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Historic Partition Law Reform: A Game Changer for Heirs' Property Owners

Thomas W. Mitchell

Abstract—Over the course of several decades, many disadvantaged families who owned property under the tenancy-in-common form of ownership—property these families often referred to as heirs' property—have had their property forcibly sold as a result of court-ordered partition sales. For several decades, repeated efforts to reform State partition laws produced little to no reform despite clear evidence that these laws unjustly harmed many families. This paper addresses the remarkable success of a model State statute named the Uniform Partition of Heirs Property Act (UPHPA), which has been enacted into law in several States since 2011, including in five southern States. The UPHPA makes major changes to partition laws that had undergone little change since the 1800s and provides heirs' property owners with significantly enhanced property rights. As a result, many more heirs' property owners should be able to maintain ownership of their property or at least the wealth associated with it.

INTRODUCTION

Against great odds, many African Americans were able to begin acquiring property at the conclusion of the Civil War. For many of these African Americans, acquiring property represented a dramatic change in status as they transitioned from legally being the property of their former slaveowners to being property owners themselves. All told, between the end of the Civil War and 1920, African Americans acquired at least 16 million acres of agricultural land.¹ They also acquired a

significant amount of non-agricultural property as well, including many oceanfront properties.

Nearly 100 years later, African Americans struggle to maintain their status as property owners. They have experienced substantial involuntary land loss, most likely totaling in the millions of acres over the course of the past 100 years. This involuntary land loss is attributable, among other causes, to actual and threatened violence,² discrimination,³ and various legal actions that

¹ Thomas W. Mitchell, *Destabilizing the Normalization of Rural Black Loss: A Critical Role for Legal Empiricism*, 2005 WIS. L. REV. 557, 563 (2005).

² See Todd Lewan, Dolores Barclay, and Allen G. Breed, *Landownership Made Blacks Targets of Violence and Murder* (pt. 2), AUTHENTIC VOICE (Dec. 3, 2001), https://theauthenticvoice.org/mainstories/tornfromtheland/torn_part2/ [Date last accessed: June 1, 2019].

³ See CIV. RTS. ACTION TEAM, U.S. DEP'T OF AGRIC., CIVIL RIGHTS AT THE UNITED STATES DEPARTMENT OF AGRICULTURE 30 (Feb. 1997) (stating that minority farmers "have lost significant amounts of land and potential farm income as a result of [United States Department of Agriculture (USDA)] discrimination."). The *Pigford v. Glickman* class action lawsuit filed by Black farmers against the USDA and the subsequent *In re Black Farmers Discrimination Litigation* (commonly referred to as *Pigford II*) involved more than 55,000 discrimination claims by Black farmers against the USDA for alleged discrimination that occurred between January 1, 1981 and December 31, 1996. See Office of the Monitor, *National Statistics Regarding Pigford v. Vilsack Track A Implementation as of February 16, 2012* (2012), <http://media.dcd.uscourts.gov/pigfordmonitor/stats/> [Date last accessed: Apr. 19, 2019]; see also Ombudsman, *In re Black Farmers — Ombudsman*, <http://www.inreblackfarmersombudsman.com> [Date last accessed: Apr. 19, 2019]. In the *Pigford* case, 15,645 claims were approved, and in the *In re Black Farmers* case, at least 18,310 claims were approved. Many of the claimants in the *Pigford* and the *In re Black Farmers* cases claimed that they lost their land as a result of USDA discrimination. Conservatively, one reasonably could assume that the claimants in these two cases alone involuntarily lost several hundred thousand acres of land as a result of USDA discrimination that occurred between 1981 and 1996. More broadly, many other Federal government reports dating back to 1965 documented widespread discrimination by the USDA against Black farmers, oftentimes resulting in involuntary land loss. See 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, 529 n. 146 (2001) [hereinafter Mitchell, *Reconstruction*]. Unfortunately, discrimination continues to drive some Black farmers out of farming, depriving some of their land as well. See Debbie Weingarten, *'It's Not Fair, Not Right': How America Treats its Black Farmers*, GUARDIAN (Oct. 30, 2018), <https://www.theguardian.com/world/2018/oct/30/america-black-farmers-louisiana-sugarcane> [Date last accessed: May 3, 2019].

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have culminated in many forced sales and other forced transfers.⁴ Further, over the course of the past 15 years, African Americans have experienced a significant drop in their rates of home ownership. The African-American home ownership rate now stands at 40.6 percent as compared to the overall home ownership rate of 64.1 percent and the White American home ownership rate of 73.1 percent.⁵ The current African-American home ownership rate represents a substantial decrease from the high water mark for African-American home ownership, which was 49.1 percent in 2004,⁶ and it is significantly lower than the African-American home ownership rate in 1970, which was 42.6 percent.⁷ What this means in context is that more than 50 years after the Federal Fair Housing Act became law, a law many believed would substantially improve many housing conditions and opportunities for African Americans and other subordinated people, the African-American home ownership rate in fact has not improved, but instead has deteriorated. In some important ways, the challenges African Americans have experienced with retaining their rural and urban properties serve as the canary in the coal mine for other disadvantaged groups of American property owners.

African Americans have lost their property involuntarily as a result of certain legal and extralegal actions. The legal actions that have resulted in forced transfers of Black-owned properties over the course of many decades include foreclosure, eminent domain, adverse possession, tax sales, and partition sales.⁸ Certainly, over the course of the past decade or so, a very large number of African-American homeowners have lost their homes in foreclosure, including a disturbingly large number who should have qualified for prime loans but who were instead steered by various lenders into agreeing to take out predatory, subprime loans.⁹

This paper focuses upon the challenges disadvantaged families, including African-American families, have experienced in trying to maintain ownership of their family-owned property.¹⁰ In many instances, families have ended up in conflicts with those that have tried to use a property law known as partition law to force sales of these family properties. In some of these families, family ownership of particular rural properties dates back to the latter part of the 1800s, and family ownership of particular urban properties dates back to the mid-1900s.

The paper begins by describing how these families have been disadvantaged by partition law, resulting in a large number of families losing their property involuntarily over the course of many decades. The paper then reviews critically important State-level reform of partition law, which began occurring in 2011 despite the previous widespread belief that partition law would never be reformed to benefit heirs' property owners. After reviewing these historic developments in partition law reform at the State level, this paper next provides an overview of the new Federal Farm Bill's provisions to assist disadvantaged farmers and ranchers who own heirs' property, an initiative many rural advocates have referred to as a potential game changer for disadvantaged farmers and ranchers given that Congress had done precious little to help heirs' property owners up until passage of this Farm Bill. The paper concludes with commentary about how the unexpected, even dramatic success of State-level, partition law reform efforts and the new Federal interest in addressing longstanding challenges for heirs' property owners could be leveraged to generate additional legal reforms and policy development and implementation. The additional legal reforms and policy initiatives would be designed to make heirs' property ownership more viable and valuable for those who own such property, including in economic, environmental, cultural, and other ways.

⁴ See *supra* note 3 at 511 and accompanying text.

⁵ U.S. CENSUS BUREAU, QUARTERLY RESIDENTIAL VACANCIES AND HOMEOWNERSHIP, SECOND QUARTER 2019 (2019), <http://www.census.gov/housing/hvs/files/currenthvspress.pdf> [Date last accessed: Aug. 22, 2019]. For purposes of this paper, the White home ownership rate refers to the non-Hispanic White home ownership rate.

⁶ U.S. CENSUS BUREAU, TABLE 16 HOMEOWNERSHIP RATES BY RACE AND ETHNICITY OF HOUSEHOLDER: 1994 TO PRESENT, <https://www.census.gov/housing/hvs/data/histtabs.html> [Date last accessed: Apr. 19, 2019]. In 2004, the overall home ownership rate in the United States in the second quarter was 69.2 percent, and the White home ownership rate was 76.2 percent. *Id.* See *Homeownership Rates by Area: 1960 to 2004*, CENSUS, <https://www.census.gov/housing/hvs/files/annual04/ann04t12.txt> [Date last accessed: Apr. 19, 2019].

⁷ U.S. CENSUS BUREAU, HISTORICAL CENSUS OF HOUSING TABLES: OWNERSHIP RATES (2011), <https://www.census.gov/hhes/www/housing/census/historic/owner.html> [Date last accessed: Apr. 19, 2019]. See also Wilhelmina A. Leigh and Danielle Huff, AFRICAN AMERICANS AND HOMEOWNERSHIP: SEPARATE AND UNEQUAL, 1940 TO 2006, *JT. CENT. POLIT. ECON. STUD. Brief #1*, 3 (2007). In 1970, the White American home ownership rate was 66.8 percent. *Id.* In that same year, the overall home ownership rate was 62.9 percent. See U.S. CENSUS BUREAU, HISTORICAL CENSUS OF HOUSING TABLES: OWNERSHIP RATES (2011), <https://www.census.gov/hhes/www/housing/census/historic/owner.html> [Date last accessed: Apr. 19, 2019].

⁸ Mitchell, *Reconstruction*, *supra* note 3 at 511.

⁹ Mechele Dickerson, HOMEOWNERSHIP AND AMERICA'S FINANCIAL UNDERCLASS: FLAWED PREMISES, BROKEN PROMISES, *NEW PRESCRIPTIONS* 166–71 (2014).

¹⁰ For purposes of this paper, disadvantaged means low-income or low-wealth individuals or families and/or people who are members of racial or ethnic groups who have faced significant discrimination in the United States over the course of many generations.

HEIRS' PROPERTY AND PARTITION LAW

One enduring challenge African-American families as well as many other families have faced in their efforts to maintain ownership or at least meaningful control of their property has been the perils of what is commonly referred to as heirs' property. Heirs' property ownership technically is a subset of tenancy-in-common ownership, the most prevalent type of common ownership of real property in the United States.¹¹ Those who own a fractional interest in tenancy-in-common property do not own any particular "piece of the property" but instead own a fractional interest in the entire property, akin to how people own shares in a corporation, which explains why such property ownership often is referred to as undivided ownership.

Heirs' property typically results from property being transferred from one generation to another by intestate succession as a result of individuals who failed to make wills or to utilize other advisable estate planning techniques. If someone who owns real property dies without a will, those deemed under State intestacy laws to be the heirs of the deceased person may be entitled to an ownership interest in real property owned by the decedent. If two or more heirs of a decedent are entitled to receive an ownership interest in real property, these heirs will own the property under a tenancy in common as mandated by intestate succession laws throughout the country.¹²

Overall, intestacy is not a trivial phenomenon. Although no robust national study of intestacy rates ever has been conducted due to the vexing methodological challenges conducting such a survey would entail,¹³ many discrete studies of intestacy have been done that have yielded valuable data.¹⁴ These studies do make it clear that a very substantial percentage of people in this country do not make wills or have other estate plans, with the rate of intestacy ranging from 41 to 68 percent in a significant subset of these studies.¹⁵ Not surprisingly, low-income Americans and Americans who have little wealth have particularly high rates of intestacy,¹⁶ which explains why many Americans own heirs' property whether they be African Americans, Hispanics/Latinos, White Americans, or Native Americans who own property in fee simple.¹⁷

Nevertheless, certain studies also have revealed that there is a substantial racial element to the patterns of intestate succession. To this end, studies have revealed a significant gap in rates of will-making between White Americans and non-Whites, including between White Americans and African Americans. For example, one study revealed that 52 percent of White Americans but only 32 percent of African Americans had made wills or had made other estate plans.¹⁸ A more recent unpublished working paper by three economists reveals an even greater disparity; approximately 64 percent of Whites in the study had made a will, but only approximately 24 percent of the Black

¹¹ Thomas W. Mitchell, *Reforming Property Law to Address Devastating Land Loss*, 66 ALA. L. REV. 1, 9, 29 (2014) [hereinafter Mitchell, *Reforming Property Law*].

¹² *Id.* at 9.

¹³ Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 877 (2012).

¹⁴ Danaya C. Wright, *Inheritance Equity: Reforming the Inheritance Penalties Facing Children in Nontraditional Families*, 25 CORNELL J.L. & PUB. POL'Y 1, 3 n.4 (2015).

¹⁵ See, e.g., Adam J. Hirsch, *Inheritance on the Fringes of Marriage*, 2018 U. ILL. L. REV. 235, 240 n. 21 (noting December 2016 study reporting a 52-percent intestacy rate); Wendy S. Goffe and Rochelle L. Haller, *From Zoom to Doom? Risks of Do-It-Yourself Estate Planning*, EST. PLAN., Apr. 2011, at 27, 27 (reporting a 65-percent intestacy rate); Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status*, 23 QUINNIPIAC PROB. L. J. 36, 41 (2009) (reporting a 68-percent intestacy rate); Mary L. Fellows, Rita J. Simon, and William Rau, *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 321, 337 (reporting a 55-percent intestacy rate); John R. Price, *The Transmission of Wealth at Death in a Community Property Jurisdiction*, 50 WASH. L. REV. 277, 295 (1975) (reporting a 41-percent intestacy rate); Kerri Anne Renzulli, *Half of Americans Don't Have a Will. Here's How to Fix That for Your Family*, TIME MONEY (Nov. 30, 2016), <http://time.com/money/4581727/estate-planning-inheritance-leave-money-will/> [Date last accessed: May 3, 2019, archived at <https://perma.cc/R3LG-Y296>] (reporting a 64-percent intestacy rate).

¹⁶ Palma Joy Strand, *Inheriting Inequality: Wealth, Race, and the Laws of Succession*, 89 OR. L. REV. 453, 492 (2011); Heather K. Way, *Informal Homeownership in the United States and the Law*, 29 ST. LOUIS U. PUB. L. REV. 113, 151 (2009); Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status*, 23 QUINNIPIAC PROB. L.J. 36, 42, 50 (2009).

¹⁷ See Way, *supra* note 16 at 152. As an aside, high rates of intestacy in certain disadvantaged communities explain how the colloquial term heirs' property (or "heir property") first came into existence within these communities. See Mitchell, *Reforming Property Law*, *supra* note 11 at 29. There are many parallels between heirs' property ownership and so-called Indian trust land in terms of how both types of properties easily can become fractionated, including because of intestacy, and how such fractionation inhibits the owners from being able to realize much of the potential benefits of their property ownership. See Jessica A. Shoemaker, *No Sticks in my Bundle: Rethinking the Indian Land Tenure Problem*, 63 U. KAN. L. REV. 383, 441 (2015). Nevertheless, there are many important ways in which heirs' property ownership differs from the ownership of Indian trust land, which results in these two forms of common real property ownership creating distinct problems for those who have an ownership interest in one form versus the other. *Id.* at 441–442.

¹⁸ See Strand, *supra* note 16 at 492 n. 201.

respondents had made a will.¹⁹ Further, the study reveals that the most highly educated Black respondents—those with a college degree or more—had by far the highest will-making rates among the Black respondents but dramatically lower rates of will-making than the least educated White American respondents, those without a high school degree who constitute the group of White Americans with the lowest will-making rates.²⁰ These data also reveal a similar pattern of will-making for Hispanics as compared to non-Hispanics (see table 1).

Further, a survey from the early 1980s of 1,708 Black landowners in five southern States revealed that 81 percent of the landowners had not made a will.²¹ Though this survey had no comparative data on will-making rates for similarly situated White landowners, it is likely that the Black landowners made wills at a significantly lower rate than White landowners based upon what is known about other racial data on will-making more generally.

Racial differences in patterns of estate planning have been under-theorized and have not been the subject of much rigorous scholarship, including empirical, historical, or socio-legal scholarship.²² Some theories have been offered to explain high rates of intestacy among African Americans. For example, some have claimed that African Americans often have elected not to make wills due to their distrust of a legal system that did not adequately protect their property rights, and others have claimed that African Americans intentionally have opted to transfer their property via intestacy because intestate succession is more closely aligned with West African customary, succession practices.²³ However, these particular theories are contested and have not been evaluated in any rigorous way.²⁴ It bears mentioning that others have claimed that low will-making rates for African Americans represent a present day manifestation of the ways in which African Americans after the conclusion of the Civil War were deprived of access to attorneys and even to

basic information about estate planning.²⁵ Though quite plausible, this theory also has not been verified in any meaningful way.

Unfortunately, heirs' property ownership can be problematic for a number of reasons. For purposes of this paper, I will focus mostly (though not exclusively) on the challenges families have faced in beating back efforts of real estate speculators, other family members, and some others who often have sought to force heirs' property to be sold. Such efforts to force sales of heirs' property often have occurred even in cases in which a clear majority of the family members have desired to retain ownership of their property, property that often has been owned by these families for generations.

As indicated, heirs' property ownership is a subset of tenancy-in-common ownership. Tenancy-in-common ownership under the background default rules established by States represents the most unstable form of common ownership of real property in the United States.²⁶ The inherent instability of tenancy-in-common ownership arises from the legal rules that determine how an individual tenant in common can part ways with his or her cotenants, sometimes referred to as the rules governing exit from common ownership.

Partition law governs exit from tenancy-in-common ownership, and any tenant in common, irrespective of the size of his or her fractional interest can file a partition action. Therefore, a tenant in common, for example, who owns a 50-percent, 10-percent, 1-percent, or 1/1,000th-percent interest can file a partition action and further can request a court to order a forced sale of the property as described herein. This is just one aspect of partition law that is counterintuitive to many heirs' property owners, many of whom assume that heirs' property only can be sold if all of the cotenants consent to a sale.²⁷

¹⁹ Marco Francesconi, Robert A. Pollak, and Domenico Tabasso, *Unequal Bequests* (Nat'l Bureau of Econ. Research, Working Paper No. 21692, 2015) (data can be found in the online appendix to the unpublished manuscript and in unpublished table on file with author).

²⁰ *Id.*

²¹ EMERGENCY LAND FUND, THE IMPACT OF HEIR PROPERTY ON BLACK RURAL LAND TENURE IN THE SOUTHEASTERN REGION OF THE UNITED STATES 65, 113 (1984) [hereinafter THE IMPACT OF HEIR PROPERTY].

²² See DiRusso, *supra* note 16 at 74 (DiRusso states: "There is a relative lack of scholarship in the application of theories relating to gender and race to trusts and estates.").

²³ Mitchell, *Reconstruction*, *supra* note 3 at 519–520. For example, some scholars have argued that given the large number of different ethnic groups represented among those who were brought to this country as slaves from Africa and the ways in which the slavery experience had an impact upon transforming many aspects of traditional African culture, one cannot assume that high rates of intestacy among African-American property owners represents an internalization of some theoretical traditional, pan-ethnic African succession practices. *Id.* at note 83 and accompanying text.

²⁴ *Id.* at 519–520.

²⁵ Faith Rivers, *Inequity in Equity: The Tragedy of Tenancy in Common for Heirs' Property Owners Facing Partition in Equity*, 17 TEMP. POL. & CIV. RTS. L. REV. 1, 52 (2007).

²⁶ See Mitchell, *Reforming Property Law*, *supra* note 11 at 33.

²⁷ Mitchell, *Reconstruction*, *supra* note 3 at 521 (citing a study that revealed that nearly 75 percent of heirs' property owners held this belief).

Table 1—Racial and ethnic disparities in will-making

	Respondent has a will	Respondent has a will, by education level		
		No high school	High school	College and above
	-----percent-----			
All respondents	56.93	47.13	58.92	65.71
White	64.23	56.76	65.26	72.04
Black	23.68	20.15	22.89	32.34
Other	27.24	20.79	34.54	38.63
Non-Hispanic	60.66	54.26	61.06	68.09
Hispanic	19.38	14.57	28.30	31.67

Note: data presented is from two separate tables in the unpublished working paper by Francesconi, Pollak, and Tobasso (see footnote 19).

In resolving a so-called partition action filed by one or more tenants in common, judges tend to consider two primary remedies. First, judges can order partition in kind, sometimes referred to as partition by division, which results in the property being divided into separately titled parcels and then allocated in some way among the various tenants in common. Oftentimes, if a judge orders partition in kind in a case in which there are three or more cotenants, the cotenant who seeks to exit the common ownership is allocated one part of the property and the remaining cotenants as a group are allocated the other part of the property. Alternatively, a judge can order partition by sale, which results in the property being forcibly sold with the proceeds of the sale—minus various transaction costs that must first be paid, which can be quite substantial—distributed to the various tenants in common pro rata based upon each tenant in common’s fractional interest in the property.

The background partition law in a clear majority of States in this country ostensibly favors partition in kind given that this remedy is viewed as being more consistent with preserving important property rights for tenants in common. In fact, judges for a very long time had considered ordering a forced sale of someone’s property to be an extraordinary remedy, one that they would order only when a physical division of a parcel of property simply was not feasible. Notwithstanding the background partition law and the long-held judicial norms just referenced, a number of State court judges throughout the United States

began routinely ordering partition by sale in the early to mid-1900s.²⁸ Judges began doing so even in cases in which the courts quite feasibly could have divided the properties in question. Furthermore, in many of these cases, the cotenant who requested the court to order partition by sale merely owned a very small fractional interest and sometimes this cotenant was a real estate speculator or some other non-family member who acquired their interest from a family member shortly before requesting a court to order a forced sale.²⁹ Nonetheless, in many of these cases, judges ordered partition by sale, including cases in which those who owned an overwhelming majority of the interests in heirs’ property that had been in a family for generations tried unsuccessfully to dissuade the courts from ordering partition by sale.

Heirs’ property ownership often is even more unstable than more conventional tenancies in common. This enhanced instability arises from the interaction between multi-generational patterns of intestate succession among certain disadvantaged groups, the default partition law, and the low-income/low-wealth status of many heirs’ property owners.

Given that it only takes one tenant in common—no matter how small her fractional interest—to request a court to order a forced sale, each additional tenant in common in any given tenancy in common increases the instability of the common ownership.³⁰ Unfortunately, it is not uncommon for heirs’ property to be owned by 30, 40, or

²⁸ *Id.* at 515.

²⁹ Thomas W. Mitchell, Stephen Malpezzi, and Richard K. Green, *Forced Sale Risk: Class, Race, and the “Double Discount,”* 37 FLA. ST. U. L. REV. 589, 612 (2010).

³⁰ Transferring real property by intestacy can be disadvantageous for other reasons. At a very basic level, people who engage in estate planning frequently choose to transfer their property in a very different way than the property otherwise would be transferred under intestacy, which means that property transfers by intestacy often result in distributions decedents would have considered undesirable for one reason or another. Further, intestate succession can result in heirs incurring greater tax liabilities than they otherwise would have incurred if the property had been transferred utilizing more sophisticated estate planning techniques. Ken Abdo, Gina DeConcini, and Tim Matson, *Death, Taxes, & Rock N’ Roll: Music, Law, and Aging Artist’s Estates*, 33 SPG ENT. & SPORTS LAW 21, 23 (stating that “[p]assing intestate can lead to unintended beneficiaries, limited ability to direct charitable goals, and substantial estate tax liability.”).

50 people—and sometimes even by hundreds of people—given that property transfers by intestate succession often generate a far larger number of members in the ownership group than would be the case if family members had used wills or other estate planning tools to transfer their ownership interests.³¹ Further, given the low-income/low-wealth status of many heirs' property owners, many of these owners have been willing to sell their interests to non-family members, often at prices well below the market value of their fractional interests though many of these sellers were unaware of that fact.³² It has been documented that some of the owners who have sold their interests to buyers who then sought a partition by sale had no idea that selling their interests to these buyers could result in forced sales of the properties in question.³³

Not only have many families ended up losing their heirs' property as a result of court-ordered partition sales, but a substantial percentage of these families have ended up losing a substantial amount of the real estate wealth associated with their heirs' property ownership.³⁴ Such results are not surprising given that a partition sale is a forced sale that is not designed as a practical matter to yield a fair market value price or even a price that roughly approximates a fair market value price. As Justice Scalia stated in a seminal 1994 bankruptcy decided by the United States Supreme Court, “market value, as it is commonly understood, has no applicability in the forced-sale context; indeed, it is the very antithesis of forced-sale value.”³⁵

To this end, in the clear majority of States, partition sales are conducted using the sales procedures for a type of forced sale referred to as a sale upon execution, most commonly used in cases in which debtors fail to pay their money judgments to their creditors. Sales upon execution are conducted using an auction in which the property that is the object of the sale is sold to the highest bidder who can pay his or her bid price in cash. However, these

auctions are well known for normally yielding sales prices well below market value, and the sales often even yield fire sale prices.³⁶

There are many reasons a partition sale predictably would yield a forced sale price that bears little relationship to a fair market value price. In many States, for example, a partition sale conducted using the sale upon execution procedures can take place within 10 to 15 days of a court ordering a sale, with only minimal notice to the public, and with no opportunity for potential purchasers to inspect the property. At most of the auctions that are conducted to sell tenancy-in-common properties ordered sold, a winning bidder must pay in cash immediately at the conclusion of the auction.³⁷ This requirement is quite different from how prospective purchasers in willing seller-willing buyer transactions can make offers to purchase property as most offers in an arms-length transaction are made contingent upon the prospective buyer later securing financing within a certain period of time.

Further, lenders normally do not allow those who own heirs' property to use those fractional interests as collateral to secure a loan, including prior to any partition sale. As a result, many low-income/low-wealth heirs' property owners who want to retain their property cannot participate in any effective way in the bidding given that they are land rich but cash poor. As a result, heirs' property sold at a partition sale often yields a sales price that represents just a small fraction of its market value as a winning bidder often is able to make a low-ball bid given that many of those who want to retain ownership of the property simply do not have financial resources to outbid even a low-ball bidder. Notwithstanding the predictable negative economic outcome of a sale conducted using the sale upon execution sales procedures, just one State uniformly requires partition sales to yield fair market value prices, and the fact that a partition sale yields a below-market or even

³¹ Cf. Kristina L. McCulley, Comment, *The American Indian Probate Reform Act of 2004: The Death of Fractionation or Individual Native American Property Interests and Tribal Customs?*, 30 AM. INDIAN L. REV. 401, 407–408 (2006).

³² See Todd Lewan and Dolores Barclay, *Quirk in Law Strips Blacks of Land*, TENNESSEAN, Dec. 11, 2001, at 8A; also available at https://theauthenticvoice.org/mainstories/tornfromtheland/torn_part5/ [Date last accessed: May 3, 2019].

³³ *Id.* (noting that some of the real estate speculators in their case studies had purchased shares from elderly or mentally disabled heirs for prices that were well below the fair market value of those undivided interests and then had requested a court to order a partition sale). More broadly, one study of heirs' property owners revealed that 75 percent of those surveyed believed that heirs' property only could be sold with the unanimous consent of all of the tenants in common. See *The Impact of Heir Property*, supra note 21 at 123. Therefore, the vast majority of heirs in this study would not know that selling their individual, fractional interests could result in a forced partition sale.

³⁴ See Mitchell, Malpezzi, and Green, supra note 29 at 610–619.

³⁵ BFP v. Resolution Trust Corp., 511 U.S. 531, 537 (1994).

³⁶ See Mitchell, Malpezzi, and Green, supra note 29 at 603–605.

³⁷ See 30 AM. JUR. 2D EXECUTIONS, ETC. § 341 (2018) (“As a general rule, the payment of a bid made at an execution sale must be in cash, that is, in United States currency.”) (footnotes omitted). In fact, at most auctions used to sell a wide range of personal and real property throughout the world, the high bidder must pay in cash. See, e.g., Matthew Rhodes-Kropf and S. Viswanathan, 36 RAND J. ECON. 789, 789 (2005) (stating that “the majority of auctions worldwide require cash bids”).

a fire sale price is almost never considered grounds for overturning a partition sale.³⁸

In many instances, partition sales have resulted in devastating property loss, including some instances in which partition action abuses fundamentally reshaped land ownership in certain States. In New Mexico, some who have studied land ownership among Hispanics in the State have estimated that 1 million acres or more of land that Hispanics owned at the conclusion of the Mexican-American War were forcibly sold in often dubious partition actions for prices that represented a small fraction of the value of the properties.³⁹ In South Carolina, up until 1950 or so, a substantial part of Hilton Head Island was owned by many African-American families before many real estate speculators began using partition actions as a tool to force the sale of a very large number of parcels of Black-owned properties, thereby decimating Black land ownership on the island.⁴⁰

This history was well known among many in the impacted communities and among a discrete number of people outside of these communities. However, outside of these communities, partition action abuses for the most part flew under the radar screen for decades. As a result, partition action abuses were rendered a legal and even civil rights issue that few people in the media, in most law and policy circles, in many advocacy organizations that have not focused upon heirs' property issues, and in the general population were aware of according to some very knowledgeable attorneys.⁴¹

THE UNIFORM PARTITION OF HEIRS PROPERTY ACT: UNEXPECTED REFORM

Media Coverage of Partition Abuses Catalyzed Renewed Efforts to Reform Partition Law After Decades of Failed Reform Attempts

In the 4 decades leading up to the promulgation of the Uniform Partition of Heirs Property Act (UPHPA) in 2010,⁴² some legal scholars and advocates published articles addressing partition action abuses, and some of

these authors proposed various partition law reforms. The Emergency Land Fund (ELF), which was organized by Robert Browne in 1971, and later the Federation of Southern Cooperatives/Land Assistance Fund (which represented a 1985 merger of the Federation of Southern Cooperatives and the ELF) were the two most prominent organizations that first sought to address problems African-American landowners faced in a comprehensive way, including problems heirs' property owners faced.⁴³ Further, various other nonprofit organizations located in the South—but nowhere else—advocated for significant partition law reform to benefit heirs' property owners in certain southern States. However, prior to 2011, there simply was insufficient political support in any State for comprehensive reform of State partition law to benefit heirs' property owners.

In lieu of comprehensive partition law reform, a small number of southern States did enact into law some discrete partition reforms in the decades preceding the promulgation of the UPHPA.⁴⁴ One of the most prominent of these discrete partition law reforms was the passage of a bill in Alabama in 1979 that became law in part as a result of the advocacy work of the ELF, a groundbreaking organization that began working in the early 1970s to help African Americans retain their land.⁴⁵ The act provided tenants in common who were litigants in a partition action and who wanted to maintain ownership of their property with the right to buy out the interests of a fellow tenant in common that had petitioned a State court for a partition sale. At the time, the enactment of this particular reform was considered quite surprising and significant given that Alabama had done little to assist African-American heirs' property owners up to that point. Unfortunately, the act was short-lived given that, in 1985, the Alabama Supreme Court determined in a very poorly decided opinion that the buyout provision was unconstitutional.⁴⁶

This widespread lack of political support led most attorneys and law professors who were familiar with partition law to conclude that partition law would never be reformed in any comprehensive way to benefit heirs'

³⁸ See Mitchell, *Reforming Property Law*, *supra* note 11 at 21–23. To this end, Texas appears to be the only State that requires property sold at a partition sale to yield a fair market value price irrespective of what procedure is used to sell the property. *Id.* at 22. Based upon conversations I have had with some attorneys in Texas, it appears that the requirement in Texas that partition sales must yield a fair market value price has not been enforced in many cases.

³⁹ *Id.* at 34–36.

⁴⁰ Andrew W. Kahrl, *THE LAND WAS OURS: AFRICAN AMERICAN BEACHES FROM JIM CROW TO THE SUNBELT SOUTH* 250–251 (2012).

⁴¹ Anna Stolley Persky, *In the Cross-Heirs*, A.B.A. J. (May 2, 2009), http://www.abajournal.com/magazine/article/in_the_cross-heirs/ [Date last accessed: May 9, 2019].

⁴² See UNIF. PARTITION OF HEIRS PROP. ACT (UNIF. LAW COMM'N 2010) [hereinafter UPHPA], available at <https://my.uniformlaws.org/committees/community-home/librarydocuments?communitykey=50724584-e808-4255-bc5d-8ea4e588371d&tab=librarydocuments> [Date last accessed: May 3, 2019].

⁴³ John G. Casagrande, Jr., Note, *Acquiring Property Through Forced Partitioning Sales: Abuses and Remedies*, 27 B.C. L. REV. 755, 755 n.2 (1986).

⁴⁴ See Mitchell, *Reforming Property Law*, *supra* note 11 at 37–38.

⁴⁵ Joe Brooks, *The Emergency Land Fund: Robert S. Browne, The Idea and the Man*, 35 REV. BLACK POLIT. ECON. 67, 71 (2008).

⁴⁶ See Mitchell, *Reforming Property Law*, *supra* note 11 at 17–18.

property owners. Proponents of comprehensive partition reform faced a significant challenge because no influential State or national organizations—including ones with a long history of effective legislative advocacy work on other matters—played any role in championing or helping to build support for partition reform or any reforms for that matter that would benefit heirs' property owners.⁴⁷ This general lack of support in part was attributable to the fact that these organizations knew very little about the challenges heirs' property owners have faced in general and with partition law more specifically. It bears mentioning that the Federation of Southern Cooperatives/Land Assistance Fund did attempt to convince a nationally prominent bar association to champion partition law reform 30 to 40 years ago, but this effort did not bear fruit.

In the wake of a class action lawsuit African-American farmers filed against the U.S. Department of Agriculture (USDA) in the late 1990s, two Associated Press (A.P.) reporters spent 6 months in the South and interviewed hundreds of people as part of their investigative reporting on Black land loss. Ultimately, they published an award-winning series in 2001, "Torn from the Land," which was syndicated nationally, and their three-part series featured a segment on partition action abuses. This segment featured several case studies of African-American families in various southern States who were dispossessed of their land by real estate speculators who used incredibly sharp and even unethical practices in partition actions.⁴⁸ The families who were impacted were paid very little for their properties given that the partition sales yielded fire sale prices in nearly every instance.⁴⁹ Publication of the A.P. article on partition action abuses turned out to be the unexpected catalyst in jump starting efforts to reform partition law in a meaningful way.

As a direct result of the A.P. series, the American Bar Association's (ABA) Section of Real Property, Trust and Estate Law (RPTE) formed a task force named the Property Preservation Task Force, spearheaded by a prominent Montana attorney named David Dietrich and consisting of a half dozen or so attorneys including me, to address partition law abuses. Our task force submitted a proposal in 2006 to the Uniform Law Commission (ULC),

the organization that has worked for more than 127 years to develop model State statutes (statutes the ULC refers to as uniform acts) including the Uniform Commercial Code that the ULC developed in partnership with the American Law Institute. The proposal requested the ULC to form a drafting committee to draft a uniform partition act that would differ in significant ways from the general State partition laws. Because the ULC has had almost no history of developing uniform acts that implicate civil rights or social justice issues, many including me were a bit surprised that the ULC agreed to accept RPTE's proposal. After deciding to form a drafting committee, the ULC then appointed me to be the "Reporter" or principal drafter for the drafting committee. Our drafting committee⁵⁰ worked for 3 years to develop the act, which was ultimately named the Uniform Partition of Heirs Property Act (UPHPA).⁵¹

The UPHPA Represents the Most Far-Reaching Partition Reform in Modern Times

The UPHPA represents the most comprehensive reform of partition law since the 1800s when partition law was substantially reformed to allow the partition by sale remedy for the first time. Prior to these reforms that first occurred in some States in the early 1800s and which were then adopted in other States at different times throughout the century, judges overseeing partition actions were very constrained in how they could resolve a partition action. Normally, they only either could order the remedy of partition in kind or they could refuse to order any remedy, thereby maintaining the property ownership as it had been before the partition action was filed.⁵²

Given that some have claimed that property law often evolves at the pace of geologic change, it is rather remarkable that in many States the UPHPA is changing a property law that almost had seemed impervious to change. To this end, the lack of any significant developments in partition law in most States over the course of 100 to 200 years or so led many to believe that archaic, State partition laws simply would persist in part based upon tradition. Those who have advocated for the UPHPA have been able to overcome this inertia by convincing lawmakers that the background partition law had become outdated in important ways and was

⁴⁷ *Id.* at 38.

⁴⁸ See Lewan and Barclay, *supra* note 32.

⁴⁹ Thomas W. Mitchell, *New Legal Realism and Inequality*, in *THE NEW LEGAL REALISM: TRANSLATING LAW-AND-SOCIETY FOR TODAY'S LEGAL PRACTICE* 203, 215 (Elizabeth Mertz, Stewart Macaulay, and Thomas W. Mitchell eds., 2016) (in some of the cases, the heirs' property in question appeared to sell for <20 percent of its fair market value).

⁵⁰ See Mitchell, *Reforming Property Law*, *supra* note 11 at 3, n. 2 (identifying members of the drafting committee). In addition to the drafting committee, two advisors appointed by the ABA and several attorneys who participated as observers made important contributions to the development of the UPHPA. *Id.* at 3, n. 3 (identifying the ABA advisors as well as certain observers who played an important role in drafting the UPHPA).

⁵¹ See UPHPA, *supra* note 42.

⁵² See Mitchell, *Reforming Property Law*, *supra* note 11 at 6; Gillian K. Bearns, *Real Property – Giulietti v. Giulietti – Partition by Private Sale Absent Specific Statutory Authority*, 26 W. NEW ENG. L. REV. 125, 142 (2004).

not working as it had been intended to work in some important respects, at least with respect to many heirs' property owners.

In developing the UPHPA, the drafting committee drew upon a subset of tools more wealthy families utilize in developing private agreements governing their common real property ownership, some aspects of partition law and other sources of law from some States, and some aspects of partition law from a limited number of other countries. Overall, the UPHPA establishes a hierarchy of remedies that are designed to help heirs' property owners preserve their property when possible or alternatively preserve as much of their real estate wealth as possible in those instances in which a partition by sale in fact would be the most equitable remedy. Though the UPHPA contains many enhanced legal protections for heirs' property owners, there are three major provisions of the act that make substantial changes to the extant partition law.

Buyout Provision

First, the UPHPA enables heirs' property owners who did not request a court to order partition by sale to buy out the interests of any of their fellow cotenants who did request partition by sale.⁵³ Those who may have their interests bought out under the UPHPA are treated quite fairly as the purchase price for their interests is established by multiplying the court-determined value of the property (normally the fair market value of the property as determined by an appraiser) by their percentage ownership of the property. For example, if a property is valued at \$500,000 and the cotenant subject to being bought out owns a 5-percent interest, then the buyout price would be \$25,000.⁵⁴

The buyout could help heirs' property owners who want to maintain ownership of their property in two ways. First, though many heirs' property owners are land rich but cash poor as described previously, many do have some cash on hand or some liquid assets. In the example from above, the heirs that collectively own a 95-percent interest and who want to maintain ownership of the property may well be able to pool their resources to come up with the \$25,000 that would be needed to buy out the tenant in common who petitioned for partition by sale. Admittedly, there may be many cases in which the only heirs who

would be able to use the buyout provision in an effective way would be heirs who are at least solidly middle class⁵⁵ as opposed to low income or otherwise economically disadvantaged.⁵⁶ Nevertheless, in cases in which heirs who are economically more well off buy out a cotenant that petitioned a court for partition by sale, all of the heirs who had sought to maintain ownership of the property would benefit from the buy out, including those heirs who could not participate in the buy out because they lacked any financial resources to do so.

The buyout remedy also may have a prophylactic effect in that it may de-incentivize certain tenants in common—perhaps especially those that may own very small fractional interests—from filing a partition action and petitioning a court for partition by sale in the first instance to further their plans to acquire sole ownership of the property for a bargain price. As background, under the general partition laws, in several reported partition actions, a tenant in common that owned a very small interest—including some real estate investors and speculators that recently had acquired a family member's interest—successfully petitioned a court for partition by sale and then was able to acquire sole ownership of the property for a very low sales price. In addressing these type of cases, one property law professor has referred to the UPHPA's buyout provision as a mechanism that constitutes “shark repellent.”⁵⁷

Fortifying the Preference for Partition in Kind

Second, if the buyout remedy does not resolve the partition action, the UPHPA seeks to strengthen the property rights of heirs' property owners by adding real substance to the preference for a physical division of the property instead of what had become a de facto preference for partition by sale in many if not most States. The act explicitly precludes utilization of the “economics-only” test that judges in a majority of States developed. Under that test, courts would order heirs' property sold if the theoretical economic value of the entire property were to be determined by the court to be significantly greater than the aggregate economic value of the parcels that would result from a division of the property. Using this test, judges give no weight, or at best, little consideration to non-economic values, including heritage value that may arise from longstanding ownership of a particular parcel of property by a family, the cultural

⁵³ See UPHPA, *supra* note 42, § 7 at 15–22.

⁵⁴ The buyout price under the UPHPA actually represents a price that is greater than the sales price a cotenant that owns a fractional interest in tenancy-in-common property typically would be able to achieve if that cotenant sought to sell his or her interest on the market, assuming there was any market for the fractional interest, which there often is not. See Way, *supra* note 16 at 157. Assuming a market, fractional interests in tenancy-in-common properties typically are subject to something called the minority discount and also are typically subject to a discount that takes account of the inherent instability of tenancy-in-common property, including the possibility that the property might be forcibly sold for a price well below market value. *Id.* at § 7 cmt. 5.

⁵⁵ See Rivers, *supra* note 25 at 8.

⁵⁶ *Id.* at 78.

⁵⁷ See Mitchell, *Reforming Property Law*, *supra* note 11 at 59.

or historical value of the property, or the harsh impact a sale might have upon an impoverished heir who was using the property for basic shelter.⁵⁸

Instead, under the UPHPA, courts must use a “totality of the circumstances” test, which requires them to make findings on a range of economic and non-economic factors.⁵⁹ These factors include consideration of (1) whether as a practical matter the property can be divided; (2) whether if the property were to be sold it would yield a sales price that would be significantly greater than the aggregate market value of the parcels that would result from a division in kind, specifically taking into account the conditions under which the property would be sold; (3) longstanding ownership of any individual cotenant and one or more of their predecessors who are or were related to the cotenant or to each other; (4) a cotenant’s sentimental attachment to the property that arises because the property has ancestral, cultural, or some other unique value; (5) a cotenant’s lawful use of the property, including for commercial and residential purposes, and the extent to which the cotenant would be harmed if he or she could not continue to use the property for that lawful use if the property were forcibly sold; (6) the extent to which the various cotenants have fulfilled their obligations to pay their percentage of the costs of maintaining the property, such as contributing to paying the property taxes and maintaining property insurance; and (7) any other relevant factor. Under the multi-factored test, unlike application of the economics-only test, a court cannot decide at the outset to give more weight to any factor whether the factor be economic or non-economic in nature.

New Sales Procedure Designed to Preserve Real Estate Wealth

Third, in recognizing that partition by sale sometimes will be the most equitable remedy in some partition actions,⁶⁰ the UPHPA seeks to ensure that any partition sale that may occur ends up yielding a sales price that maximizes the economic return for heirs’ property owners, thereby preserving as much of the real estate wealth of these families that was associated with their heirs’ property ownership. As I have highlighted in previous scholarship, many State courts throughout the country that have applied the economics-only test to determine whether to partition property in kind or by sale have made a fundamental economic mistake in assuming that a partition sale would

end up maximizing wealth for many heirs’ property owners.⁶¹ In assessing the economic value of the entire property, many of these courts had considered evidence of the fair market value of the entire property without taking into consideration that State law in almost every instance requires the property to be sold under forced sale conditions. Though seemingly not obvious to some judges who have ordered partition sales, a substantial percentage of court-ordered partition sales predictably have ended up yielding sales prices that have been considerably below market value, and, in many instances, partition sales have yielded fire sale prices.⁶² As a result, many partition sales have ended up both extinguishing property ownership for heirs’ property owners and stripping families of significant real estate wealth instead of maximizing their wealth as some judges had assumed the sales would.

To address this concern, the UPHPA fundamentally restructures the sales procedure nearly every State has used in selling heirs’ property. As indicated previously, under general State partition laws in nearly every State, partition sales must be conducted using procedures for a type of forced sale known as a sale upon execution. Sales upon execution are well known to yield sales prices well below market value because the goal of these sales is to get money to unpaid creditors as quickly as possible, not to sell the debtor’s property for the highest price possible.⁶³

In contrast, the UPHPA’s restructured sales procedure is designed to preserve as much real estate wealth as possible for heirs’ property owners by incorporating many of the features of sales that are conducted under conditions designed to yield fair market value prices. These features simply are not incorporated into the forced sales procedures used for partition sales under general State partition laws. In seeking to vindicate the wealth maximization goal many courts have relied upon in ordering partition sales in the first place, the drafting committee for the UPHPA substantially changed partition law by making an “open market sale” the preferred sales procedure under the UPHPA.

In doing background research in my role as the principal drafter of the UPHPA on possible alternative partition sales procedures, my initial inspiration for advocating for the open market sales procedure came from a 1972 partition law case in Scotland. In that case, the Scottish

⁵⁸ *Id.* at 12–13.

⁵⁹ See UPHPA, *supra* note 42, § 9 at 25–27.

⁶⁰ For example, in a partition action in which the property in question is a small, single-family home in an urban neighborhood and in which there are 15 tenants in common, it would be unlikely that the property could be divided in any practical way if the court would have to choose between ordering partition in kind or partition by sale, assuming a buyout for whatever reason did not resolve the case.

⁶¹ See, e.g., Mitchell, Malpezzi, and Green, *supra* note 29 at 612–613.

⁶² *Id.* at 610–619.

⁶³ *Id.* at 603–606.

high court changed the rule governing the specific partition sales procedure that had to be used in partition actions in Scotland—a procedure roughly similar to the sales upon execution procedure used in most States in the United States—due to a concern that the auction sales used exclusively for partition sales up to that point in Scotland often yielded very low sales prices. In seeking a better sales procedure, I felt compelled to do some international comparative research because initially I could not find examples of partition sales procedures set forth in any State statute in any State in the United States that were designed to produce sales prices that would approximate market value prices.⁶⁴

The open market sales procedure is designed to mirror the traditional procedures real estate brokers use when they market properties in their normal inventories as opposed to any distressed properties in their inventories.⁶⁵ Under the UPHPA's open market sales procedures, the court appoints a real estate broker who must list the property for its court-determined value, which will be its fair market value as determined by an appraiser in the vast majority of cases. In addition, the court-appointed real estate broker must try to sell the property using commercially reasonable practices similar to the practices he or she uses in attempting to sell properties in his or her normal inventory. As compared to partition sales that are conducted under the sales upon execution procedures, under the open market sales procedures there is much enhanced notice to the public of a partition sale, the property subject to a partition sale is exposed to the market for a much longer period of time, prospective buyers can inspect the property, and offers can be made contingent upon the offeror's securing financing at some later time, among other features.

The UPHPA's revamped sales procedure almost assuredly will result in significantly higher partition sales prices than the partition sales prices yielded using the sale upon execution sales procedure and other similar forced sales procedures that have been used in most partition actions decided under general State partition laws. As a reference point, the open market sales procedure used in Scotland has yielded much higher sales prices than partition sales previously yielded under the old partition law according

to the lawyers and law professors there with whom I have spoken. The positive feedback I have gotten from some lawyers located in States that have enacted the UPHPA into law only increases my confidence that the open market sales procedures will yield significantly higher sales prices than the forced sales procedures used for partition sales under general State partition laws.

The UPHPA's Truly Remarkable Record of State Enactments

Prior to the ULC's finalizing its work on drafting the UPHPA, there was near consensus among most lawyers and law professors who were familiar with partition law that any proposals to reform partition law in ways designed to benefit heirs' property owners stood little chance of becoming law. In part, the skepticism was based upon a general sense that the power of inertia and tradition simply were too strong. Even though some (though not all) of the skeptics acknowledged the fundamentally unjust results of many partition cases involving heirs' property owners, they also assumed that partition law reform could not succeed given the socioeconomic status of both those who benefited from and those who were harmed by the extant partition law. They assumed that powerful real estate developers and others easily would be able to thwart any reform efforts in large part because disadvantaged heirs' property owners were perceived to be people who lacked any significant economic and political capital.

This near-consensus viewpoint appeared to be validated by the decades-long record of frustrated attempts to reform partition law in significant ways in various southern States. Even though the ULC promulgated the UPHPA, the ABA approved it for consideration by the States, and a number of civil rights and other nonprofit organizations including the American College of Real Estate Lawyers strongly endorsed it, there were many who believed that the act would end up being among the many ULC uniform acts in the area of real property that would not be enacted into law even by one State. Even fewer people believed that the UPHPA would be well received by any southern State given the many previous failed attempts in the South to reform partition law in a comprehensive way.⁶⁶

⁶⁴ I subsequently discovered a few scattered examples of courts in a very small number of States that had required partition sales to be conducted using something akin to an open market sale, though these cases represented extreme outliers.

⁶⁵ See UPHPA, *supra* note 42, § 10 at 27–29.

⁶⁶ This skepticism was rooted in knowledge about the long history of lawmakers in the South neglecting to address the negative impacts partition law has had upon African-American property owners despite repeatedly being made aware of the problem. To this end, in 2007, one law professor claimed the following: "One hundred fifty 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." See Rivers, *supra* note 25 at 7. She further noted that, despite some small partition law reform successes in a small number of southern States, these reforms represented very small successes and that more comprehensive reforms were needed. In clearly referencing lawmakers in southern States and African-American heirs' property owners, she stated: "For too long, lawmakers have turned a deaf ear to the warnings about the deleterious consequences of the partition laws." *Id.* at 8. Further, in my role as the Reporter for the UPHPA, I heard many lawyers and law professors express deep skepticism that the UPHPA would gain any traction in States throughout the country and particularly in States in the South.

This skepticism was understandable for a few reasons. Overall, the ULC has had a poor record of being able to convince States to enact its uniform real property acts into law. As one law professor has stated, if the measure of success for particular categories of uniform acts is the number of jurisdictions that have enacted those acts into law, “a critic could pronounce the National Conference’s efforts in the real estate area as a failure for the most part.”⁶⁷ To this end, the median number of State enactments for the 38 uniform real property acts that the ULC has promulgated in its 127-year history is just one.⁶⁸

Given the low median number of enactments, it is not surprising that several uniform real property acts have failed to be enacted into law in even one jurisdiction. Examples include the Uniform Home Foreclosure Procedures Act,⁶⁹ the Uniform Manufactured Housing Act,⁷⁰ and the Uniform Nonjudicial Foreclosure Act.⁷¹ Other uniform real property acts such as the Uniform Assignment of Rents Act⁷² and the Uniform Residential Mortgage Satisfaction Act⁷³ have been enacted into law in a half dozen jurisdictions at the most. With few exceptions, the most successful uniform real property acts have been enacted into law in no more than 10 to 20 jurisdictions.⁷⁴

The UPHPA’s record of enactment success also is surprising given that almost none of the real property acts that have failed or otherwise garnered little support have implicated civil rights and racial justice matters in substantial ways. There were many who believed that the UPHPA would stand almost no chance of being enacted into law in even one State or jurisdiction given that it is a uniform real property act that addresses an important property law problem that had been primarily viewed as negatively impacting African Americans. Though many believed that the racial justice aspect of the UPHPA was

commendable in the abstract, they also believed that, as a pragmatic matter, this aspect of the act would render it politically unpalatable in State legislatures throughout the country thereby resulting in its total failure.

Despite this widespread pessimism, the UPHPA has had a remarkable record of success in the 8 years since it was made available to the States for legislative consideration. At this time, 13 States and one other jurisdiction have enacted the UPHPA into law,⁷⁵ with Illinois and Missouri becoming the most recent States to enact it into law in 2019. Even more notably, 5 of the 13 States that have enacted the act into law are located in the South, with Texas becoming the most recent southern State to enact it into law in the spring of 2017. The success of the UPHPA thus far in the South has come as a great surprise even to those individuals who were the most optimistic about the UPHPA’s potential to be enacted into law upon its promulgation in 2010, including me. Just as surprising, the act has received unanimous or near unanimous support in each State legislature that has voted to approve it.

In South Carolina, the legislature even named the act after Clementa C. Pinckney, the former State senator and a senior pastor of the Emanuel A.M.E. Church in Charleston, SC, widely known as Mother Emmanuel. Senator Pinckney was murdered in June 2015 along with eight other people at Mother Emmanuel while conducting a Bible study and prayer session. The South Carolina legislature named the UPHPA in his honor—the only legislative act they have named in his honor—because he had been the biggest champion of reforms to benefit heirs’ property owners during his time in the South Carolina legislature.

⁶⁷ Jon W. Bruce, *The Role Uniform Real Property Acts Have Played in the Development of American Land Law: Some General Observations*, 27 WAKE FOREST L. REV. 331, 333 (1992).

⁶⁸ HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS 126TH YEAR, TABLE VI, ACTS DRAFTED OR ENDORSED BY THE NATIONAL CONFERENCE ARRANGED BY SUBJECTS, SHOWING THEIR HISTORY AND PRESENT STATUS, 878–881 (2017).

⁶⁹ See UNIF. HOME FORECLOSURE PROCEDURES ACT (UNIF. LAW COMM’N 2015), available at <https://www.uniformlaws.org/committees/community-home?CommunityKey=7589b516-7055-4ef7-8631-c9f8c525e69f> [Date last accessed: May 3, 2019].

⁷⁰ See UNIF. MANUFACTURED HOUSING ACT (UNIF. LAW COMM’N 2012), available at <https://www.uniformlaws.org/committees/community-home?CommunityKey=96f6c9f-115e-46f0-bf6b-af42368799e5> [Date last accessed: May 3, 2019].

⁷¹ See UNIF. NONJUDICIAL FORECLOSURE ACT (UNIF. LAW COMM’N 2002), available at <https://www.uniformlaws.org/committees/community-home?CommunityKey=d873f0fc-d9eb-41b3-a6d2-e006e07a1f2c> [Date last accessed: May 3, 2019].

⁷² See UNIF. ASSIGNMENT OF RENTS ACT (UNIF. LAW COMM’N 2005), available at <https://www.uniformlaws.org/committees/community-home?CommunityKey=87c82f3e-a630-4d14-b6df-55afb591d496> [Date last accessed: May 3, 2019] (the Uniform Assignment of Rents Act has been enacted into law in five jurisdictions at this time).

⁷³ See UNIF. RESIDENTIAL MORTGAGE SATISFACTION (UNIF. LAW COMM’N 2004), available at <https://www.uniformlaws.org/committees/community-home?CommunityKey=c2e7cac3-f2fa-4f4b-8a80-293184799b7c> [Date last accessed: May 3, 2019] (the Uniform Residential Mortgage Satisfaction Act has been enacted into law in five jurisdictions at this time).

⁷⁴ Bruce, *supra* note 67 at 334.

⁷⁵ See UPHPA, *supra* note 42, available at <https://my.uniformlaws.org/committees/community-home?CommunityKey=50724584-e808-4255-bc5d-8ea4e588371d> [Date last accessed: Jan. 15, 2019]. These States are as follows: Alabama, Arkansas, Connecticut, Georgia, Hawaii, Illinois, Iowa, Missouri, Montana, Nevada, New Mexico, South Carolina, and Texas.

There are a few factors that help explain the unexpected, even astonishing enactment success the UPHPA has had thus far. I believe five factors are particularly germane. These factors include some that most people who had proposed partition law reform to benefit heirs' property owners did not fully anticipate would be important before the ULC decided to form a committee to draft the UPHPA.

First, the UPHPA never would have been drafted in the first place without the support at the national level of the Joint Editorial Board for Uniform Real Property Acts (JEB-URPA) (a very important but not widely known organization that advises the ULC on potential uniform real property projects), the ULC, and the ABA. The ULC together with some prominent State organizations within certain States have greatly facilitated the legislative advocacy work many of us have done in some of the States where we have had success, including by opening critical doors for us that otherwise would have remained firmly shut. As indicated previously, prior to the promulgation of the UPHPA, many efforts to reform partition law in significant ways floundered in large part because those who were advocating for partition reform lacked any support from prominent national and State organizations.

Second, a coalition called the Heirs' Property Retention Coalition (HPRC),⁷⁶ which was formed in 2006 specifically to help advance the goal of partition law reform through the uniform law process, played an important role in the drafting of the UPHPA. The HPRC also has played an important role in helping to enact the UPHPA into law ever since the UPHPA was first made available to the States for consideration in 2011. The HPRC mostly consists of many nonprofit legal organizations of one type or another and other nonprofit organizations—including community-based organizations—with a deep commitment to preservation of heirs' property, particularly within low-income African-American communities. Though all of these organizations have been committed to preserving heirs' property ownership, including some that have worked on heirs' property issues for decades, many of the organizations had not collaborated in any meaningful way prior to the formation of the HPRC. Further, the then-President of the ULC informed me while we were drafting the act that it was incredibly rare if not unprecedented for such a coalition of local, State, and regional grassroots and nonprofit organizations to participate in such an active way in the drafting of a uniform act.

Third, the group of organizations and people who have worked to advocate for enactment of the UPHPA have worked together in a very organized, strategic, and sustained way matched by only a very small number of the other advocacy efforts that have been undertaken to enact other uniform real property acts into law. Those most involved in this work include but are not limited to Benjamin Orzeske who is the Chief Counsel of the ULC, John Pollock who is the coordinator for the HPRC, and me. In addition, various representatives from individual organizational members of the HPRC have played important roles in particular enactment efforts in the States in which these organizations are located. For example, in Arkansas, HPRC member Karama Neal formed a statewide grassroots organization named Heirs of Arkansas⁷⁷ specifically to build support for the UPHPA. The organization worked seamlessly with the ULC and other stakeholders to advocate for the UPHPA, advocacy work that resulted in the unanimous passage of the UPHPA in the Arkansas legislature in 2015. The overall coordinated work—effectively combining top-down and bottom-up approaches—has been ongoing over the course of the past 8 years, and it likely will continue in some form for years to come.

Fourth, the lion's share of scholarship on heirs' property ownership has focused on African-American heirs' property problems in the rural South in addition to nearly all of the media coverage on the issue.⁷⁸ This scholarship and media coverage appropriately have highlighted the racial injustice many heirs' property owners have experienced. Nevertheless, it turns out that, though African Americans and other racial and ethnic minorities disproportionately have had negative experiences with their heirs' property ownership, many disadvantaged and middle-class White families also have experienced serious challenges with their heirs' property ownership.⁷⁹

In our legislative advocacy work to promote enactment of the UPHPA in various jurisdictions, it has been helpful that we have been able to point out quite explicitly in a very upfront way that partition law has negatively impacted many different types of heirs' property owners. These owners include African Americans, White Americans, Hispanics/Latinos, Native Americans, and Native Hawaiians, and the properties in question include many that are located in rural and urban areas, for example. The racial and ethnic diversity of the impacted owners helps explain why State legislatures and governors in states such as Iowa and Montana have enacted the UPHPA into

⁷⁶ See Heirs' Property Retention Coalition, *HPRC News*, <https://www.southerncoalition.org/hprc/> [Date last accessed: June 1, 2019].

⁷⁷ See Heirs of Arkansas, <https://heirsofarkansas.wordpress.com> [Date last accessed: Apr. 19, 2019].

⁷⁸ See Mitchell, *Reforming Property Law*, *supra* note 11 at 31.

⁷⁹ *Id.* at 31–36.

law to help heirs' property owners in those States and why the acts have been well received in those States.⁸⁰ The diversity among heirs' property owners also helps explain why the UHPA was enacted into law in Hawaii and New Mexico given how many native Hawaiians and Hispanics in the Southwest have been negatively impacted by partition actions.

Fifth, those of us who have advocated for enactment of the UHPA also have been able to frame the reform effort as an effort to protect vital property rights and to help families preserve their real estate wealth. This alternative framing is one that we had not focused on as much when we first began work on drafting the UHPA as we did not fully appreciate the resonance it would have with many State legislators. Without question, as a very pragmatic matter, emphasizing the UHPA's features of protecting property rights/preserving family real estate wealth has been very helpful in advocating to get the UHPA enacted into law in several States, including in several States in the South.⁸¹

Going forward, it would not be surprising if 20 to 25 jurisdictions enacted the UHPA into law by 2025. Three recent developments have given an additional boost to the efforts to enact the UHPA into law in additional States. Based upon the early enactment success of the UHPA, the ULC has added the UHPA to its list of target acts, a list of approximately 15 acts for which the ULC prioritizes in its overall efforts to enact the more than 130 uniform and model acts it is recommending for State enactment at the current time. Second, the JEB-URPA recently decided to augment the work it has done for more than 100 years in evaluating potential uniform real property acts for the ULC by getting involved in efforts to increase the number of enactments of already promulgated uniform real property acts. It has selected a small number of uniform real property acts to begin promoting, and the list includes the UHPA. To this end, Professor Wilson Freyermuth, the JEB-URPA's Executive Director, played an instrumental

role this year in successfully advocating for enactment of the UHPA in Missouri. Third, as described below, the 2018 Federal Farm Bill includes specific provisions that provide incentives for States that have not enacted the UHPA to do so.

FEDERAL FARM BILL: BUILDING UPON AND BOOSTING THE UHPA

In December 2018, the Federal Farm Bill became law. The bill includes some first-ever and potentially game-changing heirs' property provisions that were key provisions of two identical bills named the Fair Access for Farmers and Ranchers Act of 2018, which were introduced in the summer of 2018 in the U.S. Senate and House of Representatives.⁸² The provisions are designed to increase the ability of farmers and ranchers who own heirs' property to operate sustainable and successful farms and ranches. This incredibly significant Federal initiative could provide many farmers and ranchers who own heirs' property with access for the first time to a number of essential farm programs, including loan programs. It also could provide them with much needed legal resources to enable them to restructure the legal ownership of their property and to deal with neglected succession issues, which could benefit not only their farming and ranching operations but also could enable them to use their property ownership in much more expansive ways.

As background, farmers and ranchers who own heirs' property but lack clear title (including many minority farmers and ranchers) have been severely disadvantaged in terms of their ability to operate successful farming or ranching operations. To this end, they often have been unable to secure loans from commercial financial institutions because banks and other lending institutions never or almost never lend money to property owners who lack clear title to their property in those instances in which the real property would serve as collateral to secure the loan.⁸³ To make matters worse, because they lack clear

⁸⁰ See, e.g., Elizabeth Williams, *Family Farm: Law Equalizes Property Sale in Iowa, 10 Other States – DTN*, AGFAX (Sept. 5, 2018), <https://agfax.com/2018/09/05/family-farm-law-equalizes-property-sale-in-iowa-10-other-states-dtn> [Date last accessed: May 3, 2019]; see also Elizabeth Williams, *Option for Heirs: New Iowa Law Makes Option for Keeping Farm Together Easier*, DTN (Sept. 4, 2018), <https://www.dtnpf.com/agriculture/web/ag/news/business-inputs/article/2018/09/04/new-iowa-law-makes-keeping-farm> [Date last accessed: May 3, 2019]. The Iowa enactment was sparked by a 2016 Iowa Supreme Court decision in which the Iowa Supreme Court overturned an Iowa intermediate appellate court decision granting partition in kind in a case in which a brother and sister sought different remedies with respect to a family farm totaling nearly 500 acres. As a result, the brother's request for partition by sale was granted. See *Newhall v. Roll*, 888 N.W.2d 636 (Iowa 2016). The case almost certainly would have resulted in a different outcome under the UHPA, with either the sister buying out the brother's fractional interest or the court ordering partition in kind.

⁸¹ Obviously, many vital racial justice issues are not nearly as amenable to being framed in such an alternative way, which can make addressing them more challenging.

⁸² See S. 3117, 115th Cong. (2018); H.R. 6336, 115th Cong. (2018). S. 3117 was sponsored by Senator Doug Jones (D-AL) and cosponsored by Senator Tim Scott (R-SC). H.R. 6336 was introduced by Representative Marcia Fudge (D-OH) and cosponsored by Representative Sanford Bishop (D-GA) and Representative Alma Adams (D-NC).

⁸³ See Edwin McDowell, *The Victorious Home Buyer's Final Lap*, N.Y. TIMES, Mar. 18, 2001 ("unless there is clear title to the property . . . 'no bank will ever lend any amount of money.'" Cf. Letter from Christy Kane, Exec. Director, Louisiana Appleseed, to THE ADVOCATE (Aug. 10, 2015) (stating that "without clear title, owners cannot exercise important property rights such as receiving government aid, selling the property, refinancing, getting a loan to repair the property and cashing insurance checks.").

title, they also have been unable to participate in a very large number and wide variety of programs that the USDA administers, including loan programs, commodity support programs, and disaster assistance compensation programs.

To appreciate the implications for farmers and ranchers who own heirs' property and lack access to credit, one must know something about the crucial role that credit plays in agriculture, which one author has summarized as follows:

In ways that may not be obvious to those unfamiliar with agriculture, credit is the lifeblood of farming and ranching. Successful farms and ranches must have access to timely credit, in adequate amounts, at fair terms. Most crucially, virtually every producer uses short-term operating credit to purchase production inputs. Seed and fertilizer, for example, are often bought in the spring on credit, and the debt is repaid after harvest in the fall. Credit is also used to purchase machinery, equipment, livestock, and livestock feed. Without credit, real estate purchases are not possible. In summary, without ongoing access to credit, farmers and ranchers simply cannot operate.⁸⁴

One major, but quite obscure, obstacle farmers and ranchers who own heirs' property have faced has been that farm and ranch operators must obtain a farm number⁸⁵ from the USDA to participate in most USDA programs. Further, to obtain a farm number, a farm or ranch operator has to demonstrate control of the land in question. However, the USDA, up until passage of the Farm Bill, would not grant farm numbers to heirs' property owners who lacked clear title to their property because the USDA made proof of clear title a prerequisite to obtaining a farm number for those claiming to be the owners of farmland or ranchland even if the operator could demonstrate control of the land in some other ways.⁸⁶

The inability of many heirs' property owners to participate in crucial USDA programs has harmed these owners in

substantial ways. For example, disadvantaged farmers and ranchers who have owned heirs' property and who have not been able to obtain loans from commercial lenders or from the USDA often have had no other viable options for securing a farm loan because the USDA is widely known within the agricultural community as a lender of last resort.⁸⁷ As a result, these farmers and ranchers often have been unable to operate successful farming or ranching operations. Though a relatively small number of farmers and ranchers can self-finance their operations, hardly any disadvantaged farmers or ranchers, including most farmers and ranchers who own heirs' property, can operate farms or ranches without access to credit. In terms of disaster relief, the Emergency Conservation Program (ECP), for example, provides very helpful monetary relief to farmers who experience harm to their farmland and certain structures on their farms as a result of many different types of natural disasters.⁸⁸ However, to be eligible for ECP monetary assistance, a farmer is required have a farm number.

One important provision of the new Farm Bill enables heirs' property owners who lack clear title to receive USDA farm numbers provided they can provide USDA officials with at least one of a small number of approved types of documentation that are specified in the bill. The Farm Bill provides farmers and ranchers who own heirs' property and who are located in States that have enacted the UPHPA into law with more options for the types of eligible documentation they can provide to USDA officials to obtain a farm number than are provided to other farmers and ranchers who own heirs' property. These farmers and ranchers who claim to own heirs' property and who live in States that have enacted the UPHPA into law can either (a) submit a court order that verifies that the land qualifies as heirs' property as defined under the UPHPA or (b) they can produce certification from the local recorder of deeds that the record owner is deceased and that at least one "heir of the record owner has initiated a procedure to retitle the land in the name of the rightful heir."⁸⁹ In addition to these forms of documentation, the Farm Bill establishes three other specific forms of documentation an heirs' property owner who operates a farm or ranch in any

⁸⁴ Stephen Carpenter, *The USDA Discrimination Cases: Pigford, In re Black Farmers, Keepseagle, Garcia, and Love*, 17 *DRAKE J. OF AGRIC. L.* 1, 11 (2012) (footnotes omitted) [hereinafter Carpenter, *USDA Discrimination Cases*]. See also, Stephen Carpenter, *Family Farm Advocacy and Rebellious Lawyering*, 24 *CLINICAL L. REV.* 79, 95 n. 54 (2017). See also, Bryon J. Parman and Max W. Runge, *Southern Agricultural Lending and Farm Credit Conditions*, in *SOUTHERN EXTENSION COMMITTEE, UNITED STATES DEP'T OF AGRIC., SURVIVING THE FARM ECONOMY DOWNTURN* 18, 18 (2017) ("With the majority of US farmers and ranchers needing loans for operation or expansion, borrowing costs and fund availability are an important component of US production agriculture.").

⁸⁵ A farm number is defined as "a number assigned to a farm by the county committee for the purpose of identification." See 7 C.F.R. § 718.2.

⁸⁶ Leah Douglas, *Psst! The Farm Bill Includes a Rare Provision That Could Help Black Farmers*, *THE NATION* (July 24, 2018), <https://www.thenation.com/article/psst-farm-bill-includes-rare-provision-help-black-farmers/> [Date last accessed: May 3, 2019]. See also Rural Coalition, *Call In + Voice Out: Fair Access* (June 26, 2018), <https://www.ruralco.org/actions/2018/6/26/call-in-voice-out-fair-access> [Date last accessed: May 3, 2019].

⁸⁷ Carpenter, *USDA Discrimination Cases*, *supra* note 84 at 11.

⁸⁸ See U.S. DEP'T OF AGRIC., *FSA HANDBOOK: EMERGENCY CONSERVATION PROGRAM, 1-ECP* (Rev. 5), https://www.fsa.usda.gov/Internet/FSA_File/1-ecp_r05_a01.pdf [Date last accessed: May 3, 2019].

⁸⁹ H.R. Rep. No. 115-1072 at 537 (2018) [hereinafter *Conf. Rep.*].

State (including States that have enacted the UHPA into law and those that have not) can utilize in order to obtain a farm number.⁹⁰

The provision of the Farm Bill making it far easier for heirs' property owners to obtain a farm number represents a very substantial breakthrough for many farmers and ranchers who are heirs' property owners, owners who often have been unable to secure financing to operate successful farms and ranches and to participate in other vitally important USDA programs. The provision could help stabilize land ownership for these disadvantaged and at risk-farmers and ranchers by enabling them to have a more reliable stream of income to pay their property taxes and other obligations that must be paid simply to maintain ownership of their property. It also could help them withstand economic shocks such as those that occur as a result of natural disasters, which is important because farmers and ranchers often experience various types of economic shocks pertaining to matters that often are not in their control. In addition to helping these farmers and ranchers simply survive economically, substantially reducing the barriers these particular heirs' property owners have faced in obtaining a farm number could help many of them to begin to use their farms and ranches to build significant wealth for the first time just as many other farmers and ranchers long have been able to do.

Second, the Farm Bill contains a provision enabling the USDA to make or guarantee loans to certain eligible cooperatives, credit unions, and nonprofit organizations so that these entities could then relend these funds to individuals or entities provided that the loan funds would be used to fund projects designed to help heirs' property owners "resolve ownership and succession on farmland that has multiple owners."⁹¹ Resolving ownership means either clearing title or consolidating ownership in a way that results in a more manageable number of people owning the property. Addressing succession could include probating a will that has not been probated or developing an estate plan in the first instance. The relending program

is important because heirs' property owners often experience many legal and non-legal problems with their ownership because many lack clear title and because most do not have an estate plan, which can perpetuate problems with unclear title and unstable ownership, and also can make heirs' property ownership otherwise unmanageable.

For example, heirs' property owners who lack clear title have not only been ineligible to participate in most USDA programs as discussed hereinbefore, but they also have been rendered ineligible to participate in a wide variety of other Federal and State governmental programs including lending programs, housing programs, and disaster relief programs. As already indicated, they also have been ineligible for many commercial loans from private lenders.⁹² A substantial percentage of these owners also do not have wills or other estate plans, which results in perpetuating their often-dysfunctional tenancy-in-common ownership in an intergenerational way.

The relending program is structured in a way to provide much needed assistance, including legal assistance, to farmers and ranchers who own heirs' property. The relending program is very attractive from the perspective of eligible borrowers because the loans it could make possible would be low-interest loans that also have other very advantageous terms. In seeking to address the low incidence of estate planning among disadvantaged farmers and ranchers who own heirs' property, the relending program wisely requires farmers and ranchers who borrow funds under the program to complete an estate plan as a condition of the loan.⁹³ Though the Farm Bill makes the relending program possible, it must be stated that, given that it is a new program, Congress would have to appropriate funds for the program to make it fully operational.

The Farm Bill's provision making it easier for heirs' property owners to obtain a farm number together with the bill's relending program also incentivize more States to consider enacting the UHPA into law. In terms of

⁹⁰ *Id.* It bears mentioning that the Farm Bill requires the Secretary of Agriculture to identify other possible alternative forms of eligible documentation that would enable heirs' property owners to obtain a farm number.

⁹¹ *Id.* at 185. Sophisticated property owners recognize that they have a variety of options in terms of how to structure or restructure their property ownership (including how the property will be transferred to family members at some point), and they often hire financial or legal professionals to help them accomplish their economic and non-economic goals that implicate their property ownership. These owners often are advised about the perils of tenancy-in-common ownership under the default rules and as a result almost never choose to organize their ownership using the default rules of tenancy-in-common ownership, though some do enter into privately negotiated tenancy-in-common agreements (TIC agreements) that contract around the worst of the standard default features of tenancy-in-common ownership. See Mitchell, Malpezzi, and Green, *supra* note 29 at 616–617. In contrast, just as heirs' property often is created in the first instance due to a lack of proper estate planning, many heirs' property owners have been unaware that they have legal options they could pursue to improve the quality of their property ownership, which results in these families failing to consult with transactional attorneys with expertise in business law, estate planning, and real estate or with other business professionals to their detriment. Sadly, many other heirs' property owners simply lack meaningful access to attorneys who could help them structure their ownership to accomplish the property-related goals they may have.

⁹² See Way, *supra* note 16 at 156–157.

⁹³ See *Conf. Rep.*, *supra* note 89 at 185.

the farm number provision, as discussed hereinbefore, farmers and ranchers who own heirs' property and who live in States that have enacted the UHPHA into law have expanded options for types of documentation they can submit to USDA officials to obtain a farm number as compared to other farmers and ranchers. The relending program also incentivizes States that have not enacted the UHPHA into law to consider doing so. To this end, under the relending program, the only eligible entities that are eligible to receive an initial loan from the USDA are cooperatives, credit unions, and nonprofit organizations. Among these eligible entities, however, the relending programs grants an explicit preference to cooperatives, credit unions, and nonprofit organizations that (1) have at least 10 years of experience working with socially disadvantaged farmers and ranchers and (2) are entities that are located in States that have enacted the UHPHA into law.⁹⁴

Those who were primarily responsible for drafting the heirs' property provisions of the Farm Bill, including those in Congress and the Rural Coalition, were wise to incentivize additional States to enact the UHPHA into law because heirs' property owners both need substantial additional assistance from the Federal government and also need to have enhanced State-level property rights to help them stabilize their legally insecure ownership. The Farm Bill's heirs' property provisions would be undercut if farmers and ranchers who own highly insecure heirs' property end up losing their farm and ranch properties as a result of court-ordered partition sales or because they are pressured to sell their properties due to a cotenant's threat of initiating an expensive partition action that could result in a partition sale at a fire sale price. Given that the UHPHA does more than any law ever has done to help heirs' property owners stabilize their ownership, it made sense for the architects of the Farm Bill's heirs' property provisions to seek to expand the number of States that adopt the UHPHA to help further the goals of the heirs' property provisions of the Farm Bill.

The Farm Bill's heirs' property provisions already have been successful in terms of convincing some additional State legislators to introduce UHPHA bills in their State legislatures. Thus far in 2019, there have been 11 introductions of the UHPHA in various legislatures, a record number for the UHPHA. The Farm Bill played an important role in encouraging legislators to introduce the UHPHA in at least three States—Illinois, Indiana, and Nebraska—and it proved helpful when Missouri legislators considered the UHPHA bills. It would not be surprising if the Farm Bill played a role in generating additional

introductions of UHPHA bills in other States going forward or helped build support for bills that primarily were introduced to address other serious concerns about partition law in some jurisdictions as was the case in Missouri this year.

Admittedly, setting aside the incentives the Farm Bill provides to States that have not enacted the UHPHA to do so, the particular scope of the bill's efforts to assist farmers and ranchers who are heirs' property owners is limited to the work and programs of the USDA. Nevertheless, the Farm Bill's momentous heirs' property provisions could be built upon in a substantial way. This could happen if other Federal and State governmental entities, including various governmental departments, agencies, and services, took a cue from the Farm Bill by changing some of their rules and policies that have harmed heirs' property owners and could establish new programs to make heirs' property ownership much more viable.

There are early indications that the Farm Bill has been successful in raising broader awareness of some of the critical problems that have hindered heirs' property owners for decades, including among legislators who serve in Congress and in various State legislatures, as well as some who work for prominent foundations and media organizations. Quite remarkably, one of the most prominent 2020 Presidential candidates recently disseminated policy proposals to assist heirs' property owners, which might be the first time any Presidential candidate in U.S. history ever has developed any heirs' property proposals. Her proposals specifically reference the Farm Bill's heirs' property provisions (and reference the UHPHA at the State level as well), support their full implementation, and seek to build upon them by requiring the Federal Emergency Management Agency and the U.S. Department of Housing and Urban Development to provide similarly enhanced programmatic assistance to heirs' property owners.⁹⁵ Hopefully, this very positive development at the Federal level together with the unexpected success of the UHPHA at the State level can be leveraged to generate more policy development and implementation as well as legal reform to benefit heirs' property owners in the years to come.

CONCLUSION

A huge number of heirs' property owners, including a substantial and very disproportionate number of African-American heirs' property owners, have encountered problems with their heirs' property ownership, including many who have lost their property in partition actions that have yielded fire sales prices. For those families who

⁹⁴ *Id.*

⁹⁵ Lizzie Presser, *Elizabeth Warren Announces Plan to Help Heirs' Property Owners*, PROPUBLICA (Aug. 20, 2019), <https://www.propublica.org/article/elizabeth-warren-announces-plans-to-help-heirs-property-owners> [Date last accessed: Aug. 22, 2019].

already have lost their property in some type of involuntary way, there is not much that can be done to remedy the history unless State or Federal policymakers take some extraordinary actions to recognize and address the damage that has been done. Even so, there remains a very substantial number of heirs' property owners throughout the United States, in both rural and urban America.

Despite the sad history of the many heirs' property owners who lost their property involuntarily, in what constitutes dramatic change, recent legal reform and policy development are disproving the previous, widely accepted notion that heirs' property owners had little reason for hope. After most States had shown utter indifference to the plight of heirs' property owners over the course of many decades despite repeated calls for assistance, there has been a surge of States that have taken legislative action to assist heirs' property owners. Defying decades of deep skepticism about the very ability of partition law to be reformed in a substantial way, since 2011, 13 States and the U.S. Virgin Islands have enacted the UPHPA into law in an effort to address some of the thorny legal challenges heirs' property owners have endured for generations that have undermined their ownership in substantial ways. Further, there is a good chance that several more States will enact the UPHPA into law over the course of the next several years, as might other jurisdictions such as the District of Columbia.

Even more remarkably, several of the States that have enacted the UPHPA into law are located in the South, and most of these are States that are part of the so-called Deep South. The enactments in the southern States are quite significant for two reasons. First, it is generally accepted that heirs' property problems in the South are particularly widespread, which has led some to claim that the heart of heirs' property problems lies in the South. Second, it was widely (though incorrectly) assumed that the southern States would be particularly resistant to enacting the UPHPA into law. This assumption was premised upon the belief that southern State legislators would view the UPHPA as a uniform act that primarily would benefit African Americans in their States, and, therefore, would be an act they would have little interest in supporting.

Interest among policymakers in addressing some challenges heirs' property owners experience has not been limited to States or other jurisdictions that either

have enacted the UPHPA into law or are considering it at this time. The very unexpected success the UPHPA has experienced at the State level, in part, has helped certain members of Congress become more aware of heirs' property issues and more committed to addressing them, which represents quite a significant and positive development for heirs' property owners. In addition to these legislative actions, over the course of the past few years, a few very prominent Federal entities or agencies including the USDA Forest Service Southern Research Station and Natural Resources Conservation Service and the Federal Reserve Bank of Atlanta have demonstrated real interest in helping heirs' property owners realize more of the potential of their property ownership.

Many heirs' property owners want to transition from merely focusing upon their basic survival as property owners to spending more time on using their properties in more productive ways, including in ways that would enable them to build wealth. Though the UPHPA can play a vital role in helping protect heirs' property owners from some of the very devastating impacts of court-ordered partition sales, the act is not a silver bullet. It was not designed to solve the full range of heirs' property problems, including the widespread problems that flow from heirs' property owners lacking clear title or the problems many other heirs' property owners experience with gridlocked common ownership, which frustrates the ability of the common owners as a whole to use their property in useful and productive ways.

To help these property owners make that transition, more legal reform and policy development and implementation work needs to be done. Hopefully, the new and unprecedented interest very important stakeholders have demonstrated in addressing heirs' property challenges impacting urban and rural property owners alike can be leveraged to make possible the additional legal reforms as well as policy development and implementation that are needed. Given that the success of the UPHPA completely has disproven the notion that policymakers would never act to address the concerns of heirs' property owners, at least now there is real hope that more can be done to make heirs' property ownership a more viable, beneficial, and productive form of ownership for all types of families for generations to come.