 23 (1948) (“Segregation in the housing market did not end there, however. It was maintained by institutionalized discrimination in real estate, insurance, and lending industries, which remained common well past the Civil Rights era and into the twenty-first century.”).

50. Tara Carone, *The Wealth Gap: Through the Lens of Governmental Policies and Racial Inequality in Housing*, 24 PUB. INT. L. REP. 51, 51 (2018) (discussing homeownership and its relationship to American’s wealth).

51. Redlining was a process used to color code neighborhoods to determine their suitability. See Willy E. Rice, *Race, Gender, “Redlining,” and the Discriminatory Access to Loans, Credit and Insurance: An Historical and Empirical Analysis of Consumers Who Sued Lenders and Insurers in Federal and State Courts, 1950-1995*, 33 SAN DIEGO L. REV. 583, 584–85 (1996).

Corporation (“HOLC”), assisting homeowners with refinancing their homes or purchasing new homes.⁵² HOLC implemented a redlining system determining which neighborhoods were suitable for investment.⁵³ This system impacted the ability of Black homeowners to obtain mortgages and benefit from increased housing values.⁵⁴ White neighborhoods, by contrast, benefitted from low interest loans because they received suitability ratings.⁵⁵

Black neighborhoods were redlined and therefore, did not receive low interest loans and insurance.⁵⁶ Redlining made it very difficult for Black people to acquire homes and effectively blocked them from the housing market.⁵⁷ In addition to steering Black purchasers to redlined neighborhoods, realtors informed White homeowners when Black purchasers were moving, resulting in “White Flight” or “blockbusting” which contributed to undervaluation.⁵⁸

Blockbusting was a practice by real estate speculators (“blockbusters”) who purchased properties from White owners, fleeing from neighborhoods that Black homebuyers were integrating. The blockbusters paid less than fair market value and then sold the same home to Black homebuyers at above market rates.⁵⁹ Since Black homebuyers had difficulty in obtaining traditional financing, they were vulnerable to the blockbuster who financed the homes with high interest installment contracts with highly unfavorable terms.⁶⁰

52. Gregory Sharp & Matthew Hall, *Emerging Forms of Racial Inequality in Homeownership Exit, 1968-2009*, 61 SOC. PROBS. 427, 428 (2014).

53. *See id.*

54. *See id.* at 429.

55. RICHARD ROTHSTEIN, *THE COLOR OF LAW* 64–65 (2017); *see also id.* at 429.

56. Rothstein, *supra* note 55, at 64–65; *see also* Sharp & Hall, *supra* note 52, at 428.

57. *See* Sharp & Hall, *supra* note 52, at 428–29.

58. *Id.*

59. Dmitri Mehlhorn, *A Requiem for Blockbusting: Law, Economics, and Race-Based Real Estate Speculation*, 67 FORDHAM L. REV. 1145, 1151–52 (1998) (“In the classic example, speculators would target a white neighborhood on the border of an expanding black ghetto. White residents feared that the expanding ghettos would jeopardize their property values or their safety, and the speculators encouraged this fear. The speculators would make representations that minorities were moving in or deluge the residents with offers of cash for homes. By inciting panic and offering to pay cash, the speculators procured homes at a discount which they immediately resold to blacks at a substantial markup.”).

60. Richard Winchester, *Homeownership While Black: A Pathway to Plunder, Compliments of Uncle Sam*, 110 KY. L.J. 611, 635 (2022) (“An installment sale superficially resembles a mortgage loan in that the buyer makes an initial payment up front followed by a series of monthly payments consisting of interest and principal for several years. The buyer also had to pay the property taxes on the home and any costs to keep it in good repair. The arrangement, however, is materially different from a mortgage loan in that the speculator retains title to the property until the buyer makes all payments due under the contract, or until a certain amount of equity had accrued so that a mortgage could be obtained to replace the contract. This has important ramifications for a buyer who defaults. Because the speculator owned the home, it was a relatively quick and easy matter to evict the buyer and retake possession of the home. For instance, in the state of Illinois, the seller could reenter

Consequently, redlining was an instrumental factor in Black wealth erosion.⁶¹ In response to discriminatory housing practices, the Fair Housing Act (“FHA”) was implemented to stop discrimination against Black homeowners and renters and provide civil remedies to homeowners who were harmed by housing discrimination.⁶² Even though overt practices of blockbusting and redlining were already unconstitutional, racial discrimination did not stop and ripple effects continue, as confirmed by the Black couple’s experience described above.⁶³ Barriers to Black land and homeownership are directly related to the past illegal practices of racially restrictive covenants, redlining, and blockbusting.

II. HEIRS’ PROPERTY AND BLACK LAND LOSS

A. The Problematic Nature of Heirs’ Property

The story of Gloria Asby is like many other stories of families displaced by their family members or land speculators.⁶⁴ She and her brother, Johnny Rivers, along with other family members lived on family property after inheriting it from their father, Hector Rivers.⁶⁵ Johnny lived, performed maintenance, and paid the taxes on the land.⁶⁶ He presumed those actions were sufficient to protect his interests and ownership rights to the family land.⁶⁷ He was wrong.

Gloria and over 20 other family members were displaced when one of the heirs filed a lawsuit to force a sale of the property.⁶⁸ This transaction

the property in as few as sixty days under the procedures that applied to rental evictions. By contrast, under a mortgage loan, the lender’s remedies would be limited to foreclosing on the loan, which would force the lender to incur substantial costs and could take as many as three years.”).

61. See *id.* at 613 (“FHA redlining did more than prevent Blacks from acquiring an asset that could lead to greater wealth. The practice actually made homeownership a wealth-losing proposition for many Black families. That’s because the agency’s anti-Black policy did two things. It eliminated the incentive for builders to provide homes for Blacks, and it eliminated the incentive for lenders to finance the purchase of a home to a Black buyer.”).

62. See U.S. DEP’T OF HOUS. & URB. DEV. (HUD), *History of Fair Housing*, HUD.GOV (last reviewed Oct. 26, 2022), https://www.hud.gov/program_offices/fair_housing_equal_opp/aboutftheo/history [<https://perma.cc/F27J-273D>].

63. Deborah Kenn, *Institutionalized, Legal Racism: Housing Segregation and Beyond*, 11 B.U. PUB INT. L. J. 35, 40 (2001) (indicating the FHA is ineffective in addressing the systemic problems of housing segregation).

64. Tony Bartelme, *Families evicted from heirs’ property on Cainhoy peninsula*, POST & COURIER (Apr. 3, 2022) https://www.postandcourier.com/news/families-evicted-from-heirs-property-on-cainhoy-peninsula/article_4f18bf38-ef30-11e8-a187-0f3e83d446fa.html [<https://perma.cc/B7BC-FFBY>].

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

is known as a forced partition sale.⁶⁹ In Gloria's and Johnny's case, the forced sale resulted in the loss of their land and homes.⁷⁰ Even though she will receive a proportionate share of the proceeds, money cannot replace everything she lost. Further, her share may not be enough to purchase a replacement home, as forced sales do not typically sell for the fair market value.⁷¹

Discussing death with family members is difficult. Discussing succession of property after death is almost sacrilegious. Perhaps this explains why most people die without a will.⁷² This is true despite the overwhelming belief that parents want—and should—leave an inheritance for their descendants.⁷³ Even under circumstances where families agree to discuss succession, Black people are less likely to create a will.⁷⁴

While a lay person may create their own will, if it is ineffective then it will not serve the intended purpose.⁷⁵ For example, if a will was not properly witnessed, then the decedent will die intestate. If a will devised property to children equally as tenants in common, the frustrations of ownership will be similar to owners of heirs' property. Once property is characterized as heirs' property, it is very difficult to clear the title without

69. Roy W. Copeland & William K. Buchanan, An Examination of Heir Property, the 1980 Emergency Land Fund Study, and Analysis of Factors that Influence African American Farmers' Actions Related to Farmland, 7 *Pro. Agric. Workers J.* 32, 38 (2019).

70. Bartelme, *supra* note 64.

71. See Thomas W. Mitchell, *Historic Partition Law Reform: A Game Changer for Heirs' Property Owners*, in *HEIRS' PROP. & LAND FRACTIONATION: FOSTERING STABLE OWNERSHIP TO PREVENT LAND LOSS AND ABANDONMENT*, *supra* note 2, at 65, 70 ("Often such a speculator submits the winning bid in the subsequent auction sale of the property even though the winning bid represents just a fraction of the property's market value."); see also Will Breland, *Acre of Distrust: Heirs Property, the Law's Role in Sowing Suspicion Among Americans and How Lawyers Can Help Curb Black Land Loss*, 28 *GEO. J. ON POVERTY L. & POL'Y* 377, 402 (2021); UNIF. PARTITION OF HEIRS PROP. ACT. (UPHPA) introductory cmt. at 2 (UNIF. L. COMM'N 2010).

72. Jeffrey M. Jones, *Majority in U.S. Do Not Have a Will*, *GALLUP* (May 18, 2016), <https://news.gallup.com/poll/191651/majority-not.aspx> [<https://perma.cc/GBV7-VE2Q>] (indicating that 55% of Americans report that they do not have a will.). Americans' likelihood of having a will depends largely on their age and socioeconomic status. See *id.* Sixty-eight percent of those aged 65 and older have a will, compared with just 14% of those younger than age 30. *Id.* Of Americans whose annual household income is \$75,000 or greater, 55% have a will, compared with 31% of those with incomes of less than \$30,000. *Id.* And while 61% of those with a postgraduate education have a will, only 32% with a high school education or less do. *Id.* Likely reflecting those age and socioeconomic differences, nonwhite adults (28%) are about half as likely as white adults (51%) to have a will. *Id.*

73. See MERRILL & AGE WAVE, *LEAVING A LEGACY: A LASTING GIFT TO LOVED ONES* 6 (2019) https://mlaem.fs.ml.com/content/dam/ML/Articles/pdf/ml_LegacyStudy_Final.pdf [<https://perma.cc/RV6Y-PJKK>].

74. See Breland, *supra* note 71, at 402 (discussing the low rate of wills for African Americans).

75. See Bob Carlson, *Most Estate Plans Fail, Don't Let Yours Be One Of Them*, *FORBES* (Jul. 31, 2020, 7:30 AM), <https://www.forbes.com/sites/bobcarlson/2020/07/31/most-estate-plans-fail-dont-let-yours-be-one-of-them/?sh=44b721744008> [<https://perma.cc/Z7M V-CBUN>].

hiring an attorney.⁷⁶ Some scholars theorize that many Black households will not hire an attorney for estate planning or probate because of their distrust of the legal system, negative legal experiences, and misunderstanding the legal implications of tenancy in common property.⁷⁷

Passing a legacy to the next generation is aspirational. Families that leave an inheritance to their descendants provide an additional level of stability and increase the opportunity for wealth mobility.⁷⁸ Black households, in particular, have struggled with land ownership and wealth mobility.⁷⁹ In addition to the normal struggles, the Black community's efforts to own land and build generational wealth were severely limited by government actions, inactions, and interference with Black land ownership.⁸⁰ Generational property transfers are instrumental in wealth mobility and, accordingly, barriers to proper transference inhibit wealth mobility.⁸¹

State laws governing succession typically grant ownership in heirs' property as tenants in common.⁸² Tenants in common own the land equally and have equal rights to possess and use the whole property.⁸³ Generally, tenants in common may also sell individual interests without the permission or knowledge of co-tenants.⁸⁴ This ownership structure is problematic because no one owner is responsible for paying expenses of the property, including but not limited to, taxes, maintenance, and improvements.⁸⁵

The problems with clouded title impact the typical benefits of land ownership, such as the ability to obtain home equity loans, and eligibility for government-based benefits, such as homestead tax exemption and creditor protection lending.⁸⁶ Additionally, the land may be more vulnerable to

76. See Harrington, *supra* note 1 (“‘Heirs’ Property’ generally refers to family owned property inherited by multiple generations without the formal legal proceedings necessary to prove ownership.”).

77. THE EMERGENCY LAND FUND, THE IMPACT OF HEIR PROPERTY ON BLACK RURAL LAND TENURE IN THE SOUTHEASTERN REGION OF THE UNITED STATES 280 (1984) (discussing the hesitancy of African American landowners to create wills).

78. See Palma Joy Strand, *Inheriting Inequality: Wealth, Race, & the Law of Succession*, 89 OR. L. REV. 453, 468 (2010).

79. See Kenn, *supra* note 63, at 66–67.

80. See Breland, *supra* note 71, at 384, 396–400 n.171.

81. Copeland, *supra* note 4, at 1 (“Heir property creates a barrier to wealth accumulation and has contributed significantly to land loss in the African American community in the United States.”).

82. Breland, *supra* note 71, at 383, 388.

83. See *id.* at 388.

84. See *id.*

85. Bailey et al., *supra* note 2, at 9, 17; see also John Schelhas et al., *The Sustainable Forestry and African American Land Retention Program*, in HEIRS’ PROPERTY AND LAND FRACTIONATION: FOSTERING STABLE OWNERSHIP TO PREVENT LAND LOSS AND ABANDONMENT, *supra* note 2, at 20, 21; Bownes & Zabawa, *supra* note 3, at 29, 32.

86. See Copeland & Buchanan, *supra* note 69, at 33 (“The current literature on heir property correctly identifies the limitations associated with this type of ownership (*e.g.*, the inability to collateralize the property for loans, the risk of property loss due to unpaid taxes, and the difficulty in obtaining federal and state disaster- and farm-loan assistance) and the

foreclosure and tax sales because of difficulties in identifying all the heirs or finding an heir who is willing or able to pay the tax bill and seek reimbursement.⁸⁷

Partition sales also contribute to land loss.⁸⁸ Partition actions may be in-kind or by forced sale.⁸⁹ Partitions in-kind divide the property proportionate to the number of ownership interests.⁹⁰ Alternatively, a forced sale orders the entire property to be sold and divides the proceeds proportionate to the number of ownership interests.⁹¹ Predatory property developers take advantage of the forced sale process by purchasing a cotenant's share and subsequently filing a partition action.⁹² This process allows developers to force a sale and buy the entire property, often at below fair market value.⁹³

One of the most time-honored property principles is to keep property alienable. Tenancy in common property, particularly heirs' property, counters this principle. Laws governing heirs' property are problematic and create unnecessary barriers to property transfers.⁹⁴ Fractionalized ownership makes it difficult for the heirs to sell property on the open market.⁹⁵ Consequently, developers have an advantage because they have money and understand the process. Currently, the probate process for heirs' property facilitates land loss for Black households.⁹⁶

problems associated with this type of cotenancy (e.g., the diminution of value, locked wealth, and possible portion [sic] actions)"); *see also* Bailey et al., *supra* note 2, at 13 (describing heirs' property's inability to generate wealth because of lack of maintenance and problems with leveraging the property).

87. Edward "Jerry" Pennick & Monica Rainge, *African-American Land Tenure and Sustainable Development: Eradicating Poverty and Building Intergenerational Wealth in the Black Belt Region*, in HEIRS' PROPERTY AND LAND FRACTIONATION: FOSTERING STABLE OWNERSHIP TO PREVENT LAND LOSS AND ABANDONMENT, *supra* note 2, at 93–94.

88. Copeland & Buchanan, *supra* note 69, at 35, 38.

89. UNIF. PARTITION OF HEIRS PROP. ACT. (UPHPA) introductory cmt. at 1–2 (UNIF. L. COMM'N 2010).

90. *See id.*

91. *See id.*

92. Bailey et al., *supra* note 2, at 14 ("A partition sale also may be initiated by an outsider who is able to buy a family member's share. This outsider who is motivated to gain ownership of the land, now owns a fractional share of the heirs' property and can petition the court for a partition sale.")

93. *See* Thomas Mitchell, *Reforming Property Law to Address Devastating Land Loss*, 66 ALA. L. REV. 1, 19; 20 (2014).

94. *See* Strand, *supra* note 78, at 495, 499 (talking about how clouded title and substantive laws governing heirs' property limits alienability).

95. Breland, *supra* note 71, at 388.

96. *See* Copeland & Buchanan, *supra* note 69, at 35 ("The available literature has devoted significant attention and effort to commenting on the prevalence of heir property in the African American community; however, the collection of empirical data and the analysis of such data are absent. In the last decade, there has been a greater effort toward gathering data that might explain if there is a legal connection between forced sales, heir property, and African American land loss."); *see also* Mitchell, *supra* note 93, at 30–31.

B. The Reach of The Uniform Partition of Heirs' Property Act

Professor Thomas W. Mitchell identified partition sales as “a major source of black land loss.”⁹⁷ He explained how the legal community united at multiple levels to develop the first uniform law that directly addressed partition problems with heirs' property.⁹⁸ The Uniform Partition of Heirs Property Act (“Uniform Act”) was enacted in 2010 to address co-tenant rights and create due process protections to address partitions and forced sales.⁹⁹

The intentionally-limited scope of the Uniform Act focused on the predatory nature of land grabs by real estate speculators posed by the partition sales.¹⁰⁰ This was a necessary step to slow the process and attempt to protect wealth erosion from real estate speculators.¹⁰¹ However, the Uniform Act does not stop the process because the due process measures simply provide the opportunity for other heirs to purchase the partitioner heir's interest.¹⁰² This process is only effective if one or more of the family members can afford to purchase that interest and everyone else agrees not to sell or someone can purchase the entire property.¹⁰³ While the buyout option is preferable, it may not be workable.

Additionally, the explanatory language in the Uniform Act indicates the goal of incorporating property preservation and wealth protection, therefore more is required.¹⁰⁴ The underlying threat to this goal is the fractionalization created by tenants in common default rules. Even with the reforms under the Uniform Act, fractionalized property remains a precarious

97. Thomas W. Mitchell, *Growing Ineq. & Racial Econ. Gaps*, 56 *HOW. L. J.* 849, 886 (2013).

98. *Id.* at 887. (explaining how law professors, civil rights attorneys, public interest attorneys and the Real Property, Trust and Estate Law section of the American Bar Association teamed up to submit a proposal to the Uniform Law Commission to reform family-owned tenancy in common property).

99. UPHPA introductory cmt. at 3. Since enacted, the UPHPA has been adopted in 21 states. *Partition of Heirs Property Act*, UNIF. L. COMM'N, [https://www.uniformlaws.org/committees/community-home?CommunityKey=50724584-e808-4255-bc5d-8ea4e588371d#:~:text=The%20Uniform%20Partition%20of%20Heirs,in%2Dcommon%20under%20state%20law.\[https://perma.cc/S8MA-656Q\]](https://www.uniformlaws.org/committees/community-home?CommunityKey=50724584-e808-4255-bc5d-8ea4e588371d#:~:text=The%20Uniform%20Partition%20of%20Heirs,in%2Dcommon%20under%20state%20law.[https://perma.cc/S8MA-656Q]) (last reviewed Oct. 28, 2022).

100. UPHPA introductory cmt. at 1–2.

101. UPHPA introductory cmt. at 3.

102. See UNIF. PARTITION OF HEIRS PROP. ACT. (UPHPA) § 7 cmt. 6 (UNIF. L. COMM'N 2010).

103. See Avanthi Cole, *For the “Wealthy and Legally Savvy”: The Weaknesses of the Unif. Partition of Heirs Prop. Act as Applied to the Low-Income Black Heirs Prop. Owners*, 11 *COLUM. J. OF RACE & L.* 343, 361–63 (2021) (explaining the inaccessibility of Cotenant Buyout under Section 7 of the UPHPA due to the expense of purchasing the initiating cotenant's fractional interest and the difficulty of coordination and timely payment among “land-rich but cash-poor” co-tenants).

104. See generally *id.* at 356–60 (explaining how the UPHPA was enacted to address the problems with heirs property, but the act, at present, falls short of truly protecting low- to middle-income families who are land-rich but cash-poor).

ownership structure and not conducive to wealth mobility.¹⁰⁵ For example, fractionalization decreases the market rate for property because of the minority discounts and increases the risks associated with clearing title.¹⁰⁶ Consequently, the owners are still at risk of losing value.¹⁰⁷ Even under the best of circumstances, the current reforms under the Uniform Act may only delay the inevitable.¹⁰⁸ Therefore, it is time to institute the next step to incorporate wealth preservation and mobility for heirs' property.

III. REMEDIATING THE IMPACT OF LAND LOSSES

A. The Call

Scholars have called for various reforms to address the homeownership crisis.¹⁰⁹ For example, Professor Dorothy A. Brown proposed refundable mortgage interest deduction credits to assist middle and lower-income homeowners.¹¹⁰ I have previously proposed redirecting government resources to lower and middle-income households to assist with down payments, or providing interest free years for income qualified homeowners.¹¹¹ These proposals were primarily focused on increasing

105. See UHPHA introductory cmt. at 3 (“[E]state planners and real estate lawyers believe that tenancy-in-common ownership under the default rules represents one of the most unstable forms of real property ownership. To address the dangers of this form of ownership, these professionals routinely advise their wealthy and legally savvy clients to enter into privately negotiated tenancy-in-common agreements with their fellow cotenants or work with their other cotenants to reorganize their ownership under a different ownership structure altogether such as a limited liability company.”); see also Cole, *supra* note 103, at 350–51.

106. April Simpson, *New Laws Help Rural Black Families Fight For Their Land*, THE PEW CHARITABLE TRUSTS: STATELINE (Jun. 18, 2019), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/06/18/new-laws-help-rural-black-families-fight-for-their-land> [<https://perma.cc/CQ34-WKQX>].

107. See Cole, *supra* note 103, at 359.

108. See *id.* at 356–58 (explaining how the UHPHA is an imperfect solution for remedying the problems associated with heirs' property and courts often proceed with the partition action).

109. See, e.g., Victoria J. Haneman, *Retrenchment, Temp. -Effect Legis., & the Home Mortg. Int. Deduction*, 71 OKLA. L. REV. 347, 389–90 (2019) (proposing a tax credit to shift support of homeownership from the higher income taxpayers to lower income taxpayers); see also Beverly Moran & Stephanie M. Wildman, *Race & Wealth Disparity: The Role of the L. & the Legal Sys.*, 34 FORDHAM URB. L. J. 1219, 1230 (2007) (discussing the vast disparities in homeownership between white and blacks); Jared Ruiz Bybee, *In Defense of Low-Income Homeownership*, ALA. C.R. C.L. L. REV. 107, 125, 129 (2013) discussing how low-income homeowners receive limited benefits from tax preferences); o Nino C. Monea, *Legal Benefits of Homeownership*, 52 N.M. L. REV. 384 (2022) (discussing disparities in government support for housing between the affluent and poor).

110. Dorothy A. Brown, *Shades of the Am. Dream*, 87 WASH. U. L. REV. 329, 367–68 (2009).

111. Phyllis C. Taite, *Taxes, the Problem & Sol.: A Model for Vanishing Deduction & Exclusion for Resistance-Based Tax Preferences*, 59 N.Y. L. SCH. L. REV. 361, 385–87 (2014).

homeownership rates and making homeownership affordable.¹¹² This article instead proposes solutions aimed at facilitating retention of homeownership and more broadly, land ownership, by implementing safeguards against land loss.

Professor Mitchell issued a call to the legal community, at all levels, to be proactive and engage the minority homeownership crisis in a meaningful way.¹¹³ As previously discussed, the Uniform Act implemented measures to deal with forced sales.¹¹⁴ Still, heirs' property remains a crisis for minority homeownership because the only meaningful reform does not resolve fractionalization—which is the root cause of the problematic nature of heirs' property.

B. Answering the Call

Various cities and states have provided models to help repair the damage sustained by communities that suffered significant wealth loss from government action or inaction.¹¹⁵ For example, the City of Evanston (“Evanston”) enacted a “sustained policy of reparations for harm done to Black citizens.”¹¹⁶ Before making the resolution, Evanston’s staff had previously requested a report to determine the extent of local government participation in discriminatory practices against its Black residents.¹¹⁷ The report outlined the sustained history of discriminatory practices including,

112. *Id.* at 387.

113. Mitchell, *supra* note 97, at 885 (“To this end, more legal organizations committed to promoting civil rights and social justice should consider how they can play a meaningful role in helping minorities become homeowners in a financially sustainable way and in helping those who are homeowners maintain their homes. At the national level, more civil rights and public interest legal organizations should seek to participate in a proactive way in developing and championing policy agendas that include the legal reforms necessary to address critical housing issues impacting minorities. Law schools that have a commitment to promoting civil rights and social justice should consider undertaking initiatives to enhance in a substantial way the real estate offerings that are available to their students, including by developing real estate certificate or concentration programs.”).

114. *See supra* Section III.B.

115. Michelle Bond, *Philly Is Giving \$7.6M To Legal Aid Agencies To Clear Residents' Tangled Titles*, PHILA. INQUIRER (Sept. 7, 2022) <https://www.inquirer.com/real-estate/housing/dead-homeowner-unclear-ownership-funding-tangled-title-philadelphia-deed-20220907.html> [<https://perma.cc/W87U-MSKZ>]; *see generally* Jesse J. Richardson, Jr., *Receivership: Another Option for Partition of Heirs Property*, 120 VA. L. REV. 917, 930–31 (2018).

116. Debbie-Marie Brown, *Evanston's historic reparations program: A 101 guide*, EVANSTON ROUND TABLE (Aug. 23, 2022), https://evanstonroundtable.com/2022/08/23/evanstons-historic-reparations-program-a-101-guide/?gclid=Cj0KCQjwmouZBhDSARIsALYcoupeS5uka7JVqBvAZdcc9oko5I8WsUkpdw3LD1NFaHg6d42fdHws8r8aAse-EALw_wcB [<https://perma.cc/MEB3-F6FN>].

117. MORRIS (DINO) ROBINSON JR., & JENNY THOMPSON, *EVANSTON POLICIES AND PRACTICES DIRECTLY AFFECTING THE AFRICAN AMERICAN COMMUNITY, 1900-1960 (AND PRESENT)*, at 3 (Aug. 2020), <https://www.cityofevanston.org/home/showpublisheddocument/59759/637382881295170000> [<https://perma.cc/X9A9-S46M>].

but not limited to, redlining, Jim Crow Laws, employment, and education opportunities.¹¹⁸ Further, they found discrimination in zoning that restricted where Black residents could live and removed other Black residents through eminent domain.¹¹⁹

Evanston responded to this report by passing a resolution that approved reparations.¹²⁰ Evanston committed \$10,000,000 to the Reparations Fund, to be funded by the Cannabis Retailers Tax, as well as donations from individuals and organizations.¹²¹ This first program, in a series of methods to pay reparations, focuses on housing and economic development.¹²² Eligible residents may receive up to \$25,000 down payment/closing cost assistance to purchase, home improvement funds to repair or improve, and/or mortgage assistance to pay down the mortgage.¹²³

This model is important because it focuses on restorative justice by increasing homeownership rates and retaining ownership justified by the fact that prior obstacles to homeownership were a significant factor in creating wealth disparities.¹²⁴ Further, the program is designed to avoid tax liability for the recipients by disbursing funds directly from the Reparations Fund to the financial institution.¹²⁵

A significant factor in using homeownership for wealth mobility is keeping the title clear.¹²⁶ Philadelphia's city government officials recognized

118. *See id.* at 10, 12, 21.

119. *Id.* at 42–43. (“In order to protect property values, develop Evanston, and tackle the ‘problem’ of Black housing, the city adopted a policy of home demolition, a means by which the city and private citizens attempted to control and remove Black citizens from certain neighborhoods that lay beyond the west side (‘clearing’ those areas for ‘economic development.’) Often the argument was made that the housing to be demolished was ‘substandard’ or ‘unsanitary’ or that certain areas were ‘blighted’ or ‘overcrowded.’”).

120. A Resolution Establishing a City of Evanston Funding Source Devoted to Local Reparations, at 2 (2019), <https://cityofevanston.civicweb.net/document/20294/Resolution%20126-R-19,%20Establishing%20a%20City%20of%20Eva.pdf?handle=10A76BCBA423414099A224C746DBA330> [<https://perma.cc/P96Q-2ARB>].

121. A Resolution Authorizing the Local Reparations Restorative Housing Programs, at 1 (adopted Jan. 11, 2021), <https://www.cityofevanston.org/home/showpublisheddocument/63401/637544363026900000> [<https://perma.cc/QU92-W4WE>].

122. *Id.* at 2 (“The Program . . . is a step towards revitaliz[ing], preserv[ing], and stabiliz[ing] Black/African-American owner-occupied homes in Evanston[,] increas[ing] homeownership and build[ing] the wealth of Black/African-American residents[,] build[ing] intergenerational equity amongst Black/African-American residents[,] and improv[ing] the retention rate of black African American homeowners in the city of Evanston.”); *see also id.* at 3.

123. *Id.* at 7 (indicating that eligible residents include Black or African-Americans residents, or their descendants, who were Evanston residents between 1919 and 1969).

124. *See* Phyllis C. Taite, *Exploding Wealth Inequalities: Does Tax Policy Promote Social Justice or Social Injustice*, 36 W. NEW ENG. L. REV. 201, 202 (2014) (discussing how homeownership-based tax policies contribute to wealth inequalities).

125. Evanston Reparations FAQs, CITY OF EVANSTON, <https://www.cityofevanston.org/home/showpublisheddocument/57472/637257572959230000> [<https://perma.cc/R8FK-B39H>].

126. Simpson, *supra* note 106.

the significant risk of land loss and the impact on wealth erosion for Philadelphians, particularly their Black residents.¹²⁷ Philadelphia created the “Tangled Title Fund” which provides grants to assist eligible low-income property owners with clearing titles.¹²⁸ The city is also providing \$7.6 million over four years to legal aid organizations to provide legal assistance in clearing titles and preparing estate planning documents.¹²⁹ This is an outstanding model for other city governments to emulate if there are no other options. Unfortunately, there are few protections to prevent the cleared property from the same fate at the death of the current owner or owners.¹³⁰

C. Proposed Solutions

1. Current Proposals

Professor Carla Spivack proposed that the problem will solve itself over time by reverting the default form tenancy in common back to joint tenancy with rights of survivorship.¹³¹ While she is correct that it may resolve itself, she concedes it is not a viable solution because it solves one problem and creates another when other decedent heir or heirs would not gain their ancestor’s property interest.¹³² She also proposed transferring the property to a traditional land trust or forming a limited liability company.¹³³ These proposals suggest an affirmative action that requires the assistance of an attorney. Based on historical data, Black families are not likely to engage the assistance of attorneys, therefore, these proposals may not be viable.¹³⁴

One of the primary barriers to quieting title is the expensive process which requires the assistance of attorneys. Professor Batra proposed to change the structure for legal payment and require the petitioner to pay the legal fees outright instead of tying the fees to the sale.¹³⁵ She acknowledged her solution would create a windfall for the other co-tenants and that the

127. Bond, *supra* note 115 (reporting Philadelphians may risk \$1.1 billion in generational wealth if titles are not cleared).

128. Eligibility requirements include income restrictions, asset restrictions, the property must be the primary residence or intended to be and the applicant must be able to cover expenses in excess of the grant. *Tangled Title Fund*, Phila. VIP, <https://www.phillyvip.org/tangled-title-fund/> [<https://perma.cc/K7F9-5KVP>].

129. Bond, *supra* note 115.

130. See Copeland, *supra* note 4, at 3.

131. Carla Spivack, *Broken Links: A Critique of Formal Equality in Inheritance Law*, 2019 WIS. L. REV. 191, 206–07 (2019).

132. *Id.* at 207 (“There is powerful historical and cultural significance and emotional resonance around the idea of passing land on to all of the next generation. Thus, joint tenancy is not a viable solution, however appealing it is theoretically; disempowerment of testators and oblivion to their values only perpetuates the problem.”).

133. *Id.*

134. Pennick & Rainge, *supra* note 87, at 94.

135. Rishi Batra, *Improving the Uniform Partition of Heirs Property Act*, 24 GEO. MASON L. REV. 743, 759 (2017).

petitioner may never recover reimbursement.¹³⁶ She further addressed that attorneys may object, but did not acknowledge that this change could make it more difficult to hire an attorney, or impossible, if no family member is willing to pay the fees without any legal recourse for reimbursement.¹³⁷

The second proposed reform for legal fees requires the parties who object to the sale to appear in court to make the objection and their portion of the legal fees would be reduced.¹³⁸ This proposal presumes that they would have the financial means to appear and disregards the challenges for non-local heirs. This proposal will also make it more difficult to obtain legal representation and does not adequately address the free rider problem, as the objecting heirs would be entitled to a greater share of proceeds if the sale occurs despite the objections.

Professor Batra further argued that the typical publication notice is inadequate to protect an heir's property interest.¹³⁹ She noted that heirs may not be local; therefore, they would not have reasonable access to the publication.¹⁴⁰ Instead, she proposed that a petitioner should proffer actual notice to known heirs and report efforts sustained to find and provide actual notice to heirs with unknown contact information.¹⁴¹ While the notice procedures and efforts may slow down the progression of the sale and give better protections for the heirs, they may not be enough to stop the inevitable.¹⁴²

In her final proposal, she recommends mandatory mediation, which requires the parties to attempt resolution before filing a partition action.¹⁴³ Requiring the parties to mediate before filing for partition may give rise to an agreement prior to any trial.¹⁴⁴ Further, she argues that developers may be less inclined to purchase this property if they are aware of the additional barriers to ownership.¹⁴⁵ Similar to the notice proposal, mandatory mediation will slow down the process, but it may not deter developers from pursuing the property.

Professor Jesse J. Richardson, Jr. proposed adapting receivership as a tool for abandoned and neglected property to clear title, consolidate ownership, and create development opportunities.¹⁴⁶ Under his proposal, a disinterested third party, appointed by the court, would be responsible for providing notice to heirs and rehabilitating the property.¹⁴⁷

136. *Id.* at 759.

137. *Id.* at 760.

138. *See id.*

139. *Id.* at 752–53.

140. *Id.* at 761.

141. *Id.* at 762.

142. *See generally id.*

143. *Id.* at 763.

144. *See id.* at 763–64.

145. *Id.* at 764.

146. Richardson, Jr., *supra* note 115, at 936–37.

147. *See id.* at 930.

The receivership, as modified in his proposal, is not designed to punish the absent owner.¹⁴⁸ Instead, the receiver would have the authority to act on behalf of the family to sell or otherwise dispose of the property.¹⁴⁹ This proposal would take the right to decide, an important property right, away from the family. Further, a disinterested receiver may be more motivated by profit than family wishes. Finally, his proposal is limited to abandoned and neglected property in rural Appalachia.¹⁵⁰ While the proposal is an interesting and efficient way to handle abandoned property, it would not be appropriate to address heirs' property where the heirs use and maintain the property.

Still, the proposal had a useful component that may be helpful to address heirs' property, namely, creating a scheme where one or a few select people may act on behalf of the entire family. By reducing the number of people with signing and decision-making powers, the property becomes more alienable, if desired, and determining and preserving ownership will be more efficient and effective.

2. *Family Land Trusts*

Wealthy people have used trusts to prevent these problems previously discussed about heirs' property.¹⁵¹ Trusts are flexible instruments that hold property without the need for probate.¹⁵² Families most impacted by heirs' property will not likely create trusts for several reasons, including costs and access to an attorney.¹⁵³ This article proposes the creation of a statutory Family Land Trust ("FLT") to replace the current tenants in common default. Problems with heirs' property system are well-documented and require significant reform.¹⁵⁴

The proposed FLT would solve most of the problems including fractionalization, property management, forced sales, and restrictions on

148. *Id.*

149. *Id.* at 935.

150. *Id.* at 920.

151. See Sarah Breitenbach, *Heirs' Property Challenges Families, States*, THE PEW CHARITABLE TRUSTS: STATELINE (July 15, 2015) <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/07/15/heirs-property-challenges-families-states> [<https://perma.cc/7VDW-B9BW>].

152. Nikki Nelson, *Using Trusts to Protect Your Assets*, WOLTERS KLUWER (Dec. 24, 2020), <https://www.wolterskluwer.com/en/expert-insights/using-trusts-to-protect-your-assets> [<https://perma.cc/R5P7-5VY2>].

153. See Breitenbach, *supra* note 151.

154. See *supra* Section II.A; see also Uniform Law Commission, *Tenancy in Common Ownership Default Rules Act* (Jun. 14, 2022), https://higherlogicdownload.s3-external-1.amazonaws.com/UNIFORMLAWS/62ea081f-0000-8ab4-cb92-5a9b92547e04_file.pdf?AWSAccessKeyId=AKIAVRDO7IEREB57R7MT&Expires=1680019637&Signature=RSd%2Biukcw%2FkEaDf9pImZQi8z85k%3D [<https://perma.cc/EFH3-BCZB>] (draft discussing proposed rules to make tenancy in common transactions more beneficial to the majority of owners by addressing common problems such as missing owners, rules of proportionate ownership expenses and transferring ownership to a different form).

alienation. With a trustee,¹⁵⁵ forced sales would be severely hampered because it would become difficult for land speculators to gain the power to force a sale through a minority interest.

State legislatures have the power to create laws for the proposed FLT. The trust would only exist to hold title to family, owner-occupied, land and noncommercial land except for small family farms.¹⁵⁶ A larger farm or commercial property should have the resources to create a trust or other pass-through entity. Trust law also solves the problem of fractionalization which, in turn, eliminates the clouded title. Further, current heirs' property owners would have the right to opt into the proposed FLT.

Congress attempted a similar result with the Indian Land Consolidation Act of 1983 ("Act") litigated in *Hodel v. Irving*.¹⁵⁷ Congress created the Act to solve "the problem of extreme fractionalization."¹⁵⁸ The Act provided the following:

that no undivided fractional interest in such lands shall descend by intestacy or devise, but, instead shall escheat to the tribe if such interest represents 2 percentum or less of the total acreage in such tract and has earned to its owner less than \$100 in the preceding year before it is due to escheat.¹⁵⁹

The Act focused on the fractionalization of the property and used the income potential and value of the property to determine which property should be escheated to the tribe.¹⁶⁰ The court ruled this was a taking of property without providing just compensation.¹⁶¹ This proposal is different in that no one would lose their property interest because every heir would remain as a beneficiary of the trust. While some of the property rights will be restricted, the benefits outweigh the burden and the opportunity to rebuild family wealth is more available.

To better illustrate the point, imagine Decedent died intestate with three children, Alice, Barry, and Charlie. Only one heir would be required to file a notice of death and title would default to the proposed FLT. The beneficiaries may vote on a single trustee, or multiple trustees, or seek court appointment of a trustee or multiple trustees. The trustee would be responsible for annual notifications to the beneficiaries of necessary

155. This proposal does not restrict the trust to one trustee. For simplicity the article will reference a single trustee but later explains the option for selecting multiple trustees. The rules and recommendations are the same whether there are multiple trustees or a single trustee.

156. For the purpose of this article a small family farm is defined as a farm with annual profits of less than \$200,000 per year.

157. 481 U.S. 704, 706 (1987).

158. *Id.* at 712.

159. *Id.* at 709.

160. *See id.* at 712, 714.

161. *Id.* at 717–18.

expenses and seeking proportionate contributions if they plan to keep the property.

If a beneficiary is nonresponsive or fails to contribute for five consecutive years, or five years of nonpayment within ten years, then a claim for adverse possession, by the trustee, may be filed to remove the beneficiary from the FLT. Before removal, the beneficiary will be given notice and a 60-day grace period to make the outstanding payments. This would not be a taking because the beneficiary will have effectively abandoned their property based on their lack of responsiveness or not contributing for the statutory period. This solution takes care of the free-rider problem and maximizes the opportunity to keep the property within the family.

The proposed FLT beneficiaries will also have the option to disclaim an interest, sell their interest to another beneficiary, or sell the interest to the trust. This part of the proposal is also different from *Hodel* because the heirs, in that case, did not have a choice.¹⁶² Creating a statutory FLT makes it easier for legal aid, legal clinics, and pro-bono attorneys to assist with the initial transfer and registration and makes it unnecessary to probate the prior estates for existing heirs' property because the opt in would only require registering the death certificates of the previous ancestors. This proposal provides access to attorneys and ease of process with little or no cost to the heirs. Further, this process makes it simpler to fix existing heirs' property quagmires, shortens the process to clear title, and makes significant steps toward restorative justice.

If the land is income-producing, such that rental payments or small farm income accrues, the trustee would create an account, pay expenses, and provide an annual accounting, like any other trustee. If family members operate the farm, then they will be paid a salary from the proceeds. If the family members decide to sell the property, the trustee must have the majority approval of the beneficiaries. The voting shares would be determined by strict per stirpes.¹⁶³ Using the example from above with Alice, Barry, and Charlie, two of the three children would be required to agree on any property disposition in the example above. The proposed FLT, even with these restrictions, preserves some decision-making power over the property, but the ultimate disposition would be determined by the majority instead of a minority vote of heirs.

Now assume Alice dies leaving four children. The trustee would file the death certificate with the updated beneficiaries in the property deed records. Alice's children would have the voting share of one because they

162. *See id.* at 716–17.

163. Strict per stirpes, BLACK'S LAW DICTIONARY, (11th ed. 2019)

("By roots or stocks; by representation. This term, derived from the civil law, is much used in the law of descents and distribution, and denotes that method of dividing an intestate estate where a class or group of distributees take the share which their deceased would have been entitled to, had he or she lived, taking thus by their right of representing such ancestor, and not as so many individuals.").

would represent Alice's share. In other words, there are still three voting shares and Alice's children would vote by majority vote on her original voting share. Next, assume Charlie dies with five children. The methodology would be the same. The trustee would file the death certificate and update the beneficiaries and Charlie's children would vote for his share.

At Barry's death, this proposal would follow the same trend and keep the original three voting shares if Barry had at least one representative heir. In this example, Barry has one child. At first glance, all the beneficiaries (heirs for comparison) are now grandchildren. Because they are all equally related to Decedent, it would be tempting to give them equal voting shares. This proposal intentionally rejected that option. By keeping the fractional share true to the current scheme, it maintains the fractional ownership share but the property is not burdened with the typical heir's property complexities.¹⁶⁴ To avoid unnecessary complications with voting, the trustee would not normally have a vote unless the trustee is the only member of a line of descent or to break a tie.

This approach balances individual ownership interests against the collective ownership model and supports limitations on some ownership privileges for the greater family benefit.¹⁶⁵ Even though the proposed FLT's are governed by the collective family unit, this approach offers the most independence from outside sources, minimizes the free-rider problem, and maximizes the opportunity to keep the property within the family to rebuild generational wealth.

A final component to maximize land retention is to provide a property tax exemption. The property tax exemptions would be limited to proposed FLT's whose family's history is directly tied to histories of eminent domain, blighting, redlining, blockbusting, and other government-based actions that led to land loss or land value loss. This tax relief is justified under the same principles used by the California legislature when they returned Bruce's Beach with provisions for tax relief.¹⁶⁶

Governments have used, and continue to use, tax policies to promote White wealth.¹⁶⁷ Therefore, using tax policy as a tool to rectify past harms caused or facilitated by government action is consistent with the use of tax policy to promote government policies. Using a multilayered approach is the only methods to provide strategic, systemic, and continuous support to restore a portion of Black wealth lost by government action or inaction.

164. See *supra* Section III.A.

165. See Phyllis C. Taite, *Freedom of Disposition v. Duty of Support: What's a Child's Worth?* 2019 WIS. L. REV. 325, 326 (2019) (asserting the testamentary freedom should be subordinate to a greater family duty).

166. See *supra* Section II.B.

167. See Phyllis C. Taite, *Tax Code Bias and Its Starring Role in Perpetuating Inequalities*, 72 S.C. L. REV. 735, 737 (2021) (discussing how tax policy compounds economic inequalities by favoring white wealth).

CONCLUSION

With the proposed statutory changes, heirs' property may become an effective tool in rebuilding communities destroyed by prior laws and government action or inaction. Whether land or homeownership was lost 100 years ago or 10 years ago, it is undisputed that bad laws and flawed governments at every level were instrumental in destroying, stealing, and inhibiting Black wealth. The attacks were strategic, systemic, and continuous.

Rebuilding destroyed communities will never make up for all that was lost, but that does not negate the duty to act. The response must be strategic, systemic, and continuous to provide restorative justice. The City of Evanston took the first steps to pay reparation to its residents after acknowledging the discriminatory practices of its government.¹⁶⁸ Even though the planned marijuana tax has not been as lucrative as projected, this is still a good model to use in developing funding plans and highlights the importance of multiple funding sources and multi-faceted approaches.¹⁶⁹

California returned Bruce's Beach to the descendants and provided ownership, income tax relief and property tax relief.¹⁷⁰ This holistic approach provides the model for wealth restoration and preservation. Restorative justice requires multi-level responses and the proposed FLT's provide a direct response to a systemic problem. Most importantly, the family received repair and had the right to decide how they wanted to handle their newly restored property. The Bruce family made the decision to sell the property back to the County for nearly \$20 million.¹⁷¹ While the proceeds represent a fraction of the estimated value, the most important points are family had the right to make that decision and a portion of family wealth was restored.

On a final note, tax policy has subsidized wealth almost since the inception of the Internal Revenue Code.¹⁷² Tax code bias is evident in homeownership which has supported White wealth mobility.¹⁷³ The property tax exemptions and proposed FLT's are a small price to pay for the indignities Black Americans have suffered for years as a marginalized and economically oppressed community. This article provides solutions for state and local

168. Brown, *supra* note 116.

169. The Grio Staff, *Evanston Planned \$20M for Reparations, Spent Only \$400K and Helped 16 People*, (Jan 11, 2023) <https://thegrio.com/2023/01/11/evanston-planned-20m-for-reparations-spent-only-400k-and-helped-16-people/> [<https://perma.cc/QQ73-BXNV>].

170. See *supra* Section II.B.

171. Bill Chappell, *The Black Family Who Won the Return of Bruce's Beach Will Sell it Back to LA County*, NPR (Jan. 4, 2023, 11:43 AM ET), <https://www.npr.org/2023/01/04/1146879302/bruces-beach-la-county-california> [<https://perma.cc/6LHE-BB2U>].

172. See Phyllis C. Taite, *May the Odds Be Ever in Your Favor: How the Tax Cuts and Jobs Act Fortified the Great Wealth Divide*, 48 PEPP. L. REV. 1023, 1052 (2021) (discussing how tax policy subsidized the wealthier households).

173. See Phyllis C. Taite, *Inequality by Unnatural Selection: The Impact of Tax Code Bias on the Racial Wealth Gap*, 110 KY. L. J. 639, 640 (2022) (discussing tax policies that promoted white wealth and obstructed Black wealth mobility).

governments to implement small changes that could have a life-changing impact for the affected communities.