2001

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FROM RECONSTRUCTION TO DECONSTRUCTION: UNDERMINING BLACK LANDOWNERSHIP, POLITICAL INDEPENDENCE, AND COMMUNITY THROUGH PARTITION SALES OF TENANCIES IN COMMON

Thomas W. Mitchell

INTRODUCTION

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

Within the African American community, the history of the federal government’s failure to deliver “forty acres and a mule” to African Americans after the Civil War has been kept alive from one generation to another. For many African Americans, the aborted land reform initiative represents
more than just a discouraging chapter in the failed Reconstruction period. The broken promise has become a metaphor for the continued unwillingness of the government to provide African Americans with the same range of economic opportunities that it has afforded white Americans to integrate African Americans into the economic mainstream of society.

African Americans today not only feel betrayed by the government’s retreat on land reform during Reconstruction, but also by the perception that the government has played an active role for the past half century in dispossessing land from African American families who overcame great obstacles to acquire land on their own. This perception is particularly strong in rural African American communities and was vocalized time and again in public forums held prior to Pigford v. Glickman in 1999, the landmark class action lawsuit filed by African American farmers against the United States Department of Agriculture (USDA). Despite strong opposition from many African American farmers, the federal judge in Pigford determined that the then proposed consent decree was a “fair, adequate and reasonable settlement of the claims” brought by the class of African American farmers.

In arguing that the settlement should be approved, plaintiffs’ counsel projected that the settlement would cost the federal government $2.25 billion, which would make it the largest civil rights case settled by the federal government in U.S. history. Under the consent decree, African American farmers like Mr. Beverly may receive a $50,000 cash payment and have all of their outstanding debt to the USDA that was affected by discriminatory conduct of USDA officials discharged. Moreover, African American farmers are entitled to some limited, forward-looking injunctive relief. More than anything else, however, many African American farmers who lost their land through foreclosure as a direct result of the USDA’s discrimination made clear that they wanted the government to restore their land to them. Under

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2 Id.
3 Fred O. Williams, Black Farmer Decrees Deal With USDA Over Past Bias, THE BUFFALO NEWS, Feb. 28, 1999, at B11; see also infra note 151.
4 Pigford, 185 F.R.D. at 113.
5 Id. at 95.
6 Pigford v. Glickman, No. 97-1978, ¶ 9(a)(iii)(B) (D.D.C. Apr. 14, 1999) (consent decree). Furthermore, in order to reduce the tax consequences for successful claimants awarded a $50,000 cash payment under “Track A” of the settlement, the USDA will pay the Internal Revenue Service (IRS) 25% of the $50,000 payment, or $12,500. Id. ¶ 9(a)(iii)(C).
7 Id. ¶ 9(a)(iii)(C). Furthermore, the USDA will send the IRS 25% of the principal amount of any debt forgiven under ¶ 9(a)(iii)(C).
8 Id. ¶ 11. Such injunctive relief includes “priority consideration, on a one-time basis, for the purchase, lease, or other acquisition of inventory property to the extent permitted by law.” Id. ¶ 11(a). In addition, the USDA will provide each successful claimant with “priority consideration for one direct farm ownership loan and one farm operating loan at any time up to five years” after the consent decree was approved by the court. Id. ¶ 11(b).
9 Pigford, 185 F.R.D. at 109.
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the consent decree, however, most successful claimants will not have their land returned.\footnote{Id.}

It is likely that at least a few of the class members in the Pigford lawsuit lost land that had been in their families since the Reconstruction period. The predecessors of these class members were not the only African Americans who acquired land in the years immediately following Emancipation.\footnote{Prior to Emancipation, a small number of free blacks owned land. Marsha Jean Darling, Landownership, Black, in ENCYCLOPEDIA OF SOUTHERN CULTURE 168-69 (Charles Reagan Wilson & William Ferris eds., 1989).} Though largely unknown and uncelebrated within or outside of the African American community today, African Americans acquired approximately fifteen million acres of land in the South in the fifty years following Emancipation. As much as any group of Americans in this nation's history, these landowners embraced the republican ideal of the rural smallhold and widely distributed ownership, and believed that only through such ownership could real economic and political independence be achieved.\footnote{ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, at 109 (1988).}

As we enter a new millennium, the pattern of ownership in the rural African American community represents the mirror opposite of the trend in black land acquisition one hundred years ago at the dawn of the twentieth century. A remarkable history of land acquisition has given way to extraordinary levels of land loss in the past half century. Today, the most current census of agriculture reveals that African American owner-operators of farms—whether full or part owners—own at most little more than two million acres of land in the United States.\footnote{1 BUREAU OF THE CENSUS, U.S. DEP'T OF AGRIC., 1997 CENSUS OF AGRICULTURE, PT. 51, UNITED STATES SUMMARY AND STATE DATA 25 (1997) [hereinafter 1997 CENSUS OF AGRICULTURE]. The 1997 census reveals that the 11,192 black, full-farm owners collectively owned 1,095,693 acres of land. Furthermore, 5,368 black, part owners collectively operated 1,068,343 acres of land, some of which they owned in full. In addition to full and part owners, an additional 1,891 tenant farmers collectively rented 221,432 acres of land.} Despite hard-fought struggles to retain their land, many African Americans have lost land involuntarily.

Even the USDA has acknowledged that for many farmers, “especially minority and limited-resource farmers,” land loss has been involuntary.\footnote{CIVIL RIGHTS ACTION TEAM, U.S. DEP'T OF AGRIC., CIVIL RIGHTS AT THE UNITED STATES DEPARTMENT OF AGRICULTURE 14 (1997) [hereinafter CRAT Report].} This Article focuses on one of the primary causes of involuntary black land loss in recent times—partition sales of black-owned land held under tenancies in common. A partition sale can be viewed as a “private” forced sale of land held under a concurrent ownership arrangement, typically a tenancy in common. The combined effect of two sets of legal rules contributes to the loss of black-owned rural land as a result of partition actions. First, like many other poor Americans, rural African American landowners have tended not to make wills; at the owner’s death, state intestacy laws enable a
broad class of heirs to acquire an interest in real property of the decedent. Interests in property transferred by intestacy from one generation to another become highly fragmented, splintering the fee into hundreds and even thousands of interests. A tenancy in common so splintered is commonly referred to as fractionated heir property or just heir property.

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

Opportunistic lawyers and land speculators have taken advantage of these legal rules in order to force sales of black-owned land. Many times, family members know—or learn from an outsider—that they own an interest in a tenancy in common and decide to cash out. Although some of these people seek legal assistance, many of these people do not want the entire land sold.15 Many of these family members exit the tenancy in common by selling their interest to nonfamily members.16 They often do not know the financial pressure this may place on other cotenants who may wish to remain on the land or to preserve it for the family. Unbeknownst to the family member, the buyer often takes the interest with the underlying motive of seeking a partition sale.17 Even the partition actions initiated by family members who seek a sale of the property tend to be brought by “heirs who are physically removed from the land.”18

Part I of this Article examines how the legal rules governing land owned under tenancies in common contribute to black land loss, especially as they pertain to tenancies in common that have become highly fractionated over time as land is transmitted from one generation to another by way of intestacy. As indicated, the very rules governing tenancies in common do not fairly allocate rights and responsibilities among cotenants no matter how consolidated the fee may be. This Part also demonstrates how a large percentage of land owned by rural, African American landowners has become highly fractionated over time through transfers of land by way of intestacy.

Part II of this Article reviews the history of the African American land imperative that fueled land acquisition in rural African American communi-

16 Id.
17 Id.
18 Id. at 126.
ties in the first fifty years after Emancipation. The history falls into two periods. In the first period, between 1865 and 1910, hundreds of thousands of rural African Americans acquired land, mostly in the South. Black landownership stabilized between 1910 and 1920. After 1920, rural black ownership began a steep decline that paralleled the demise of the black farmer in America. Black land loss is tied to the demise of the black farmer both directly and indirectly. The “Great Migration” of African Americans out of the South—spurred in part by the boll weevil and other natural disasters that caused widespread crop failures—led many blacks to abandon their land and left those who maintained ownership with less security of tenure. Furthermore, the USDA’s systemic and persistent discrimination against black farmers throughout much of the twentieth century caused many black farmers to lose their land involuntarily through foreclosure and forced others to sell their land under distress conditions.

Part III of this Article demonstrates that both political and property theory support the view that minority landownership can promote dynamic community life and facilitate greater democratic participation for groups historically at the margins of American political life. The theories of “democratic property” articulated by an eclectic group of thinkers ranging from John Locke to W.E.B. Du Bois have been borne out in case studies of particular rural communities. In these communities, those who acquired land participated in the political and civic lives of the wider society at a higher rate than those similarly situated who did not own land.

Part IV of this Article demonstrates that in some areas the law supports stable land-based communities or groups because of a legislature’s or a court’s belief that there is an important link between stable group ownership of land and community. In these instances, legislators or judges have made a judgment that the particular land-based group constitutes an important community that merits legal protection and support in its effort to maintain its landownership intact. For example, courts have liberalized the application of the rules against restraints on alienation as applied to residential housing schemes such as condominiums and cooperative housing arrangements. For other groups, such as African Americans who own land under tenancies in common, judges have not considered it important to support the preferences of the ownership group to maintain their ownership of the land on an ongoing basis. Judges in partition actions, for example, have considered landownership and monetary distributions from a sale of the land to be fungible; the value of stable communities has been ignored or minimized.

Part V of this Article offers a series of proposals that would stabilize and promote landownership in rural African American communities. These proposals advocate government intervention to promote enhanced landownership—both quantitatively and qualitatively—for African Americans. Many of the reforms proposed in this Article are not race specific; land tenure for all rural landowners and small farmers generally would be strengthened should some of the proposals be enacted.
Reforming the state laws of intestacy to narrow the class of heirs to whom property may pass could prevent fractionation of the ownership interest in the first instance. So, too, public interest lawyers and community activists could work to educate landowners about the importance of estate planning with the goal of family land retention. Such reforms, however, would only marginally impact ownership interests that already are fractionated. In these cases, the horse is already out of the barn. Instead, this Article maintains that the problem of fractionated heir property within the rural, African American community justifies more fundamental reform of common property law and the creation of government institutions that would have the capacity to help those who own heir property restructure their ownership in a way that the ownership could be stabilized and the property could be used productively. Though such government institutions do not currently exist in the United States, such institutions have operated for decades in other countries around the world. In Norway, for example, the government first established institutions in the 1800s to help landowners consolidate their fragmented holdings so that land could be used more productively in rural areas.

Given the unfulfilled promise of land reform after the Civil War and the subsequent efforts to undermine those African Americans who acquired land with little to no support from the government, our society has a clear moral obligation to reverse the processes that have stripped black landowners of their land. The United States would not be alone in such an endeavor. The Vatican recently urged major land reform in poor countries on moral grounds. Reforming laws in the United States to promote land acquisition and retention in African American communities would be consistent with this international focus on promoting just patterns of land distribution. Moreover, landownership has facilitated participation in the larger society for those given the opportunity to acquire land. For this reason, strengthening the ability of African Americans to maintain landownership should specifically concern those interested in a more vibrant democracy, who are sympathetic to increasing the participation of African Americans and reversing their historic marginal status.

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19 PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, TOWARDS A BETTER DISTRIBUTION OF LAND (1997). Other world religions such as the Baha'i Faith have also specifically addressed the importance of farmers and the role of the agricultural sector to society. See, e.g., Talks 'Abdu'l-Bahá Delivered in New York (July 1, 1912), in BAHÁ'Í PUBLISHING TRUST, THE PROMULGATION OF UNIVERSAL PEACE 217 (Howard MacNott ed., 2d ed. 1982) ("The fundamental basis of the community is agriculture, tillage of the soil. All must be producers.").

20 Some political and moral thinkers advocate that land be reallocated to specific ethnic groups in order to promote enhanced cultural integrity for such groups. Hurst Hannum, for one, states that "[w]ith few exceptions, a territorial base . . . is essential to the preservation of a group's culture." HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION 112 (1990). However, African Americans who fought to acquire and retain land throughout the past century were not motivated by the idea of building a separate and distinct culture that would be separated from the rest of the country.
As case studies have demonstrated the link between landownership and healthy community life, land tenure reform provides a tested strategy, consistent with the American liberal tradition, to promote racial justice and a more democratic society. This would suggest that the federal government’s possible payment of $50,000 to Mr. Beverly without restoring his farm to him not only fails to make him whole economically, but also leaves him one short in the “bundle of democratic tools” that he formerly possessed.21 Although the court in Pigford took the fatalistic position that “[h]istorical discrimination cannot be undone,”22 our legal institutions should do their best to make whole, both as economic and civic actors, African Americans who were unfairly dispossessed of their land. Short of this, the federal government should act now to ensure that rural, black landownership does not become merely an interesting, short-lived chapter in American history.

I. PARTITION SALES OF BLACK-OWNED LAND: A MAJOR CONTRIBUTION TO LAND LOSS

Though many legal rules and processes contribute to black land loss, activists and academics agree that partition sales of land held under tenancies in common and tax sales are common avenues of land loss.23 These experts further conclude that foreclosure,24 adverse possession,25 and eminent domain also contribute to land loss.26 In some of these legal proceedings, opportunists use practices that border on the unethical to acquire black-owned land against the clear will of most of those owning such land.27 One organization with long experience promoting black land retention claims that “a sale for partition and division is the most widely used legal method facilitating the loss of heir property” within the African American communities they serve.28 In order to understand how partition

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22 185 F.R.D. at 112.
24 ONLY SIX MILLION ACRES, supra note 23, at 50; see also Pigford, 185 F.R.D. at 87.
26 ONLY SIX MILLION ACRES, supra note 23, at 45.
27 THE IMPACT OF HEIR PROPERTY, supra note 15, at 44 (“There is an array of persons and entities that prey on the heir property situation by practices which are, although technically legal, clearly unscrupulous. These persons and entities include lawyers, judges, individual citizens, businessmen, marginal lending institutions, land speculators, and public officials.”).
28 Id. at 273; see also John G. Casagrande, Jr., Note, Acquiring Property Through Forced Partitioning Sales: Abuses and Remedies, 27 B.C. L. REV. 755, 756 n.9 (1986) (noting that Edward Pennick of the Federation of Southern Cooperatives/Land Assistance Fund estimated in 1985 that half of the cases at that time leading to the drop in black landownership involved partition actions that lead to a sale of
sales cause loss of black-owned land, one needs to understand the tenancy in common as a form of concurrent ownership of land and the consequences of the lack of estate planning common to a large number of poor, rural African Americans.

A. Tenancies in Common

1. General Characteristics. Tenancies in common are the most widespread form of concurrent estates in land. Unlike the joint tenancy, which normally requires the presence of the four “unities” of time, title, interest, and possession, a tenancy in common merely provides that each of the common owners who holds an undivided interest in the property is entitled to use and possess the entire property. Unlike the joint tenancy’s right of survivorship, a tenant in common may alienate her interest during life and at death without seeking the consent of her other cotenants.

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

A tenant in common who fails to pay her proportional share of these ongoing expenses does not lose any interest in the property. Not surprisingly, “freerider” problems are frequent. The tenant who has paid more

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30 Id. at 190.
31 Id. §§ 5.9, 5.10, at 215-22.
32 THE IMPACT OF HEIR PROPERTY, supra note 15, at 43.
than a pro rata share of the ongoing costs of maintaining the property may seek to recoup payments made in excess of her share against other cotenants. However, such contribution actions can jeopardize the interests of those who desire to maintain ongoing ownership of the land. Some courts permit a tenant in common to initiate an independent action short of a final accounting against her fellow cotenants, seeking contribution for repair costs incurred in excess of the tenant’s pro rata share. Other courts maintain that such a cotenant can only recover these excess repair expenses in a final accounting as part of a partition action that terminates the concurrent ownership estate. Many times one cotenant pays more than his share of the property taxes. Due to the fact that the cotenants are not personally liable in most circumstances for payment of the property taxes, the tenant who has paid more than his pro rata share of the property taxes may only recoup such excess expenses after a court sells the property at a judicial sale and equitably distributes the proceeds from the sale.

2. Partition Sale. In most social contexts, a tenancy in common represents an unstable form of common equity ownership. Each interest may be freely alienated by the holder, allowing any cotenant to bring a stranger into the community of ownership. A person holding an undivided interest in a tenancy in common—no matter how small that interest is—may file a partition action to terminate the cotenancy without the consent of the other cotenants. The court will either order that the property be partitioned in kind (resulting in the physical division of property) or that the entire property be sold and the proceeds of the sale distributed. Most state statutes provide that a physical division of the property is the preferred remedy in a partition action; these statutes indicate that a partition sale should be ordered only if it would be inequitable to order a partition in kind. Yet, courts now order partition sale in almost every case.

35 Cunningham et al., supra note 29, at 215-17.
36 Id. at 215.
37 Id. at 217.
38 Dukeminier & Krier, supra note 34, at 340. The remedy of partition is also available to joint tenants, but it is not available to tenants by the entirety. Id. at 341.
39 Cunningham et al., supra note 29, § 5.13, at 229.
Although some courts and commentators still refer to partition sale as a drastic remedy, the current preference for partition sale reflects the ascendant economic view that places primary importance on individual wealth maximization. According to this view, an economically valuable parcel of land should be allocated to the person willing to pay the highest price on the free market. This assures efficient use, at least theoretically. In accordance with this view, partition sale is preferred over partition in kind because land sold as a unit often has a higher economic value than the aggregate value of subdivided parcels that result from a division in kind. Under this paradigm, it is irrelevant if many of these forced sales transfer land from poor smallholders to wealthier people or to corporate entities because the value of landownership is measured against the market. As one commentator holding this view has claimed:

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

South Carolina's statute, however, does not provide that an in-kind division is preferred. See S.C. Code Ann. § 15-61-10 (1977 & West Supp. 1999).


In Maine and Idaho, no state statute or legislation addresses partition of real property.


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

RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 82-86 (5th ed. 1998).


Reid, supra note 41, at 878-79.
By liberal, or even routine, orders for partition sale, the courts now enable an individual cotenant, no matter how small her interest is in the land, to force a sale of the entire property in order to maximize the amount of money she will receive in the distribution of the proceeds.

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

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

There is evidence that some federal judges in partition actions involving Native American-owned land have more faithfully adhered to partition statutes that require judges to weigh the economic and noneconomic implications of ordering a partition sale as opposed to the preferred remedy of a

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46 *Lawrence M. Friedman, A History of American Law* 63 (1985). In comparing land transactions in the early American colonies with property transfers in England, Friedman states: "Land transactions shifted from status to contract; land rights were no longer matters of family, birth, and tradition; rather, land was a commodity, traded on the open market. This was a slow but inexorable process. It was not complete until the nineteenth century, and in a sense not even then." *Id.*


48 *See id.* at 1.

49 *Id.* at 5.

50 436 A.2d 27 (Conn. 1980).

51 *Id.* at 33.
division in kind. As in many areas of federal Indian law, however, the laws governing partition sales of Native American-owned land resemble a patchwork quilt due to the fact that jurisdiction between state, federal, and tribal authorities in such actions often differs from one case to another. For example, jurisdiction depends upon whether a fee interest in land is held under a restricted fee patent or is an unrestricted interest. At least some federal courts vested with jurisdiction over such partition actions appear to be more sensitive to the implications and equities of ordering a partition sale than many state courts hearing partition actions in the non-Native American context. For example, in Oyler v. United States, on a motion for reconsideration of a court-ordered partition sale of a fractionated allotment that had both Indian and non-Indian tenants in common, the district court set aside its order for a partition sale. Instead, the court imposed an order that provided mixed relief including division in kind of most of the ninety-four-acre tract, and sale and reallocation to one group of defendants of a 2.6-acre tract. In ordering a remedy that mostly consisted of partition in kind, the court noted that the majority of the interest holders opposed sale. The court also considered the consequences of ordering a sale of land that the defendants valued as part of their heritage, especially in a manner that would not fully compensate the parties after subtracting the costs of the litigation. The court stated:

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

The Oyler court acknowledged not just the real-world, economic ramifications of ordering a partition sale, but specifically took into account the land’s significance to one group of Americans dispossessed of much of their

52 See sources cited at note 40, supra.
54 A Native American owner who owns a parcel or interest in land under a restricted fee patent holds the legal title subject to federal restrictions against alienation, encumbrance, and taxation. Oyler v. United States, No. 92-2104, 1993 U.S. Dist. LEXIS 4633, at *6 n.2 (D. Kan. Apr. 2, 1993).
56 This 94-acre tract in Johnson County, Kansas, presents a good example of how convoluted ownership of land allotted—under treaty or statute—to individual Native Americans or Native American families from former reservation lands can become over time. In 1993, over 50 tenants in common owned an undivided interest in the land. Oyler, 1993 U.S. Dist. LEXIS 4633, at *5. Of these cotenants, some were Native American and others were non-Native American. Id. Of the Native American cotenants, some held their interest in restricted status and others held unrestricted interests that were freely alienable. Id. at *6.
57 Id. at *3-6.
58 Id. at *14.
59 Id. at *14 n.9.
historical land base. Unfortunately, the Oyler court's concern for preserving Native American heritage land has few, if any, analogs in partition cases involving land acquired by African Americans following Emancipation.

B. Patterns of Estate Planning Make Much Black-Owned Land a Target for Land Speculators

The tenancy in common represents a potentially unstable form of landownership because alienability is unrestricted and the partition remedy is weighted toward dissolution. A tenancy in common with a large number of cotenants is even more unstable simply because the problems of free-riding and exit are multiplied. Because of the low incidence of estate planning among poor, rural African Americans, much of the black-owned land base in the South has been traditionally transferred from one generation to another under state intestacy laws. Property acquired under the intestacy laws is commonly referred to as "heir property." 

Although a tenancy in common created by volition and a tenancy in common created by operation of the laws of intestacy may be governed by the same set of property laws, these two methods of formation yield ownership arrangements that are vastly different in character. A tenancy in common created consensually resembles a closely held corporation: there tends to be a small number of co-owners, each member of the ownership structure knows the other owners, and the owners are likely to live within close proximity of one another. A tenancy in common created under the laws of intestacy, by contrast, bundles together groups of people who may possess little actual connection to one another and perhaps lack even knowledge of one another's identity.

60 See C. Scott Graber, Heirs Property: The Problems and Possible Solutions, CLEARINGHOUSE REV. 273, 277 (1978) ("One thousand heirs provide 1,000 targets to a person who really wants the land.").

61 As previously discussed, the incidence of will making among rural, African American landowners may not be that much lower than the rate of will making among poor people generally despite the assumption by many commentators who have written articles suggesting that African American landowners make wills at an especially low rate. See infra notes 76-79 and accompanying text.


63 THE IMPACT OF HEIR PROPERTY, supra note 15, at 8. In St. Lucia, a country in the Caribbean, such land is referred to as "family land." See John W. Bruce, Family Land Tenure and Agricultural Development in St. Lucia (Land Tenure Ctr., Madison, Wis.), Dec. 1983.

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

65 THE IMPACT OF HEIR PROPERTY, supra note 15, at 62. For example, one study has revealed that a typical heir property tract in the Southeast is owned by eight people, five of whom live outside of the southeastern region. Id.
As time passes, not only does the number of interests increase in a tenancy in common created by operation of law, but divergences also appear in the size of individual ownership interests, especially after any in the first generation of heirs with children or lineal heirs die and their interests pass to their descendants.\textsuperscript{66} When the property comes to be held by owners from multiple generations, the common owners are likely to value the land differently and conflicts are more likely to arise. Further, as the number of interests increase, the owners are more likely to live in scattered locations. Decisions regarding the disposition of the property that may have been fairly simple to coordinate when all of the tenants in common resided, for example, in Sumpter County, Alabama, become more difficult if some common owners live in Demopolis, Alabama, others in Albany, Georgia, and still others in Chicago, Illinois.\textsuperscript{67} And as the number of interests increases, it becomes difficult to locate and keep track of the owners: problems arise with the unlocatable heir and with unknown heirs.\textsuperscript{68} Moreover, heir property often lacks record title.\textsuperscript{69} Because of these characteristics of heir property, economic development of a significant proportion of land owned by African Americans has been stifled. Owners have difficulty obtaining financing and co-owners may not be able to agree on the most appropriate use of the land.

Consider the case study of an African American estate in Mississippi conducted by the Emergency Land Fund. A certain African American named John Brown purchased eighty acres of land in Rankin County, Mississippi, in 1887.\textsuperscript{70} After he died intestate in 1935, the land continued to be passed down by intestacy. By the time an heir holding more than fifty percent of the interest in the land filed for a partition in kind of the property in 1978, there were sixty-seven heirs who held an interest in the property, with the smallest interest holder owning a 1/19440th interest in the land.\textsuperscript{71} As in many other cases, the desire of the majority interest holder to secure a physical partition of the land was frustrated when the court decided to order a sale of the property after a few of the other heirs holding a minority interest objected to the proposed division of the property.\textsuperscript{72} The fractionated heir property problem within rural African American communities manifested by the John Brown estate is typical; a 1984 study estimated that forty-one percent of black-owned land in the southeastern states is heir property.\textsuperscript{73}

If heir property tends to be highly fractionated and fractionation increases the risk of partition, then this pattern of family wealth transmission

\textsuperscript{66} See id. at 40.
\textsuperscript{67} See id. at 42-43.
\textsuperscript{68} Id. at 43.
\textsuperscript{69} Id. at 44.
\textsuperscript{70} Id. at 283.
\textsuperscript{71} Id. at 283-85.
\textsuperscript{72} Id. at 283.
\textsuperscript{73} Id. at 64, 475.
directly contributes to black land loss. Two separate studies conducted within restricted geographical areas of the South indicate that at least half and perhaps most rural, African American landowners in the South have not made wills. One study surveyed 1,708 black landowners in ten counties located in five southeastern states and found that eighty-one percent of the black owners of rural parcels had not made wills. Another study of 120 rural, black landowners in twelve counties in south-central Alabama found that fifty-six percent of these landowners had not made wills.

Despite such evidence of low rates of estate planning, the assumption that the rate of will making for rural, African American landowners lags far behind those of other, similarly situated landowners is hard to evaluate given the lack of comparative empirical studies. It is difficult to determine whether the pattern of will making within the rural African American landowning group is a marker of class or race because similar studies of poor, rural white landowners do not appear to exist. One broad study found that fifty-five percent of all people (whether landowners or not) surveyed in five states had not made wills. This study also found that sixty-five percent of those with an annual family income below $65,000 did not have wills. Further, seventy-two percent of those with estates worth less than $130,000 and fifty percent of those with estates worth less that $260,000 had not made wills.

Moreover, the explanations offered by academics for the number of rural black landowners who have not made wills are not very convincing. Although one study ascribes the failure of many rural black landowners to make wills to a legal system that African Americans had come to mistrust because their property interests were often not protected by it, there does not appear to be any empirical evidence to support this assertion. In fact, the results of a survey of black landowners—included in the report—seem to contradict the historical explanation and suggest that many of those who

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74 Id. at 65, 113.
75 Robert Zabawa & Ntam Baharanyi, Estate Planning Strategies and the Continuing Phenomenon of Black-Owned Landloss, RURAL SOC., July 1992, at 13, 16. The rates of will making for black landowners in both the broader survey conducted in 10 counties in 5 southeastern states and the study limited to 10 counties in Alabama were higher than the rate that the Emergency Land Fund forecasted. In their study on heir property, the Emergency Land Fund hypothesized that approximately 90% of black landowners in the Southeast will die without making wills. See THE IMPACT OF HEIR PROPERTY, supra note 15, at 114.
76 THE IMPACT OF HEIR PROPERTY, supra note 15, at 118 (noting that no comparable survey exploring the will-making practices of rural, white landowners has been conducted). It would be instructive to conduct such a study to examine whether poor white, rural communities experience a comparable problem of land loss.
77 LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW 30 (2d ed. 1997).
78 Id.
79 Id.
80 THE IMPACT OF HEIR PROPERTY, supra note 15, at 115 (“Estate planning through testacy was not incorporated into black thought because blacks felt that they could not trust or rely on a legal system which had traditionally failed to protect their interests.”).
experienced the most direct racism had learned the importance of making wills. However, given the wide representation of ethnic groups among those who were brought to this country as slaves from Africa and the impact that the slavery experience had on transforming traditional culture, it appears unlikely that the rate of will making can be linked to some particularized, traditional African cultural practice. Interestingly, the cultural explanations offered for the failure of many people of African descent to make wills parallel explanations some have offered for the high percentage of Native Americans who have not made wills, which has lead to the fractionation of many individual Native American allotments.

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81 See id. at 121. The report states the following: Fifty (50%) percent of the respondent will-makers were over fifty-five (55) and eighty-four (84%) percent were over thirty-five (35) years of age. Although the older black landowners still harbor a distrust of the legal system, many have evidently learned that the legal system can be relied upon to support affirmative initiative to protect their land. By making wills, they can provide for orderly and efficient disposition of their property.... Younger minority landowners have not learned the bitter lesson taught the older generation regarding minority land retention in the rural South. They did not witness the loss of ten (10) million acres of black-owned land between 1910 and 1969. They may soon learn, however; but the lesson may be costly.

82 Edith Clarke, Land Tenure and the Family in Four Selected Communities in Jamaica, 1 SOC. & ECON. STUD. 81, 86-87 (1953).

83 See Bruce, supra note 63, at 14-15.

84 A group called the Intertribal Agricultural Committee (IAC), whose membership consists of Native American tribes that control over eighty percent of the land held in trust by the federal government for Native Americans, has played an important role in the policy debates addressing proposed reforms aimed at ameliorating the fractionation of heir property in Indian country. In 1999, the IAC submitted testimony to Congress as Congress was considering amendments to the Indian Land Act. In explaining how the problem of fractionation of heir property developed for Native Americans, the IAC offered their view of the reason Native Americans had not made wills after ancestral Native Americans lands were allotted in the late nineteenth century. The IAC stated:

The lack of a tradition of private ownership resulted in a lack of formal wills or other conveyance documents which would have prevented the current situation. This situation may not have become a problem if left to traditional tribal remedies, because the established tribal decision making process would have re-allocated the holdings. However, the allotments were made under federal provisions, and therefore the distributions of a decedent's assets were also based on the English Common Law, not the local law or tribal cultures understood by the affected individuals.
Although the root causes of the low incidence of will making among rural, African American landowners are not well-understood, it does appear that many black landowners lack a sophisticated understanding of the legal rules governing the transfer of property from one generation to another. Two studies indicate that a clear majority of the black landowners surveyed were apathetic about preparing a will, expressing the sentiment that they simply "haven't got around to it."\(^5\) However, the surveys also revealed that many of the landowners were quite misinformed about the laws governing tenancies in common. In one study, almost seventy-five percent of those acquiring property through intestacy believed that all the tenants in common must consent to a sale of the land.\(^6\) The misconceptions held by many rural African Americans concerning the laws that govern tenancies in common suggest that these communities have comparatively limited access to attorneys and indicate that meaningful policy reform would include proposals designed to increase the access such owners have to legal professionals for purposes of basic estate planning.

The reliance on intestacy has contributed to intense fractionation of property held under common ownership structures within other poor communities both in the United States and in other countries. For Native Americans, one commentator has stated that the heirship problem "[is] second only to alienation among the evils wrought by" the era of the allotment of Native American lands that was part of federal Native American policy between 1887 and 1934.\(^7\) Studies by the United States Senate and House of Representatives in the early 1960s indicated that one-half of the allotted Native American lands then held in trust by the federal government had become fractionated.\(^8\) The Supreme Court noted the problem in *Hodel v. Irving:* "The failure of the allotment program became even clearer as successive generations came to hold the allotted lands. Thus 40-, 80-, and 160-acre parcels became splintered into multiple undivided interests in land, with some parcels having hundreds, and many parcels having dozens, of owners."\(^9\)

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\(^5\) The Impact of Heir Property, supra note 15, at 113; Zabawa & Baharanyi, supra note 75, at 18.

\(^6\) The Impact of Heir Property, supra note 15, at 123.

\(^7\) Michael L. Lawson, Heirship: The Indian Amoeba, reprinted in S. 2480-S.2663: Before the Senate Select Comm. on Indian Affairs, 98th Cong. 81 (1984); see also Hodel v. Irving, 481 U.S. 704, 707 (1987) ("The policy of allotment of Indian lands quickly proved disastrous for the Indians. Cash generated by land sales to whites was quickly dissipated, and the Indians, rather than farming the land themselves, evolved into petty landlords, leasing their allotted lands to white ranchers and farmers and living off the meager rentals.").

\(^8\) See House Comm. on Interior and Insular Affairs, 86th Cong., Indian Heirship Land Study (Comm. Print 1961); Senate Comm. on Interior and Insular Affairs, 86th Cong., Indian Heirship Land Survey (Comm. Print 1960-61).

\(^9\) Hodel, 481 U.S. at 707.
Just as the John Brown estate highlighted the intense fractionation of heir property typical of many rural, African American property holdings, certain tracts of land on the Sisseton-Wahpeton Lake Traverse Reservation demonstrate the extreme degree of fractionation for all too many Native American allotments. The average tract on that reservation has 196 owners and the average owner holds undivided interests in fourteen tracts. An especially dramatic example of this fractionation is tract 1305. According to the Supreme Court:

Tract 1305 is 40 acres and produces $1,080 in income annually. It is valued at $8,000. It has 439 owners, one-third of whom receive less than $.05 in annual rent and two-thirds of whom receive less than $1. The largest interest holder receives $82.85 annually. The common denominator used to compute fractional interests in the property is 3,394,923,840,000. The smallest heir receives $.01 every 177 years. If the tract were sold (assuming the 489 owners could agree) for its estimated $8,000 value, he would be entitled to $.000418. The administrative costs of handling this tract are estimated by the Bureau of Indian Affairs at $17,560 annually.

Fractionation of individually owned Native American trust land precludes meaningful economic development, preventing wealth generation from one generation to another. However, such fractionation has not led to significant land loss because of the different applications of partition laws in cases involving much of individually or family-owned Native American trust land. Until 1980, the Interior Department had maintained that even a partition in kind of a Native American allotment required the consent of all of the tenants in common. In 1980, a federal district court in South Dakota ruled in Sampson v. Andrus that a partition may be made at the discretion of the Secretary of the Interior upon application of just a single tenant in common. Even after Sampson, however, partition sales do not appear to be a major source of land loss in the Native American community.

Outside of the United States, other poor communities have also experienced significant problems with fractionation of commonly owned property. In St. Lucia and other Caribbean countries, for example, "family land" has become intensely fractionated over time due to the failure of landowners to make wills. Owners of such land find it difficult to secure credit.
and marketable title, limiting productive use of their land.\textsuperscript{95} But the comparative Native American and Caribbean case studies show that the dynamic of land loss requires more than just fractionated heir property. Partition rules are crucial. In contrast to rural African Americans, St. Lucian owners of “family land” have not lost much of their land through partition because the law does not allow an individual common owner to seek partition without the consent of all the other common owners.\textsuperscript{96}

II. THE AFRICAN AMERICAN LAND IMPERATIVE: AN AMERICAN SUCCESS STORY UNDERMINED BY SYSTEMIC DISCRIMINATION AGAINST BLACK LANDOWNERS

A. Between 1865-1910, An African American Land Imperative Fueled Significant Black Land Acquisitions

Africans brought to this country and enslaved were denied the right to acquire land by law.\textsuperscript{97} Some scholars have suggested that the African slaves had no prior experience with private ownership of land.\textsuperscript{98} According to this view, although the slaves were brought to the New World from different regions in West Africa and differed according to linguistic and cultural practices, the slaves as a group were all drawn from societies with communal land tenure regimes that left no space for individual resource ownership.\textsuperscript{99} This broad anthropological interpretation of African land tenure systems should be read with healthy skepticism. Although some commentators may lack a nuanced understanding of the land tenure regimes of the African societies from which slaves were drawn, it is clear that the American slave system undeniably squelched the ability of slaves to practice the culture of their African ancestors.\textsuperscript{100} As time progressed, the slaves “began to think of themselves more and more as individuals bound together by the exploitative

\textsuperscript{95} Id. at 21-23; see also THE IMPACT OF HEIR PROPERTY, supra note 15, at 241-50, 306-07.
\textsuperscript{96} Cf. Bruce, supra note 63, at 4 (noting that an administrator of an intestate’s estate in St. Lucia may not partition the land in kind unless all of the heirs consent.).
\textsuperscript{97} KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH 197 (1956).
\textsuperscript{98} R.J.M. BLACKETT, Robert Campbell and the Triangle of the Black Experience, in BEATING AGAINST THE BARRIERS: BIOGRAPHICAL ESSAYS IN NINETEENTH-CENTURY AFRO-AMERICAN HISTORY 164 (1986); PAUL BOHANNAN & PHILIP D. CURTIN, AFRICA AND AFRICANS 124-28 (1971); see also SIDNEY W. MINTZ & RICHARD PRICE, AN ANTHROPOLOGICAL APPROACH TO THE AFRICAN-AMERICAN PAST: A CARIBBEAN PERSPECTIVE 5 (1976) (challenging the view that West African societies from which many slaves to the Americas were brought shared many overarching cultural practices including “corporate” as opposed to private ownership of land).
\textsuperscript{100} STAMPP, supra note 97, at 362.
system of human bondage" and less as culturally united by distinct African cultures.

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

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

Furthermore, in the antebellum period, the incentive to acquire capital was particularly strong for those African Americans given the opportunity to purchase their freedom. Those fortunate enough to be freed spared no effort to become property owners.

After issuance of the Emancipation Proclamation, the freedmen and freedwomen fully expected the government to redistribute land throughout the South to a new class of black smallholders. The great majority of emancipated slaves had experience only in agriculture, but lacked the re-

\[101\] SCHWENINGER, supra note 99, at 27.
\[102\] Id.
\[103\] See id. at 12.
\[104\] See id. at 30.
\[105\] Id. at 59.
\[106\] See id. at 65-66.
\[107\] See id. at 69.
\[108\] See Manning Marable, The Land Question in Historical Perspective: The Economics of Poverty in the Blackbelt South, 1865-1920, in THE BLACK RURAL LANDOWNER, supra note 23, at 4. Eric Foner has argued that the aspiration for landownership among African Americans after emancipation was similar to the post-emancipation yearnings of freedmen in many other countries throughout the Western Hemisphere, such as Haiti and Brazil. However, Foner states that only "American blacks emerged from slavery convinced that the federal government had committed itself to land distribution." FONER, supra note 12, at 104.
sources to purchase land. These hopes of land reallocation seemed justified by events that occurred both in the closing phases of the Civil War and in the actions taken by the federal government soon thereafter. In his march through the South, General Sherman issued Field Order No. 15 on January 16, 1865, declaring as abandoned land the Sea Islands stretching from Savannah, Georgia to Charleston, South Carolina, a total of 485,000 acres. Within months of this order, General Rufus Saxton, charged with implementing Sherman’s order, settled 40,000 freedmen on the islands on forty-acre plots. In addition to land, Sherman authorized Saxton to give surplus horses and mules to the freedmen to the extent they were available. As it would turn out, General Saxton’s allotment of land to the freedmen on the Sea Islands under Field Order No. 15 would constitute the greatest land redistribution program ever benefiting African Americans in this country’s history.

Furthermore, in March 1865, Congress established the Bureau of Refugees, Freedmen, and Abandoned Lands (“Freedmen’s Bureau”). The legislation creating this agency “promised every male citizen, whether refugee or freedman, forty acres of land at rental for three years with an option to buy.” And in 1866, Congress passed the Southern Homestead Act opening to the freed slaves settlement of forty-six million acres of public lands. The 1866 Homestead Act differed from the Homestead Act of 1862 in that the latter only provided for homesteading by non-Confederate whites. In the first two years of the Southern Homestead Act, applicants could apply for settlement of eighty acres of land; later this limit was increased to 160 acres.

Ultimately, however, hopes for significant land reform were destroyed. The impact of the Freedmen’s Bureau was muted and the Southern Homestead Act proved to be “a dismal failure.” Although the

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112 Id. at 165.
113 Id. Eric Foner has suggested that the program of land distribution on the Sea Islands that included forty acres and, sometimes, a horse or a mule, may account for the familiar call for “forty acres and a mule” after the end of the Civil War. Foner, supra note 12, at 70-71.
114 Couto, supra note 111, at 165.
115 Freedman and Refugees Act, ch. 90, 13 Stat. 507 (1865).
116 Couto, supra note 111, at 165.
118 Id.
119 Id.
120 See Foner, supra note 12, at 161.
121 Id. at 246.
Freedmen's Bureau had 850,000 acres of land under its control in 1865,122 half of the land was returned to the former white owners by mid-1866.123 Furthermore, several months after passage of the Freedmen's Bill, President Andrew Johnson began issuing a number of pardons to former confederates and ordered General Oliver Otis Howard, commissioner of the Freedmen’s Bureau, to issue a circular restoring land to the pardoned Southerners.124 Fewer African Americans were able to settle lands under the Southern Homestead Act than the Act’s early supporters had envisioned due to the fact that the final bill permitted anyone to apply for land who claimed that he had not supported the Confederacy. By one estimate, seventy-seven percent of the applicants under the Southern Homestead Act were white, and black applicants faced additional hurdles of discrimination in their efforts to obtain or to maintain government homesteads.125

African Americans throughout the South overcame obstacles to land acquisition by demonstrating what can only be described as heroic action. African Americans acquired fifteen million acres of land in the South between Emancipation and 1910 almost completely through private purchase, overcoming discriminatory credit practices, violence perpetuated by anti-black groups, and the refusal of many whites to sell to black people.126 In the agricultural sector, where the overwhelming number of black landowners were concentrated, black farm owners constituted 16.5% of all southern landowners by 1910.127 It must be noted, however, that African Americans were never permitted to purchase any significant amount of prime real estate; for the most part, black people could buy land in “areas with less fertile soil, perhaps tucked away in the hills, not too close to the main highways or railroads, nor to white schools or churches.”128

B. Factors Undercutting Black Landownership After 1916

These remarkable gains in black landownership in the rural South (the poor quality of the land notwithstanding) have almost been wiped out. At the end of the twentieth century, African Americans in the region were losing land almost as rapidly as their forbearers acquired it at the beginning of the

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122 Id. at 158.
123 Id. at 161.
124 See id. at 159.
125 MICHAEL L. LANZA, AGRARIANISM & RECONSTRUCTION POLITICS: THE SOUTHERN HOME
126 See Peggy G. Hargis, Beyond the Marginality Thesis: The Acquisition and Loss of Land by Af
rican Americans in Georgia, 1880-1930, in 72 AGRIC. HIST., 241, 242 (1998); see also SCHWENINGER,
supra note 99, at 145-46, 151-52. Not only did many African Americans who tried to acquire land face
violence, but some whites who sold land to African Americans were threatened with violence from other
whites for what were considered unpatriotic acts. See RANSOM & SUTCH, supra note 110, at 86.
[hereinafter THE DECLINE OF BLACK FARMING].
128 Id. at 22-23.
One study estimates that of the fifteen million acres of land that black people acquired between 1865 and 1910, hardly any land remains under the ownership of the original black families who once owned the land. Fewer than three million acres of land are currently owned by rural African Americans in farming irrespective of when such land was acquired. The dwindling number of black-operated farms today are concentrated in the southeastern states within the Black Belt and in Texas, Oklahoma, and California.

Black land loss closely tracks the steep decline of black farmers since 1920, a phenomenon the recently settled class action lawsuit filed by black farmers against the USDA brought to national attention in the past year. In 1920, black farm owners accounted for one out of every seven farms in the United States; today these farms account for less than one percent of all U.S. farms. Overall, the number of black farmers has decreased from a high of 925,708 in 1920, when one in four black farmers owned their own land, to approximately 18,000 today—a ninety-eight percent decline. The number of white farmers has declined as well, but the rate of decline of black farmers far outpaces that of white farmers. Even in 1870, just five

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129 The Impact of Heir Property, supra note 15, at 100.
130 See supra note 13 and accompanying text. It should be noted that the exact amount of black landownership is difficult to ascertain precisely because most estimates rely in part on agricultural census data. This data is problematic for many reasons. See The Impact of Heir Property, supra note 15, at 19-21; see also The Decline of Black Farming, supra note 127, at 2 n.3. Due to the methodological problems in calculating the precise number of acres under black landownership, there has been some conflict in the literature of black land loss as to the precise amount of black landholdings. For example, in 1973, one commentator estimated that blacks in the rural South owned only six million acres of land. See generally Only Six Million Acres, supra note 23. A different study issued 11 years later concluded that there were "9,257,311 acres of black-owned rural land in the southeastern states." The Impact of Heir Property, supra note 15, at 61.

131 Strictly speaking, the Black Belt refers to the region, not the people, in the southeastern portion of the country that has fertile, dark soil. The Impact of Heir Property, supra note 15, at 18.


133 Id.

134 Marvin, supra note 108, at 15. Of the approximately 888,000 black-operated farms in 1910, 175,000 were fully owned and another 43,000 were partially owned. The remaining black-operated farms in 1910 were sharecropped. Id.

135 1997 Census of Agriculture, supra note 13, at 25. The number of white farmers also decreased significantly between 1920 and 1992; however, the rate of decline of 65% for white farmers in this period still pales in comparison to the rate of decline of black farmers. Spencer D. Wood & Jess Gilbert, Re-entering African-American Farmers: Recent Trends and a Policy Rationale 2 (unpublished paper, on file with author).

136 For example between 1982 and 1987, the percentage of black-owned farms declined by 31% at the same time that the percentage of white-owned farms declined by 66%. See 1 Nat'l Agric. Statistics Serv., U.S. Dep't of Agric., 1987 Census of Agriculture, Pt. 51, U.S. Summary and State Data 20-21, app. A-7 (1987).
years after the end of the Civil War, there were close to 29,000 black farm owners in the South.\textsuperscript{137}

With the age distribution of black farmers heavily tilted towards older farmers, the future of black farmers in America looks worse, assuming that is possible. The 1997 agricultural census counted only 745 black farmers under thirty-five years of age nationwide, most of them concentrated in the Southern states. These young farmers comprised just four percent of all black farmers.\textsuperscript{138} Black farmers who were seventy years or older constituted the largest group of black farmers, representing twenty-four percent of the total.\textsuperscript{139} Overall, the average age of black farmers was the highest of any identified group of farmers, whether minority or white.\textsuperscript{140}

General economic shifts in the agricultural industry have squeezed out many small farmers—the group in which most black farmers are concentrated.\textsuperscript{141} The few remaining black farmers face the additional threat of being forced out of farming due to continued discrimination by the USDA. Applications for farm credit and other benefits available under the USDA are approved or denied by county committees of local farmers.\textsuperscript{142} Federal regulations mandate that those eligible to elect commissioners to the three- to five-member county committees and those eligible to be elected must possess an interest in a farm either as an owner, operator, tenant, or sharecropper.\textsuperscript{143} Paralleling the small percentage of black farmers nationally, there are only thirty-seven African American county commissioners out of 8,148 county commissioners nationwide.\textsuperscript{144}

The settlement of the \textit{Pigford} class action resulted in no substantive changes to the federal mechanism of loan determinations that vests so much power in local commissioners.\textsuperscript{145} Given the historic and stubborn refusal of

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\textsuperscript{137} See \textit{Schweninger}, supra note 99, at 164, 174.
\textsuperscript{139} See \textit{id.}; also \textit{Jerry Thomas, Black Farmers' Battle Reaps Bitter Harvest}, CHI. TRIB., Dec. 7, 1997, § 1, at 1 (discussing the difficulty the last full-time, black owner-operator of a farm in Kankakee County, Illinois, has had farming and trying to pass his farming operation onto another black farmer to continue the enterprise).
\textsuperscript{140} See 1997 \textit{Census of Agriculture}, supra note 13, at 24, 26.
\textsuperscript{141} See \textit{id.} at 25. The 1997 census indicates that 77% of black farmers had agricultural sales of less than $10,000 and 86% of these farmers had sales of less than $20,000. \textit{id.}
\textsuperscript{142} Selection and Function of Agricultural Stabilization and Conservation Committee, 7 C.F.R. § 7 (2000).
\textsuperscript{143} \textit{id.} §§ 7.5(a)-(b), 7.15.
\textsuperscript{144} See CRAT Report, supra note 14, at 19. The representation of other minority farmers on county commissions tracks the meager representation of black farmers. In 1994, minorities accounted for 4.7% of those eligible to vote for county committee seats; however, just 2.9% of the county commissioners elected in 1994 were minorities. \textit{id.} at 20.
\textsuperscript{145} \textit{Pigford v. Glickman}, 185 F.R.D. 82, 110 (D.D.C. 1999). The court stated:
\textit{The Consent Decree does not, however, provide any forward-looking injunctive relief. It does not require the USDA to take any steps to ensure that county commissioners who have discriminated against class members in the past are no longer in the position of approving loans. Nor does it provide a mechanism to ensure that future discrimination complaints are timely investigated and

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these commissioners to treat black farmers fairly, even after repeated federal studies over the past decades documented blatant discrimination against black farmers by USDA officials and county commissioners,\textsuperscript{146} disparity in government support for black farmers is likely to recur despite the settlement of the \textit{Pigford} lawsuit. In fact, at the same time the government was settling the \textit{Pigford} lawsuit, black farmers in Arkansas and Georgia claimed that commissioners in five county offices in the two states improperly denied black farmers disaster assistance.\textsuperscript{147} One phenomenon has remained constant since the first government reports highlighted discrimination against black farmers over thirty years ago—the number of black farmers has declined after each report has been issued. In fact, whereas the U.S. Commission on Civil Rights reported that there were only 57,271 black farm operators in 1982,\textsuperscript{148} the 1997 census reports that there are currently just 18,451 black farm operators in the country.\textsuperscript{149} Even if discrimination is uprooted, policies designed to support all small farmers—white and minority—must be implemented in order to renew the prospects for small farmers who have not prospered under this country’s agricultural policy over the past half century.\textsuperscript{150}

\textit{Resolved} so that the USDA does not practice the same discrimination against African American farmers that led to the filing of this lawsuit. In fact, the Consent Decree stands absolutely mute on two critical points: the full implementation of the recommendations of the Civil Rights Action Team and the integration and reform of the county committee system to make it more accountable and representative. The absence of any such provisions has led to strong, heart-felt objections. It also has caused the Court concern.

\textit{Id.} Although the \textit{Pigford} lawsuit filed by black farmers helped reveal the widespread and systematic discrimination within the federal farm program, the allegations of discrimination that formed the basis of the lawsuit have a long history and were well-documented in many reports dating back to at least 1965. \textit{See, e.g., CRAT Report, supra note 14; GEN. ACCOUNTING OFFICE, FARM PROGRAMS: EFFORTS TO ACHIEVE EQUITABLE TREATMENT OF MINORITY FARMERS (1997); GEN. ACCOUNTING OFFICE, MINORITIES AND WOMEN ON FARM COMMITTEES (1995); OFFICE OF INSPECTOR GENERAL, U.S. DEP’T OF AGRIC., EVALUATION REP. NO. 50801-5-Hg, IMPLEMENTATION OF OIG’S RECOMMENDATIONS—DEPARTMENT’S CIVIL RIGHTS COMPLAINT SYSTEM AND THE DIRECT FARM LOAN PROGRAM (1998); U.S. COMM’N ON CIVIL RIGHTS, EQUAL OPPORTUNITY IN FARM PROGRAMS (1965) (finding discrimination in the USDA’s Farmers Home Administration, Cooperative Extension Service, Soil Conservation Service, and Agricultural Stabilization and Conservation Service); THE DECLINE OF BLACK FARMING, supra note 127; U.S. COMM’N ON CIVIL RIGHTS, FEDERAL TITLE VI ENFORCEMENT TO ENSURE NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS (1996); U.S. DEP’T OF AGRIC., REPORT OF THE USDA TASK FORCE ON BLACK FARM OWNERSHIP (1983); THE MINORITY FARMER: A DISAPPEARING AMERICAN RESOURCE, supra note 132 (1990); Decline of Minority Farming in the United States: Hearing Before the Government Information, Justice, and Agricultural Subcomm. of the House Comm. on Government Operations, 101st Cong. (1990); U.S. Comm’n on Civil Rights, Cycle to Nowhere, CLEARINGHOUSE PUB. NO. 14 (1970).}

\textit{Disaster Aid Denied, Black Farmers Charge, Chi. Trib., Aug. 11, 1999, § 1, at 13.} \textsuperscript{147}

\textit{The Decline of Black Farming, supra note 127, at 1.} \textsuperscript{148}

\textit{1997 Census of Agriculture, supra note 13, at 25.} \textsuperscript{149}

\textit{Wendell Berry, Failing Our Farmers, N.Y. Times, July 6, 1999, at A17 (stating that “farm communities have disintegrated everywhere . . . [a]nd a destructive agricultural economy is profoundly undemocratic”).} \textsuperscript{150}
Members of the *Pigford* class have publicly voiced concern about an issue even more fundamental than the issue of whether African American farmers will survive. They believe the actions of the USDA and its state agents have been designed to strip away the diminishing number of acres under black ownership in rural America. Some believe the USDA participated in a conspiracy to take land from black farmers. Others say the refusal to restore land lost as a direct result of the USDA’s acknowledged discrimination amounts to an intentional choice to dispossess black farmers of their land. At root, these allegations reflect the view that black-owned rural land is a political and not just cultural or economic heritage. Without land, they fear African Americans will have less power to build communities and to exercise the range of activities associated with full citizenship in a democracy.

There are other factors behind the raw numbers indicating a historic decline in the numbers of black landowners in the rural South, including African American migration patterns in this century. As blacks left the South, the splintering up of families contributed to less secure common ownership of real property in the region. Ironically, at the peak of black landownership and farming in the South in 1910, large numbers of African Americans began migrating out of the South. This “Great Migration” continued through the 1960s and fundamentally redistributed the black population of the country. In 1900, ninety percent of black people lived in the

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

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

Id.

153 Initially, “The Great Migration” referred to the migration of black people out of the South during and soon after World War I. More generally, the term has also been used to capture the migration of blacks out of the South during and after World War II. Stewart E. Tolnay, *The Great Migration and Changes in the Northern Black Family, 1940 to 1990*, 75 SOC. FORCES 1213, 1214 (1997). Between 1910 and 1920, 525,000 African Americans migrated out of the South; in the 1920s, 877,000 African Americans left the South. REYNOLDS FARLEY & WALTER R. ALLEN, *THE COLOR LINE AND THE QUALITY OF LIFE IN AMERICA* 113 (1987). Prior to 1910, blacks had migrated out of the South in much smaller numbers. In the 1870s, 70,000 left; in the 1880s, 80,000 left; in the 1890s, 174,000 left; and between 1900 and 1910, 197,000 more left. The doubling of the numbers of blacks migrating out of the region in the period between 1890 and 1910 as compared to the period between 1870 and 1890 has been attributed, in part, to the increasing use of blacks as strikebreakers in northern labor disputes. DOUGLAS
South; by 1980, the percentage had declined to fifty percent. Various push and pull factors encouraged blacks to leave the South in large numbers during the World War I period. With the onset of war in 1914, northern factories expanded their production; at the same time, the cheap supply of labor from southern and eastern Europe dried up. During the same period, beginning in 1906 in Louisiana and moving to Mississippi in 1913 and to Alabama in 1916, the Mexican boll weevil wreaked havoc on the southern cotton crop. The appearance of the boll weevil coincided with a plunge in the price of cotton and a series of floods that hit the South in 1915.

Analysis of demographic distribution patterns in the past century for Native Americans and African Americans reveals some interesting correlations. Just as 90% of African Americans lived in the South in 1900, 90% of Native Americans lived in rural areas as recently as 1930. By 1990, 50% of the Native American population resided in urban areas. Just as African Americans first came north in large numbers during the outbreak of World War I, World War II served as the primary "pull" factor that drew Native Americans out of rural areas in large numbers. Twenty-five thousand Native Americans served in the military during World War II, and another fifty thousand were employed in war-related industries. A higher percentage of Native Americans fought in World War II than did any other ethnic minority group in America, and many of these Native Americans enthusiastically volunteered for military service. Donald L. Fixico, Termination and Relocation: Federal Indian Policy, 1945-1960, at 4, 6 (1986). Furthermore, Native Americans invested 17 million dollars in war bonds and supported the war effort in many other sacrificial ways.


154 Tolnay, supra note 153, at 1214; see generally Farley & Allen, supra note 153, at 110-13.
155 Nick Clooney, Black Americans Till Southward, Cin. Post, Feb. 11, 1998, at A1. Interestingly enough, the demographic trends have now shifted, and more black people are currently migrating to the South than to any other region in the country. In 1988, the proportion of African Americans living in the South increased to 56% from a low of 52% in 1980. See Barbara Vobejda, In Turn Back, Blacks Moving to the South; Dramatic Shift Reflects Economy, Racial Mood, Wash. Post, Jan. 29, 1998, at A3. Further, between 1990 and 1995, 375,000 black people moved into the South, doubling the number that had moved in during the prior five-year period. Id. According to William Frey, a demographer at the University of Michigan, the South was the only region in the country where more black people moved in than migrated out between 1990 and 1995. Id. The regional net black migration numbers between 1990 and 1995 are as follows: Midwest -106,500; West -28,700; Northeast -233,600; and South 368,800. Id. In a stark reversal of sentiment, many African Americans now find the South more socially progressive than the North. Id.

The appearance of the boll weevil coincided with a plunge in the price of cotton and a series of floods that hit the South in 1915.
These natural devastations led southern planters to shift their production to food crops and livestock that required fewer tenant farmers and day laborers.\textsuperscript{159}

As once relatively unified African American families dispersed, those who remained in the region and in possession of family agricultural land and those who left sometimes came to value their common property holdings differently. Unfortunately, the legal rules governing tenancies in common in conjunction with intestacy rules do not distinguish between family members who disperse and lose all meaningful connection to the land and those who maintain meaningful ties to the land. As noted before, many migrants who left the region during the Great Migration and their descendants unwittingly have sold their interests in land in the South to land speculators who then initiate legal proceedings that force a sale of the entire family's landholdings. The distant relatives geographically removed from the land are almost never cognizant that the fractional interests they sell will be used as a lever to force their distant relations off of family land.

III. IMPORTANCE OF MINORITY LANDOWNERSHIP VALIDATED BY THEORY AND CASE STUDIES

History has demonstrated that for countless African Americans, land has not been merely a fungible commodity. Black landownership has provided important benefits to the record and nonrecord owners, as well as to extended families and to the African American community at large. Though many of the positive attributes of such ownership are not captured well by economic models that only measure value in terms of individual wealth maximization, studies employing a richer set of measures have demonstrated that landownership for African Americans has had significant, measurable effects. To borrow language from classical economics, landownership has had multiplier effects for the African American community. These positive benefits include evidence of increased levels of political participation, education, and psychological well-being.

A. Visions of Participatory Democracy in a Racially Mixed Society

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

\textsuperscript{158} Id.
\textsuperscript{159} Id.
society has scaled back its commitment to bringing African Americans into the mainstream of American life.

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

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

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

In the nineteenth century, Frederick Douglass contended that black Americans had no desire to form their own state or to return to Africa; once freed, he believed black Americans would be quickly assimilated into the mainstream of society. By contrast, Martin Delany, the leading black nationalist of that time, maintained that any free people needed to be part of the group that ruled society. He believed that entrenched racism would prevent black people from ever joining the ruling elite in America. Therefore, at one stage of his career Delany encouraged black people in America to emigrate to Central and South America, as well as to the West Indies. In terms of individual hopes and aspirations, following Emancipation, most freed slaves wanted to become landowners even more than they desired vot-

161 Id. at 92.
Landownership meant economic security and self-determination.

The conflicting ideologies of nationalists and integrationists converged during the civil rights movement and especially with the passage of the Voting Rights Act of 1965. Black people along a wide ideological spectrum embraced the view that fundamental change in the social and economic agenda of the country could be achieved through the ballot box. Many assumed that increased voting in the black community would result in the election of more black officials, who in turn would be the engines of political transformation. The optimism of the civil rights movement has not borne out its hoped-for results, for despite the energy that African Americans invested in trying to reshape the political system, African Americans continue to be severely underrepresented in politics.

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

Majority groups often argue that granting rights to minority groups qua groups will fragment the national fabric and undermine national unity. Perhaps with this in mind, John Stuart Mill claimed it would be "next to impossible" for real democracy to flourish in an ethnically diverse soci-

166 The assumption that black elected officials as a group would push through programs that would result in fundamental social and economic change, which would inure to the benefit of the wider black community, has not been borne out in many instances. See Lani Guinier, No Two Seats: The Elusive Quest for Political Equality, 77 VA. L. REV. 1413, 1448 (1991).
167 Will Kymlicka & Ian Shapiro, Introduction, in NOMOS XXXIX 6 (Ian Shapiro & Will Kymlicka eds., 1997).
168 HANNUM, supra note 20, at 56.
169 See generally HANNA F. PITKIN, THE CONCEPT OF REPRESENTATION (1967) (providing a thorough analysis of the societal meaning of representation from an historical viewpoint as well as from a political viewpoint).
170 HANNUM, supra note 20, at 71.
Mill’s solution was to argue that a country’s boundaries be drawn along ethnic lines and that national minorities be granted the right to secede. Obviously, these are not realistic alternatives for ethnically pluralistic western societies. The project for modern democracies is to learn to thrive on heterogeneity.

Faith in assimilation has triumphed at the level of constitutional principle. However, not only has the United States steered away from recognizing minority group rights, but the government has also demonstrated only a lukewarm commitment to eradicating discrimination against individual minority group members. Despite noticeable gains since the 1960s, for example, African Americans today hold less than two percent of elected offices throughout the country. To a striking degree, large portions of the American landscape remain geographically segregated by race. In fact, Douglass Massey and Nancy Denton have shown that racial segregation of housing has worsened in the twentieth century. One-third of African Americans live in areas so intensely segregated that they are almost completely isolated from other groups in society, rendering them amongst “the most isolated people on earth.”

B. Landownership Considered Vital to Promoting a Participatory Democracy

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

171 JOHN STUART MILL, UTILITARIANISM, LIBERTY AND REPRESENTATIVE GOVERNMENT 361 (E.P. Dutton 1929).
172 Id. at 362, 366.
173 HANNUM, supra note 20, at 56.
174 OLIVER & SHAPIRO, supra note 117, at 24.
175 MASSEY & DENTON, supra note 153, at 77.
John Locke maintained that property ownership is essential to civil society.\(^{177}\) People enter into political or civil societies primarily to preserve property, he argued, defined in this context as “Lives, Liberties and Estates.”\(^{178}\) Elsewhere, Locke asserted that the “chief matter of property is the Earth itself,” that is, land.\(^{179}\) Locke’s theory of the social compact assumes that those with valuable material possessions—most importantly land—have the strongest incentive to enter into agreements to establish governments because of their desire to preserve their property. Furthermore, once governments are formed, people should retain their property if civil society is to serve its ends. Locke asserts:

The Supream Power cannot take from any Man any part of His property without his own consent. For the preservation of Property being the end of Government, and that for which Men enter into Society, it necessarily supposes and requires, that the People should have Property, without which they must be suppos’d to lose that by entering into Society, which was the end for which they entered into it, too gross an absurdity for any Man to own. Men therefore in Society having Property, they have such a right to the goods, which by the Law of the Community are theirs, that no Body hath a right to take their substance, or any part of it from them, without their own consent; without this, they have no Property at all.\(^{180}\)

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

Locke qualified the right to private property in two ways. First, an individual’s right to property should be subject to the principle that there must be “enough, and as good left in common for others.”\(^{181}\) Second, an individual ought not to take more property that he can use.\(^{182}\) Even so, Locke’s principal interest lay in setting forth moral and philosophical arguments to support the right to private property and his ideas were used by Anglo-American politicians to support the property rights of the rich, irrespective of these provisos.\(^{183}\) Moreover, Locke’s arguments about property address the conditions under which individuals initially acquire property rights that become subject to governmental protection, but do not ask whether the distribution of property at any moment in time reflects the fact that different

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\(^{177}\) See John Locke, Two Treatises of Government 110 (Peter Laslett ed., Cambridge Univ. Press 3d. ed. 1967) (1698) (stating that only “owning property ... can give a man permanent membership of society”).

\(^{178}\) Id. § 123, at 368. In the Second Treatise, Locke at times uses both a more materialistic definition of property and the more expansive definition referred to above.

\(^{179}\) Id. § 32, at 308-09.

\(^{180}\) Id. § 138, at 378.

\(^{181}\) Id. ¶ 27, at 306.

\(^{182}\) Id. ¶ 30, at 308.

individuals and groups possess unequal power to acquire property in the first instance.\textsuperscript{184}

Locke’s political theory of property powerfully influenced the framers of the United States Constitution, as well as early American jurists.\textsuperscript{185} Thomas Jefferson, for example, fully accepted Locke’s view of the sanctity of private property rights.\textsuperscript{186} Jefferson, however, was relatively more concerned about democratic principles than Locke was, a concern that shaped his civic republican view of the proper distribution of land. According to republicans, democracy works best if citizens are both enlightened and independent. For Jefferson, private property was “a corollary to democracy” because landownership allowed men to achieve economic security and to develop self-reliance.\textsuperscript{187} Believing that the “small land holders are the most precious part of a state,”\textsuperscript{188} Jefferson thought that as many men as possible should own land. Jefferson’s argument for widely distributed property is also linked to his view of the good society. Agriculture, for Jefferson, held sociological and moral value that was even more important than its economic value.\textsuperscript{189} Freed from the corrupting influence of industry and commerce, rural smallholds could help develop virtues that would protect the moral fiber of the country and ensure its longevity.\textsuperscript{190}

One hundred fifty years later in his 1935 book \textit{Black Reconstruction},\textsuperscript{191} W.E.B. Du Bois focused upon the failure of the government to allocate land to the newly freed slaves in explaining the failure of Reconstruction to build a real democracy. The enfranchisement of black people in the South after the Civil War failed to achieve its liberating potential, he argued, because white landowners maintained their monopoly of land.\textsuperscript{192} Although black people used their political power to establish public school systems, Du Bois asserted that “universal suffrage could not function without personal freedom, land and education.”\textsuperscript{193} As a socialist thinker, Du Bois considered the popular black demand for private ownership of land (and little else) in the economic realm to be incomplete.\textsuperscript{194} Even so, Du Bois believed that


\textsuperscript{185} See, e.g., Johnson v. M’Intosh, 21 U.S. (8 Wheat.) 543, 590 (1823).

\textsuperscript{186} Griswold, \textit{supra} note 183, at 673. Jefferson was so closely identified with Locke that some of his detractors accused him of copying Locke’s treatises in drafting the Declaration of Independence. \textit{Id.} at 674.

\textsuperscript{187} \textit{Id.} at 672.


\textsuperscript{189} Griswold, \textit{supra} note 183, at 667.

\textsuperscript{190} \textit{IV The Writings of Thomas Jefferson} 85-86 (Andrew A. Lipscomb ed., 1903).

\textsuperscript{191} W.E.B. DU BOIS, \textit{BLACK RECONSTRUCTION IN AMERICA} (1935); \textit{see also Gunnar Myrdal, An American Dilemma} 225 (1944) (listing failures of Reconstruction).

\textsuperscript{192} \textit{See Du Bois, \textit{supra} note 191, at 619.}

\textsuperscript{193} \textit{Id.} at 585.

\textsuperscript{194} \textit{See id.} at 611.
black people in possession of a land base could achieve a measure of economic independence that would give meaning to the right to vote. In the end, according to Du Bois, white resistance to ceding land to blacks, "spelled for [black people] the continuation of slavery." The belief in self-determination underpinning Du Bois's philosophy was echoed thirty years later during the height of the civil rights struggle. Leaders of the Black Power movement challenged the agendas of white liberals and black civil rights leaders as misguided. Single-minded efforts to increase social welfare spending as a means to achieve social upliftment for black people would fail short, they predicted. Instead, they argued that black people should work towards self-determination, not just increased participation in mainstream politics. And they believed that more energy should be spent developing and supporting black institutions controlled by black people. Important among these were economic institutions that could assure autonomy, just as Du Bois had argued.

C. Case Studies Demonstrate the Link Between Landownership and Participation

The political theories of "democratic property" have been tested in social science case studies that document the links between land and many measures of community well-being and empowerment. Complex social networks develop around particular pieces of land for communities defined by continuity rather than mobility. Thus, land and place are important to working class and poor, minority communities in ways not common to mobile, middle class communities. One study of a working class, Italian-American community in the West End of Boston displaced in an urban redevelopment project underscores the point that certain groups associate stable property rights with their ability to maintain a healthy sense of group identity. Not only were complex sets of social networks localized within

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195 Id. at 624.
196 Id. at 611.
198 Id. at 46. Notwithstanding the radical, public image of the leaders of the black power movement, the economic philosophy underpinning many of the programs advocated by some of the movement's leaders echoed the view of many liberal whites during the Reconstruction period one hundred years earlier. See MYRDAL, supra note 191, at 226-27 (noting that a liberal, southern white politician believed that after emancipation black people should have been given land instead of being turned over without an economic base "to the mercy of Republican politicians, white and black, who made political slaves of them").
the particular area of the West End from which the residents were displaced, but most residents also considered the entire area "as an extension of home" and constructed their identity around this extended home.\textsuperscript{203}

Social science studies demonstrate that in African American communities, too, landownership promotes community well-being. Landownership has been correlated with increased civic participation,\textsuperscript{201} psychological well-being,\textsuperscript{202} and an enhanced sense of community.\textsuperscript{203} One study of black landowners in Hancock County, Georgia, revealed that the children of black landowners attended school for significantly more years than the children of black or white sharecroppers in the county.\textsuperscript{204} Landownership can also benefit families and communities regardless of any measurable economic benefits to particular individuals.\textsuperscript{205} Even those extended community members who "return home" only periodically may draw psychological strength from the very existence of the rooted community.\textsuperscript{206} But because those who own land have greater security than those who rent or work for wages, family landholdings may induce more family members to remain in relative proximity to one another. The land itself can provide the base upon which to build institutions geared to community development.\textsuperscript{207} This focus on land as a base for community infrastructure extrapolates from the classical liberal view that landownership is uniquely important to the protection of individual liberty interests. To this end, Robert Ellickson has stated: "Compared to other resources, land remains a particularly potent safeguard of individual liberty. Like no other resource, land can provide a physical haven to which a beleaguered individual can retreat."\textsuperscript{208}

As indicated, families that own land often build mutually beneficial support systems based around the land. One study comparing differences in

\begin{footnotes}
\item[200] Fried & Gleicher, Residential Satisfaction, supra note 199, at 315.
\item[201] Lester M. Salamon, Land and Minority Enterprise: The Crisis and the Opportunity 42-44 (1976).
\item[202] Cf. Fried, Grieving, supra note 199, at 377 (discussing postrelocation depression suffered by those relocated due to urban renewal projects).
\item[203] Lisa Groger, Tied to Each Other Through Ties to the Land: Informal Support of Black Elders in a Southern U.S. Community, 7 J. CROSS-CULTURAL GERONTOLOGY 205 (1992); see also Salamon, supra note 201, at 29-53; Browne, supra note 176, at 121.
\item[205] Cf. Fried, Grieving, supra note 199, at 365-66 (discussing the benefits and harm resulting from pre- and post-relocation); Fried & Gleicher, Residential Satisfaction, supra note 199, at 315.
\item[206] The Black Rural Landowner, supra note 23, at xviii; see also Fried, Grieving, supra note 199, at 363; Frank G. Progue, The Mobile Black Family: Sociological Implications, in The Black Rural Landowner, supra note 23, at 25, 36 ("Landownership . . . becomes important because it provides an economic base for sociopsychological release and/or identification even for blacks who have migrated.").
\item[207] Groger, supra note 203, at 209.
\end{footnotes}
the systems of informal support between equally poor, landowning and landless elderly black people in the Piedmont region of North Carolina demonstrated that a greater percentage of the children of sharecroppers moved far away from their parents (often to northern cities) than did the children of landowners.\(^1\) The elderly sharecroppers were more often left to fend for themselves.\(^2\) By contrast, over two-thirds of the landed households in the case study lived on “compounds” in which children or other relatives resided on the land itself or in the immediate vicinity. In these compounds, the relatives and the black elders established “reciprocal exchange relationships” that benefited each person tied to the land in some meaningful way.

In addition to particular rural black families, whole communities of African Americans have been strengthened through landownership. Dating back to the early days after the Civil War, groups of African American families and individuals formed rural land collectives either on their own or with the assistance of the government. For example, freedmen in Hampton, Virginia formed the Lincoln’s Land Association and cooperatively purchased hundreds of acres of land that groups of families then collectively worked.\(^3\) During the Great Depression, the Resettlement Administration and the Farm Security Administration established several rural communities for destitute, low-income families.\(^4\) If measured by a survivorship rate, the African American communities were not particularly successful; most did not last even a generation. Yet, these communities greatly improved the opportunities of the individuals involved. According to Lester Salamon, many poor tenants (through lease-purchase agreements) gained the chance to become landowners in the newly created communities replete with schools, cooperative enterprises, and other community buildings.\(^5\) Many program participants who purchased land expressed increased self-esteem.\(^6\) The landowners were also much more active in their communities than were tenants as measured by such indicia as relative participation in social and religious organizations, voter registration, and voting turn-out.\(^7\)

The Prairie Farms project in western Alabama is a good example of the community building potential of land-based communities. The Resettlement Administration designed this program to settle destitute and low-income tenant families on approximately three thousand acres in Macon.

\(^{209}\) Groger, supra note 203, at 209.
\(^{210}\) Id. at 209-10.
\(^{211}\) Id., at 209-10.
\(^{212}\) FONER, supra note 12, at 106.
\(^{214}\) SALAMON, supra note 201, at 31-32.
\(^{215}\) Id. at 41.
\(^{216}\) Id. at 42-43.
County, Alabama. Each of the thirty-four families that were settled at Prairie Farms was provided with a farmstead. The cooperative living at Prairie Farms "centered on farming, and the education and social activities that revolved around agriculture." The farm families shared livestock for breeding, set aside a community pasture for common use, and cooperatively used certain machinery and equipment.

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

Although many of the African American communities formed by the Resettlement Administration and the Farm Security Administration did not endure, one must remember that these projects were started during the Great Depression, a particularly turbulent period of American history. Furthermore, the net cost expended by the government on African American resettlement communities was so small that Lester M. Salamon has referred to these resettlement projects as "social reform on the cheap." However, the people who had the opportunity to live within these communities clearly benefited. As Robert Zabawa and Sarah Warren have stated:

[Prairie Farms] was an exercise in the creation of a community based on change. There was a change in the relationship to the land—from tenancy and shares to ownership. There was a change in the relationship to production—from cotton to diversified farming. There was a change in the economic relationships—from dependency on the plantation owner and store to cooperative

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217 Id. at 480.
218 Id. at 484.
219 Id.
220 Id. at 485.
221 Id. at 484-85.
222 Id. at 486.
223 Lester M. Salamon, The Time Dimension in Policy Evaluated: The Case of the New Deal Land-Reform Experiments, 27(2) PUB. POL'Y, Spring 1979, at 129, 178. In his study of six African American resettlement projects in Alabama, Arkansas, Louisiana, and Mississippi, Salamon indicated that the net cost per family to the government was $2,273. This compares with the average net cost per family to the government of $4,379 for all resettlement projects in the United States.  
buying and selling. There was a change in the relationship to education—from sporadic elementary education to high school level offerings and adult education. And there was a change in the relationship to community—from cabins scattered along an eroded wasteland, to new houses in a farming community with a health and community center. This is what Prairie Farms had to offer.

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

Native Americans lost millions of acres of land that were declared surplus under the Dawes Act. In addition, two-thirds of all the land allotted to individual Native Americans under the Dawes Act—roughly twenty-seven million acres—ended up in non-Indian hands by 1934, mostly by means of sale, mortgage foreclosure, and tax sale after the restrictions on alienation initially built into the Dawes Act were stripped away, beginning with passage of the Burke Act in 1906. Although the destruction of communal tenure and its impact on Native American communities under the Dawes Act is well-documented, the plight of those Native Americans who lost their individual allotments was no less damning of the policy. On most reservations that were allotted under the Act, between seventy-five and one hundred percent of the Native Americans who received fee patents lost their lands in short measure, and the overwhelming majority of these

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224 Zabawa & Warren, supra note 216, at 477.
225 From enactment of the Dawes Act in 1887 to the congressional repudiation of the allotment policy in 1934, approximately 90 million acres of land passed out of Native American control. COHEN, supra note 53, at 138.
227 One pair of authors who have reviewed the history of the Indian Claims Commission has stated that the allotment policy was a “disaster second only to the original onslaught of the Europeans” as it pertained to Native American cultural integrity. MICHAEL LIEDER & JAKE PAGE, WILD JUSTICE 77 (1997).
228 The federal government appropriated approximately 60 million acres of land from Native American people under the surplus land provisions of the Dawes Act—38 million in outright cessions and an additional 22 million under provisions that allowed non-Native Americans to homestead on 44 reservations. AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT 309 (1977).
230 During the allotment period, 118 reservations were allotted. AMERICAN INDIAN POLICY REVIEW COMMISSION, supra note 228, at 309.
Native Americans became impoverished. At the time of its enactment, the Dawes Act was lauded as a vehicle to civilize Native Americans through private property ownership. As land quickly passed out of Native American hands and these Native Americans slipped into poverty, however, champions of the allotment policy shifted grounds and adopted a social Darwinist rationale. Theory believed that impoverished Native Americans would be forced to learn the value of hard work and earning money.

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

After the Revolutionary War, South Carolina yielded to pressures from land-hungry white settlers and enacted a series of statutes authorizing non-Indians to lease Catawba land in contravention of the Nonintercourse Act. At the time of the first leases with non-Indians, the Catawbas were “then strong and felt themselves in their own greatness,” but by the 1830s, practically all of the land reserved to the tribe under treaty had been leased to non-Indians on terms highly disadvantageous to the Catawbas.

Like so many other Native American tribes, the once-strong Catawbas were reduced to a pathetic shadow of their former selves thirty years after first transferring some of their property rights to white settlers. In a “state of star-
vation and distress," the Tribe finally acquiesced to South Carolina’s repeated efforts to purchase all of their land.\(^{238}\)

Just as the loss of a land base contributed to the demise of the Catawba Tribe, the Catawbas experienced a resurgence after the Federal government—concerned about the tribe’s sinking fortunes\(^{239}\)—placed into trust approximately 3,500 acres of land for their benefit in the 1940s.\(^{240}\) From the brink of starvation, the Catawbas recovered so rapidly that within fifteen years of obtaining a new land base and various other forms of federal assistance,\(^{241}\) the Government determined that the Catawbas were one of the twelve tribes\(^{242}\) who were suitable candidates for the withdrawal of federal assistance and services under the termination policy.\(^{243}\)

IV. GROUP OWNERSHIP AND COMMUNITY: THE LAW’S UNEVEN TREATMENT OF DIFFERENT GROUPS

Though the theoretical link predicted between landownership and enhanced minority civic participation has been proven, legal recognition of the importance of minority landholding to building community and increasing democratic participation has been “fragmentary” at best.\(^{244}\) Only fed-

\(^{238}\) The Catawba experience is consistent with the experience of those Native Americans who lost land allotted to them under the Dawes Act. The overwhelming majority of Native Americans who were not able to maintain ownership of their allotments found themselves in dire poverty. MCDONNELL, supra note 231, at 113.

\(^{239}\) Catawba Indian Tribe, 476 U.S. at 502 n.7. By 1930, the tribe’s population had been depleted by two-thirds, and a Senate subcommittee holding field hearings in South Carolina “‘found some hundred and seventy-five remnants of this band located on a tract of practically barren rock and gradually starving to death.’” Id. (quoting from Division of Tribal Assets of Catawba Indian Tribe, Hearings on H.R. 6128 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 85th Cong. (unpublished), Insert 5, at 3 (Minutes of State and Federal Conference, Oct. 21, 1958), quoting letter from Senator Thomas to Commissioner Rhoads (Feb. 10, 1932)).

\(^{240}\) In addition to placing this land in trust for the Catawbas, the federal government agreed to make a specified annual monetary contribution to the Tribe and “to assist the Tribe with education, medical benefits, and economic development.” Catawba Indian Tribe, 476 U.S. at 502 n.7.

\(^{241}\) See S. REP. No. 80-863, at 3 (1959) (“The Catawba Indians have advanced economically ... during the past fourteen years, and have now reached a position that is comparable to their non-Indian neighbors.”).


\(^{243}\) The federal government’s Native American policy has been characterized by distinct periods stamped with underlying ideologies that oscillate back and forth on a spectrum that at one end recognizes the benefits of Native American self-determination to some limited degree and on the other end seeks to assimilate all Native Americans—physically, spiritually, and culturally—into the majority society. In marked contrast to the federal government’s policy that made allowances for Native American self-determination during the New Deal, the architects of the termination policy, which was ushered in with the passage of H.R. Con. Res. 108 on August 1, 1953, believed that Native Americans should completely assimilate into the majority culture. ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW 137-64 (1991).

\(^{244}\) Cf. Margaret Jane Radin, Property and Personhood, 34 STAN. L. REV. 957, 1006 (1982) (arguing that in takings clause cases there is some fragmentary evidence that suggests courts will give enhanced protection to a group’s property rights if such group property holdings contribute to ensuring the group’s autonomy or internal integrity). Even in the Native American property context, which is the area in
eral Native American law explicitly recognizes that promoting landownership is necessary to self-determination for minority groups who otherwise face systematic discrimination. Outside of the Native American context, neither common law nor statutes acknowledge the value of minority landownership.

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

A. Modern Federal Indian Law and Policy Recognizes that Native American Landownership Promotes Indian Culture and Community

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

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

Consistent with these recommendations, specific provisions of the Indian Reorganization Act nullified and reversed the federal government's century-old mission to assimilate Native Americans by breaking up tribal property holdings into individual interests. The first section of the Act ends any further allotment of reservations. The second section extends trust restrictions on allotments indefinitely, while the fifth section authorizes the Secretary of the Interior to acquire additional lands to be put into trust for Native American tribes. Since implementation of these provisions, Native American landholdings have increased moderately.

Today, Native American land retention is promoted by a number of federal statutes that subject much of tribal and individually owned land to restraints on alienation. The Indian Nonintercourse Act, 25 U.S.C. § 462 and 25 U.S.C. § 464, is among the most important of such statutes. Congress even maintained the federal restraints on alienation when

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250 CORNELL, supra note 229, at 93.
251 Id.
252 THE MERIAM REPORT, supra note 231.
253 CORNELL, supra note 229, at 90.
254 Id. at 460-61.
255 CORNELL, supra note 229, at 93.
257 Indian Reorganization Act § 2.
258 Indian Reorganization Act § 5.
259 In addition to land that the government has taken into trust on behalf of Native American tribes, land has been restored to various tribes through legislative resolution of land claims. The return of 130,000 acres of land to the Pueblo of Taos and the resolution of the Passamaquoddy and Penobscot land claims in Maine (under which each tribe was awarded 150,000 acres of land to be placed into trust) represent two of the better-known legislative resolutions of Native American land claims. CLINTON ET AL., supra note 243, at 737.

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

Id.
it enacted Public Law 280 in 1953 that permitted states to assume civil and
criminal jurisdiction over Native American country.\textsuperscript{264}

The rationale for federal restraints on alienation of Native American
land has developed over time. In order to federalize the process of Native
American land cessions, Congress first imposed pervasive restraints on
alienation of Native American land in 1790 in the first of a series of Trade
and Intercourse Acts.\textsuperscript{265} The 1790 Act was a temporary measure and was
reenacted—also for limited periods—in later years.\textsuperscript{266} Congress enacted a
permanent Nonintercourse Act in 1802.\textsuperscript{267} The 1802 Act, as amended, was
largely incorporated in the 1834 Act, the final in the series of such acts.\textsuperscript{268}
Ever since, restraints on alienation of Native American land have been a
cornerstone of federal Native American policy.\textsuperscript{269} When restraints on alien-
ation were first established two hundred years ago, Congress was not pri-
marily concerned with slowing the loss of Native American land.\textsuperscript{270} Tribes
were largely a pawn in a power struggle for supremacy between the federal
government and the states; the shifting of power from the states to the fed-
eral government in the area of Native American affairs represented one step
in the federal government's gradual rise to political supremacy.\textsuperscript{271}

In this century, courts have construed the Nonintercourse Act and other
restraints on alienation of Native American land as designed to protect Na-
tive Americans from being dispossessed of their land by parties other than

\begin{footnotes}
\item[264] Act of Aug. 15, 1953, ch. 505, 67 Stat. 588-90 (1953). Congress carved out an exception to the
offer of civil jurisdiction. Section 1360(b) states:

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

\item[265] Act of July 22, 1790, ch. 33, § 4, 1 Stat. 137. The 1790 Act provided the following:

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

\item[266] See Act of Mar. 3, 1799, ch. 46, 1 Stat. 743; Act of May 19, 1796, ch. 30, 1 Stat. 469; Act of
Mar. 1, 1793, ch. 19, 1 Stat. 329.

\item[267] See Act of Mar. 30, 1802, ch. 13, 2 Stat. 139.

\item[268] See Act of June 30, 1834, ch. 161, § 12, 4 Stat. 730.

\item[269] Robert N. Clinton & Margaret Toby Hotopp, Judicial Enforcement of the Federal Restraints on
Alienation of Indian Land: The Origins of the Eastern Land Claims, 31 Me. L. Rev. 17, 19, 38 (1979);
see also Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237, 276 (1985) (Brennan, J.,
dissenting); County of Oneida v. Oneida Indian Nation of N.Y., 470 U.S. 226, 247-48 (1985); Oneida
Indian Nation of N.Y. v. County of Oneida, 414 U.S. 661, 667-70 (1974); United States v. Creek Nation,
295 U.S. 103, 109-11 (1935); Cherokee Nation v. Georgia, 30-31 U.S. (5 Pet.) 1, 17 (1831); Johnson &

\item[270] Clinton & Hotopp, supra note 269, at 36.

\item[271] Id. at 88.
\end{footnotes}
the federal government. However, judges in earlier cases often considered whether restraints on alienation of Native American land were applicable in a particular case against the backdrop of "the Government's paternal policy toward the Indians." These judges viewed Native Americans as doltish, incompetent or—at least—incapable of managing their own affairs. For example, in United States v. Candelaria, the Supreme Court considered, inter alia, whether land owned by the Pueblo Indians of New Mexico was subject to federal restraints on alienation. In determining that the lands owned by the Pueblo in fee simple were subject to the restraints, the Court first considered the purpose of the statutory restraints, including those set forth in the Nonintercourse Act. The Court stated that: "Many provisions have been enacted by Congress—some general and others special—to prevent the Government's Indian wards from improvidently disposing of their lands and becoming homeless public charges."

Next, the Court considered whether the Pueblo—who owned their land in fee simple, unlike many other tribes—were subject to the Nonintercourse Act by considering whether the Pueblo were capable enough to fend off those who might dispossess them of their land. The Court viewed the Pueblo as different from the "nomadic and savage Indians then living in New Mexico," but as markedly inferior to more advanced races. The Court—reflecting the government's paternalistic attitude at that time—characterized the Pueblos as follows: "Although sedentary, industrious and disposed to peace, they are Indians in race, customs and domestic government, always have lived in isolated communities, and are a simple, uninformed people, ill-prepared to cope with the intelligence and greed of other races."

Based on this blatantly racist characterization, the Court determined that the Pueblos' landholdings were subject to the federal restraints.

Federal courts no longer claim that restraints on alienation are necessary to protect lowly Native Americans from making improvident decisions. Instead, according to some judges, the restraints remain in place because policymakers believe that a substantial land base must be main-

272 Cf. id. at 37.
273 United States v. Minnesota, 113 F.2d 770, 773 (8th Cir. 1940).
274 271 U.S. 432 (1926).
275 Id. at 441.
276 Id. at 442.
277 Id. at 441-42.
278 Federal courts demonstrated this same paternal attitude towards individual Indians who held allotments subject to restraints on alienation. In United States v. Debell, 227 F. 775 (8th Cir. 1915), the Eighth Circuit voided a sale of an allotment from an illiterate Native American woman to a white speculator. The court described the purposes of the federal restraints as follows:

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

Id.
tained in order for Native Americans to preserve their culture and for Native American communities to exercise self-determination. In this light, land represents more than a fungible commodity capable of creating wealth for individual Native Americans. Native American land is not to be subject to the full force of the market because it represents a patrimony or political heritage. As one commentator has stated:

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

Although a great portion of the Native American landholdings remain subject to federal restraints on alienation, Congress has unilateral power to remove the restrictions on tribal or individually owned land. Native Americans lost a great deal of land when restrictions were removed during the allotment era and the termination era. Recently, the Supreme Court has maintained that congressional transfer of land without restraints on alienation to Alaska Natives indicates that Congress does not value maintaining these native communities intact. In Alaska v. Native Village of Venetie Tribal Government, the Supreme Court considered whether the Native Village of Venetie Tribal Government could tax the State of Alaska and a private contractor for conducting business on tribal land. In order to decide this issue, the Court had to assess whether the community of Native Neets’aii Gwich’in in Alaska could be considered to be "dependent Indian communities" under 18 U.S.C. § 1151 after passage of the Alaska Native Claims Settlement Act (ANCSA).

Although the Neets’aii Gwich’in’s

279 COHEN, supra note 53, at 509-10; see also Mountain States Tel. & Tel. Co., 472 U.S. at 278-79 (Brennan, J., dissenting); Boisclair, 801 P.2d at 309. But see United States v. Michigan, 882 F. Supp. 659, 675 (E.D. Mich. 1995) ("Restricting the alienability of land based on the status of the titleholder is founded on the fear of the consequences of outright ownership . . . .").

280 COHEN, supra note 53, at 509-10.

281 Clinton & Hotopp, supra note 269, at 77.


283 18 U.S.C. § 1151 (1994). Section 1151, in pertinent part, defines "Indian country" as follows: "The term "Indian country" . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . , (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

reservation was revoked in 1971 pursuant to ANCSA, in 1973, two native corporations formed for the tribe took title to the former reservation land under a provision in ANCSA that permitted Native corporations to do so, provided that these corporations would forego the statute’s other monetary payments and land transfers.\(^{285}\)

Although the Tribe’s land was “exempt from adverse possession claims, real property taxes, and certain judgments as long as it [was] . . . not sold, leased or developed,”\(^{286}\) ANCSA did not provide that former reservation land could be acquired by Native corporation subject to federal restraints on alienation. The Court considered the fact that ANCSA did not provide that former reservation land acquired by a Native corporation would be subject to restraints on alienation as an indication that Congress did not intend to use its power to preserve Native communities intact. The Court stated that:

ANCSA transferred reservation lands to private, state-chartered Native corporations, without any restraints on alienation or significant use restrictions, and with the goal of avoiding “any permanent racially defined institutions, rights, privileges, or obligations.” By ANCSA’s very design, Native corporations can immediately convey former reservation lands to non-Natives, and such corporations are not restricted to using those lands for Indian purposes. Because Congress contemplated that non-Natives could own the former Venetie Reservation, and because the Tribe is free to use it for non-Indian purposes, we must conclude that the federal set-aside requirement is not met.\(^{287}\)

Thus, while federal policy now supports Native American landownership, the federal judiciary has not fully supported the modern policy.\(^{288}\) The courts over the past three decades increasingly conflate Native American sovereignty and Native American property rights, two concepts that are analytically distinct and are treated as such in non-Native American contexts.\(^{289}\) In 1989, for example, the Supreme Court held that tribal governments may not exercise zoning authority over certain fee land located within a reservation but owned by nontribal members.\(^{290}\)

The demographic makeup of a Native American reservation can determine not only the extent of a tribe’s sovereign powers, but in some in-

\(^{285}\) Native Vill. of Venetie, 522 U.S. at 524.

\(^{286}\) Id. at 533.

\(^{287}\) Id. at 532-33 (citations omitted).

\(^{288}\) Royster, supra note 226, at 20.

\(^{289}\) Carole Goldberg-Ambrose, Of Native Americans and Tribal Members: The Impact of Law on Indian Group Life, 28 LAW & SOC’Y REV. 1123, 1126-27 (1994); Joseph William Singer, Sovereignty and Property, 86 NW. U. L. REV. 1, 24 (1991). The judiciary has also limited tribal sovereignty in cases in which a tribe has attempted to assert jurisdiction over non-Indians. Singer, supra, at 24; see also United States v. Mazurie, 419 U.S. 544, 557 (1975) (holding that, within Indian country, Indian tribes are more than "private, voluntary organizations").

stances, the very physical boundaries of a reservation. In a series of cases involving allotment-era statutes, federal courts have decided whether Congress intended to diminish or terminate a reservation by passing surplus land Acts that opened reservations to non-Native American settlers. The legal question raised in diminishment cases "constitutes a uniquely historical issue" given that the drafters of the surplus land Acts assumed that Native Americans would assimilate into society within a generation after the reservations were opened and did not foresee that the reservations would continue to exist as a result of the New Deal Indian Reorganization Act. Even so, courts have gone through the exercise of "determining" congressional intent by fine parsing of language used in different surplus land acts.

Aware that an effort to deduce Congress's intent to diminish or preserve a reservation based on the contemporaneous record is a largely formalistic exercise untethered from reality, federal courts in the past twenty-five years have examined the subsequent "jurisdictional history," including the demographic composition of the opened lands. At root, the focus in the cases on the demographic makeup of a community reflects the judiciary's anxiousness to protect the non-Native American's "justifiable expectations" that they should not fall under the jurisdiction of tribal government. Where Native Americans remain a significant part of the population in the opened part of a reservation, the Supreme Court has considered this to be a significant fact in holding that a reservation remained intact. In cases where a majority of the population on the opened land consists of non-Native Americans, courts have determined that the reservation has been either diminished or terminated. If sovereignty remains the key to Native American economic development, and courts are increasingly limiting tribal sovereignty and even territory to land owned in fee either by the tribe or its members, landownership is vital.

291 Clinton & Hotopp, supra note 269, at 132.
294 Solem, 465 U.S. at 471-72; Pittsburg & Midway Coal Mining Co. v. Yazzie, 909 F.2d 1387 (10th Cir. 1990).
295 Royster, supra note 226, at 71.
296 See, e.g., Solem, 465 U.S. at 463.
297 See, e.g., Hagen v. Utah, 510 U.S. 399 (1994); Rosebud Sioux, 430 U.S. at 604-05; DeCoteau v. Dist. County Ct., 420 U.S. 425 (1975); Yazzie, 909 F.2d at 1387. This focus upon the Indian ownership of land as a key factor in determining the limits of a reservation harkens back to the pre-1948, judicially determined definition of Indian country. See Ash Sheep Co. v. United States, 252 U.S. 159, 164-65 (1920); see also Bates v. Clark, 95 U.S. 204, 206 (1877).
298 Cf. Stephen Cornell & Joseph P. Kalt, Pathways from Poverty: Economic Development & Institution Building on American Indian Reservations, 14 AM. INDIAN CULTURE & RES. 89, 119 (1990) (arguing that widespread economic development on Native American reservations has become more of a possibility in recent years as decision making and businesses have shifted from outside of Indian Nations to the Indian Nations themselves because "efficiency follows sovereignty"). Cornell and Kalt emphasize that increased levels of self-determination only make economic development more of a possibility. Id. In order
B. In Takings Jurisprudence, Judges Do Not Consider the Importance Land May Have for Minority Communities

In Fifth Amendment takings jurisprudence, courts have not balanced the public purpose a governmental entity offers in its bid to condemn property by eminent domain against the importance that the property holds for rooted communities, whether minority or majority. In 1954, the Supreme Court held that a state's eminent domain power was coterminous with the state's police powers. Thirty years later, in *Hawaii Housing Authority v. Midkiff*, the Court held that the exercise of eminent domain power need only be rationally related to achieving a public purpose, and the means chosen to effect the articulated public purpose be merely rational. Together, *Berman* and *Midkiff* vest state and federal authorities with almost unlimited power to condemn property provided that the government pays just compensation, no matter whether the property could be characterized as fungible or "property for personhood." Furthermore, in comparing the two cases, in the later case of *Midkiff*, the Court focused less attention on the public use rationale. In *Berman*, the Court made a nominal effort to address the manner in which the community as a whole may have benefited from the taking, while in *Midkiff* the Court did not view a taking that would transfer property from one private individual to another as inconsistent with the public use requirement because "'[i]t is not essential that the entire community, nor even any considerable portion . . . directly enjoy or participate in any improvement'" for the taking to be considered for the public use. Of course, the use of the eminent domain power by a governmental entity does not always signify that land will be distributed away from the poor to the more wealthy; in fact, the state intervention in *Midkiff* redistributed land in favor of those with fewer rights in land.

In takings jurisprudence, urban renewal and highway projects highlight the lack of judicial attention to the value that land may have for minority communities. The urban renewal programs were initiated first under the

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for tribes to capitalize on this opportunity, each tribe must develop culturally appropriate internal political systems and adopt economic systems that respond to the needs and capacities of the tribe. *Id.* at 109-17.

299 Radin, *supra* note 244, at 1005; see also 2A JULIUS L. SACKMAN & PATRICK J. ROHAN, NICHOLS ON EMINENT DOMAIN (rev. 3d ed. 1997).


302 *Id.* at 241-42.

303 *See generally* Radin, *supra* note 244.

304 *Berman*, 348 U.S. at 34-35 ("It was believed that the piecemeal approach, the removal of individual structures that were offensive, would be only a palliative. The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes but also schools, churches, parks, streets, and shopping centers.").

305 *Midkiff*, 467 U.S. at 244 (quoting Rindge Co. v. Los Angeles, 262 U.S. 700, 707 (1923)).
Housing Act of 1949 \[^{306}\] and several federal highway projects were undertaken by the 1860s. \[^{307}\] Together, these projects displaced a tremendous number of people throughout the country; \[^{308}\] perhaps unsurprisingly, most of the poor who were displaced were African Americans. \[^{309}\]

A finding that an urban renewal or highway program will destroy or severely damage a community, however, provides no legal basis for halting such a program. In a 1967 case, *Nashville I-40 Steering Committee v. Ellington*, \[^{310}\] the district court judge denied an application for a temporary injunction filed by a community group seeking to halt a highway program that would adversely impact a mostly African American community in Nashville, Tennessee, despite a finding that the community's concerns were legitimate. As the court of appeals noted:

> [T]he blocking of other streets will result in a heavy increase in traffic through the campus of Fisk University and on the street between this university and Meharry Medical College. A public park used predominantly by Negroes will be destroyed. Many business establishments owned by Negroes will have to be relocated or closed. \[^{311}\]

Relying in part on *Berman*, the Sixth Circuit held that the courts could not halt the project because the "minimizing of hardships and adverse economic effects is a problem addressing itself to engineers, not judges." \[^{312}\]

### C. Residential Communities, Common Property, and Restraints on Alienation

The body of statutory and common-law rules governing the different forms of group ownership of real property are designed to advance specific economic or social policies. Even in private law doctrine, by allocating power between individuals and the group, policy makers make certain tradeoffs between promoting liberty and equality. \[^{313}\] As applied to some forms of common law group ownership, specifically the tenancy in common, the liberty interests of individuals prevail as against the ownership group; in other forms of common ownership such as the condominium, the law enhances the rights of the group as a whole at the expense of the indi-


\[^{307}\] Id. at 754.

\[^{308}\] Id. at 804-05.


\[^{310}\] 387 F.2d 179 (6th Cir. 1967).

\[^{311}\] Id. at 186.

\[^{312}\] Id. at 185.

\[^{313}\] Ellickson, *supra* note 208, at 1345.
The laws that have developed to implement these latter policies subject the use and disposition of the property to group control—whether property owned in common by all the members of the group or property that individual members of the group own in some measure individually, but acquire subject to a group ownership scheme. Even when groups have the power to curtail individual property rights of those within the group scheme, the law ensures that these individuals have the right to exit the group on reasonable terms.

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

In addition to the predominant economic justification for the rule against restraints on alienation, some courts and commentators suggest that the rule serves a political purpose. Greater alienability of land serves a de-

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

316 See, e.g., DUKEMINIER & KRIER, supra note 34, at 152-53.
317 City of Oceanside v. McKenna, 264 Cal. Rptr. 275, 279 n.4 (Cal. Ct. App. 1989); Seagate Condo. Ass'n v. Duffy, 330 So. 2d 484, 485 (Fla. Dist. Ct. App. 1976); RESTATEMENT (FOURTH) OF PROP. 2129-33, 2379-80 (1944). However, the ascendancy of the principle of free alienation was somewhat counterbalanced by common law rules that responded to the aristocracy's desire to transfer its landholdings intact from one generation to another. See generally Charles J. Reid, Jr., The Seventeenth-Century Revolution in the English Land Law, 43 CLEV. ST. L. REV. 221, 261-82 (1995).
centralized market system that in theory promotes the values of democracy by preventing concentration of land (and the wealth it represents) in a hereditary aristocracy. Subjecting wealth concentrated in the hands of dynastic families to market pressures promotes democratic ends. Providing for unrestricted rights of alienation under all circumstances, however, does not always increase democratic participation, to the extent that such goals are promoted by landownership. In fact, unfettered rights of alienation may in some circumstances redistribute property away from people with fewer resources to those with greater resources. To this end, Joseph Singer has argued that:

Under some market conditions, alienability may actually concentrate ownership in the hands of the wealthy since such corporations or individuals are able to bid more for property and may be able to induce others to sell. Restraints on alienation of low-income housing may serve, therefore, to ensure its continued availability to poor families.

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

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

319 Burdick v. Burdick, 33 F. Supp. 921, 928 (D.D.C. 1940) (stating that "[p]ermitting unreasonable restraints on alienation are inconsistent with the principles of democracy. They are the concomitants of an aristocracy. Such restraints are relics of a feudal society, are obsolete and are repugnant to our institutions and conditions.").

320 Singer, supra note 42, at 550.

321 Seagate Condo. Ass'n, 330 So. 2d at 485.

Some groups come to own land through consensual agreements, such as condominiums, while others come together through the operation of the law, as in groups that acquire land under the rules of intestacy. Where common ownership arises by intestacy, the law assigns the group a form of ownership, the tenancy in common, that provides the group with few mechanisms that promote the interests of the overall group and contribute to stability. If the law makes it difficult for a group to change the form of ownership under which it owns property from one that permits the group little power to restrain individual members' rights of alienation to one that is more "group friendly," the law effectively adjudges stability within the particular community as unimportant. The same analysis applies to situations in which the law prevents a group that owns property under a form of ownership that permits few restraints on alienation from establishing its own set of rules regulating entry and exit into or from the group that diverge from the default rules under the particular form of ownership. Such barriers to private ordering also promote unstable ownership.

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

In recent times, legislatures and judges have created liberal exceptions to the rule against restraints on alienation "in connection with sales of residential property, particularly those involving condominium and cooperative arrangements, and on the transfer of shares of corporate stock." For these forms of common ownership that were developed to meet the demand for residential housing, courts give credence to the social and economic justifications offered by the group seeking to impose the restraints, typically on transfers of ownership interests and use, even though the restraints may cause economic harm to certain individuals. Although some courts engage in a rigorous analysis of the arguments offered in favor of the restraints, other courts accept bare assertions that the challenged restraints serve a beneficial purpose for the community of residential owners or society as a whole.

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324 As discussed infra notes 343-45 and accompanying text, recent opinions demonstrate that judges accept rather bare-boned statements that certain restrictions on the transfer of an ownership interest or on the use of the property owned in residential communities serve some socially beneficial purpose. Such judicial solicitude for those groups seeking to impose these restrictions on transfer and use is similar to the relaxation of judicial standards for granting partition sales. In many partition cases, judges now simply accept conclusory averments that the land at issue cannot be equitably divided. See Casagrande, supra note 28, at 766. Of course the relaxation of the judicial standards in these two areas serve contrasting policies.
Some of the most important decisions limiting application of the rules against restraints on alienation have been made in the context of cooperative housing schemes. In a cooperative housing arrangement, the members of the cooperative own stock in a nonprofit corporation, and such stock ownership entitles each member to occupy an individual apartment. In this type of cooperative housing structure, just as in a tenancy in common, the members of the cooperative are financially interdependent. The Restatement on Property states that:

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

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

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

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

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

Because the court believed that the restraints included in the member-
ship agreements provided “the only way to keep [such] co-operative hous-
ing co-operative,” the court had to determine in the first instance whether
the residential community had a redeeming social value. Arguably, the
court should have protected the cooperative housing arrangement from the
unchecked forces of the market only if such residential communities serve
some useful purpose for the society. In deciding that the restraints were
reasonable, the court recognized that legal instruments designed to promote
stability within such communities serve important social ends, namely cre-
at ing stable residential communities.

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

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

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

\[32\] Id. at 32. The association’s membership agreement also placed certain restraints on the ability of
those acquiring a membership interest under either a will or the laws of intestacy to become members of
the association. \textit{Id.}

\[33\] Id. at 33.

\[34\] Id. at 32.


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

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

Although the California appellate court considered whether the restraints on alienation in McKenna served public policy ends, other courts have merely considered the needs of the community of condominium owners. For example, a Florida appellate court upheld the lawfulness of restrictive conditions contained in a condominium declaration that, as in McKenna, forbade unit owners from signing long-term leases on their units. Although the case did not involve affordable housing or any other noteworthy public policy, the court upheld the leasing restrictions because it viewed the goal of protecting the very character of the condominium community as reasonable. The court stated that:

Given the unique problems of condominium living in general and the special problems endemic to a tourist oriented community in South Florida in particular, appellant's avowed objective—to inhibit transiency [sic] and to impart a certain degree of continuity of residence and a residential character to their

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337 City of Oceanside v. McKenna, 264 Cal. Rptr. 275 (Cal. Ct. App. 1989). The individual grant deeds stated that the restrictions were designed "to achieve a stabilized community of owner-occupied dwelling units, to avoid artificial inflation of prices caused by resales by speculators and to prevent scarcity caused by vacant homes awaiting resale by speculators." Id. at 278.
338 Id.
339 Id. at 279.
340 Id.
community—is, we believe, a reasonable one . . . . The attainment of this community goal outweighs the social value of retaining for the individual unit owner the absolutely unqualified right to dispose of his property in any way and for such duration or purpose as he alone so desires.\footnote{Id. at 486-87.}

In some instances, courts seek to preserve the character of a particular community by upholding restraints that limit the class of people who may purchase property in planned residential developments from owners who would like to sell their property. For example, the Florida court of appeals recently upheld restraints on alienation that sought to preserve the character of a planned development for military officers.\footnote{Indian River Colony Club, Inc. v. Bagg, 727 So. 2d 1143 (Fla. Dist. Ct. App. 1999).} The Indian River Colony Club restricted prospective purchasers to members of its Club—a club restricted to people who had served in the military as commissioned or chief warrant officers. In addition, the property deeds contained a provision that mandated the purchase price a property owner would be entitled to receive upon resale.\footnote{Id. at 1144.}

The court noted that holding the restriction limiting resales to club members to be unreasonable would destroy the primary purpose of the planned development, which was to serve a particular community of military officers. With respect to the restriction on the resale prices owners could receive, however, the court merely parroted the language from the deed of restrictions, which stated that the restrictions were made “for the mutual and reciprocal benefit of each and every residential lot and apartment in the subdivision.”\footnote{Id. at 1146.}

In sum, judges and legislators have found that relaxing the rules against restraints on alienation can serve a useful purpose in promoting stable communities. State courts throughout the country have upheld restraints imposed upon owners who live in residential developments under the rationale of preserving and promoting stable communities. As discussed earlier in subpart IV.A, Congress has placed restraints on alienation of land owned by Native Americans, thereby facilitating the ability of Native Americans to preserve their cultures and ways of life. Since passage of the Indian Reorganization Act, the restrictions on alienation of Native American-owned trust land have played a useful role in stemming land loss in the Native American community.

Therefore, it is clear that the technology of the law can easily develop new legal rules or forms of group ownership that restrict individual alienation in order to promote the ability of groups of owners to maintain stable landownership and healthy communities. Such rules have not been developed thus far to address the heir property problem that has lead to dramatic land loss among African Americans. However, the demonstrated link be-

\footnotesize{342 Id. at 486-87.}
\footnotesize{343 Indian River Colony Club, Inc. v. Bagg, 727 So. 2d 1143 (Fla. Dist. Ct. App. 1999).}
\footnotesize{344 Id. at 1144.}
\footnotesize{345 Id. at 1146.}
tween landownership, democratic participation, and community building for African Americans in this country provides compelling evidence that black landowners of property owned in common deserve as much legal protection as Native American landowners or even condominium owners. The final Part of this Article provides a roadmap for those decision makers who might be compelled by the moral obligation to help African American landowners maintain their land and other African Americans to acquire or reacquire land.

V. PROPOSAL

In the past thirty years, the decline in rural black landholdings has been called a “crisis” and black farmers have been referred to as an “endangered species” in reports that exhibit an ever-increasing tone of desperation. However one chooses to describe the phenomenon, the number of black farmers and the number of rural acres under black ownership currently stand at the lowest point since 1900. If the losses are not reversed or at least halted, African Americans will be effectively shut out of the agricultural sector as producers and rural black people will soon own less land than rural black people owned in the years immediately following the Civil War. Addressing the issue of land loss by itself, however, will not do much to improve the standing of black farmers and rural landowners. At present, many rural African Americans cannot productively use land they own. As the Pigford lawsuit made plain, many black farmers have been denied credit unlawfully. In other instances, African Americans who hold an interest in their property—no matter how large—are unable to use the land as collateral to secure financing to build homes or to improve their agricultural operations.346

Just as the USDA and its county agents systematically discriminated against black farmers for decades, driving many of these farmers out of business, meaningful policy reform must be just as systematic and far-reaching.347 Simply allowing the members of the Pigford class to collect limited damages will do next to nothing to ensure that black people will have the opportunity to participate as producers in the agricultural sector of the economy during the next century. The moral imperative to redress fundamental acts of injustice applies with equal force to those thousands of rural black landowners who lost their land due to the unethical, sometimes illegal, practices of white

346 Graber, supra note 60, at 278 (“Those who describe the ‘equity base’ that blacks have in Southern farmland refuse to recognize that much of this equity base cannot generate credit. This land will not finance a home or farm equipment or serve as collateral for an emergency loan.”).

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

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

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

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

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

Even if land were restored to African Americans or tenants in common of heir property were given the right to reorganize their landownership under a more stable form, poor landowners would often lack access to lawyers who can help them manage their land effectively or fend off speculators who seek to acquire ownership of their land. To remedy this, Congress
should expand the mission of legal services to allow poor landowners access to legal services lawyers. Such an expanded vision of legal services would recognize that there is as much value in preventing those on the cusp of distress from falling into the ranks of the economically disenfranchised as there is in trying to help those already destitute survive on the margins.

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

A. Land Consolidation

In many parts of the world, rural land has fallen into unproductive use. This often occurs after the ownership becomes physically fragmented or when the number of people or entities who hold a legal interest in the land grows beyond a certain critical point. Such fragmentation of land or ownership or both often arises due to "the application of rigid inheritance rules." Clearly, the heir property phenomenon in rural, African American communities and among Native Americans is a paradigmatic example of fractionation caused, in part, by inheritance law.

In an effort to return such land to productive use, a number of countries have enacted land consolidation legislation. Under classic land consolidation, legislatures seek to aggregate spatially fragmented landholdings into as few newly consolidated holdings as possible. In addition, in Norway, the law also enables those charged with consolidating the land to attempt to improve the landownership pattern by introducing rules designed to improve cooperation between those stakeholders with an interest in the land. In all state-sponsored consolidation efforts—as in legislatively approved condominium schemes—those enacting or implementing land consolidation

348 Although land fragmentation is typically considered from the standpoint of spatial patterns, "legal" fragmentation occurs once the number of people or entities holding overlapping—and often conflicting—legal interests in a parcel of land exceeds the point at which these different people or entities can effectively manage and utilize the land productively. Cf. Heller, supra note 44, at 624 (discussing problem in which an initial distribution of property rights gives too many owners a right to exclude others from using the scarce resource and claiming that "when there are too many owners holding rights of exclusion, the resource is prone to underuse—a tragedy of the anticommons.").


351 Oldenburg, supra note 350, at 183.

352 Austenå, supra note 350, at 138-40.
initiatives must balance the interests of the individual, the landowners as a group, and the society.\textsuperscript{353} Even so, a fundamental principle underlying consolidation is that no individual should suffer economic loss in the consolidation process.\textsuperscript{354}

In the United States, almost all proposals offered to cure the problems of fractionated, Native American heir property and in the landholdings of rural blacks assume that the tenancy in common form must be maintained. Much like "classic land consolidation" measures, these proposals seek to reduce the levels of fractionation by aggregating the interests in particular parcels of heir property in an effort to reduce the number of people who retain legal interests in the property. This may be done by intestacy reform,\textsuperscript{355} modification of partition laws,\textsuperscript{356} and changes in adverse possession laws.\textsuperscript{357}

To address African American heir property problems, some proposed changes to the partition and adverse possession laws would require the reallocation of many rights in the tenancy in common to the tenants in possession and a significant reduction of the rights of the tenants not in possession. For example, C. Scott Graber has proposed that cotenants in possession be given the right to constructively oust other cotenants after twenty years with the exception of "those who derived their interest by devise or inheritance from the same source as the claiming co-tenant."\textsuperscript{358} Graber also proposes that cotenants in possession be given the right to force a sale of the interests held by unknown heirs.\textsuperscript{359} Similarly, Harold A.


\textsuperscript{355} See, e.g., Williams, \textit{supra} note 92, at 726-27 (1971) (highlighting some of the intestacy reform proposals offered to solve the problem of heir property for Native Americans).

\textsuperscript{356} See, e.g., Chris Kelley, \textit{Stemming the Loss of Black Owned Farmland Through Partition Action—A Partial Solution}, 1985 ARK. L. NOTES 35. Kelley proposes that, in partition actions in Arkansas, those tenants in common who do not wish to sell their interests should be given the right to purchase the interests of those who indicate a willingness to sell their interests in the property for its appraised value at a private sale. \textit{Id.} at 40. Further, Kelley proposes that only tenants who own a simple majority of the interests in a tenancy in common should be permitted to seek a judicial sale of the property. \textit{Id.; see also} Harold A. McDougall, \textit{Black Landowners Beware: A Proposal for Statutory Reform}, 9 N.Y.U. REV. L. & SOC. CHANGE 127, 135-36 (1980). McDougall proposes that, in certain circumstances, heirs be given the right to buy out their fellow cotenants' interests prior to the filing of a partition action and absent the consent of the other cotenants. One such circumstance he identifies would be when more than two-thirds of the heirs petition for such a forced private sale. \textit{Id.} at 136.

\textsuperscript{357} See, e.g., Graber, \textit{supra} note 60, at 282; \textit{see also} McDougall, \textit{supra} note 356, at 136.

\textsuperscript{358} See Graber, \textit{supra} note 60, at 282-84.

\textsuperscript{359} \textit{Id.}
McDougall proposes, *inter alia*, that heirs who have been in possession for a long time be given the right to purchase the property at a private sale once a partition act is initiated. The proceeds of the sale would then be held in escrow for the other heirs and any unclaimed portion eventually would be refunded to the purchasing heir. He also proposes that the adverse possession laws be changed to make it easier for a tenant in possession to possess the property adversely against absentee heirs. As part of his proposal to make it easier for a tenant in possession to constructively oust a tenant not in possession, McDougall would permit tenants in possession to tack the occupancy of their immediate predecessors in title in order to reduce the amount of time it would take to satisfy the statutory adverse possession period.

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

Second, these proposals do not provide a long-term remedy. For example, under the constructive ouster proposal, the problems of fractionation will recur if the tenant in possession dies intestate. Given the overall rate of will making for both rural African Americans landowners and other poor rural Americans, this recurrence is more likely than not. In addition, vesting a tenant in possession with the right to force a sale of the property assumes that this tenant may be well-positioned to maintain the property. To the extent that much of heir property has been underutilized, however, there may be instances in which a poor tenant in possession has elected to remain in possession in order to live rent-free in a dwelling on the family property. If this person receives the power to force a sale of the property, she could be susceptible to land speculators who might agree to finance the sale provided that the land is transferred immediately thereafter. Even if this tenant in possession could acquire the property for herself, she may ultimately lose the property through foreclosure, tax sale, or distress sale unless her financial status significantly improves.

Intestacy reform proposals that seek to reduce the further fractionation of heir property may be unfair to the extent that certain individuals in the

360 See McDougall, *supra* note 356, at 135-36.
361 Id. at 136.
362 Id.; see also Graber, *supra* note 60, at 282.
363 See MORAL-LÓPEZ, *supra* note 349, at 119 (stating that preventing “future excessive subdivision and fragmentation is as important as the consolidation of fragmented holdings”).
ownership group will have more restricted options for passing on their property than others. Even absent such fairness concerns, intestacy reform alone offers too mild of an approach to address a problem of the magnitude of heir property. For example, proposals to restrict the class of people eligible to inherit under a will or to restrict the class that takes under the rules of intestacy will not consolidate the number of tenants in common in a timely or effective manner. In those instances in which land has become highly fractionated with large numbers of people holding an interest in the tenancy in common, changes in the laws of inheritance, no matter how far-reaching, would not consolidate the number of interests in any reasonable period of time. The most aggressive intestacy reform proposals would allow just one person to inherit a piece of land. However, resurrecting the law of primogeniture, or some gender-neutral variation, faces the likely political opposition of the heirs who would lose the right to take under the laws of descent.

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

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

A real focus of effective policy reform must be the default rules governing relations among tenants in common by operation of law, that is, not voluntary and consensual communities. Unlike tenancies in common formed by voluntary agreement, members of nonconsensual tenancies in common lack direct control over the formation of the tenancy in common or the composition of the initial members of the ownership group. \(^{367}\) Given such uncertainty, in almost all instances the prospective “co-tenants by law” cannot preplan their relationship by entering into an agreement that allocates the rights and responsibilities of members prior to the moment that the law declares them to be tenants in common. \(^{368}\) Therefore, the moment the tenancy in common is formed by operation of law, the tenancy in common is most likely to be subject to the default rules. \(^{369}\) Theoretically, the members of a nonconsensual tenancy in common can develop a new set of rules allocating the rights and duties of each cotenant that would supercede the default rules. However, negotiating after-the-fact agreements is practically impossible for “co-tenants by law” because the law requires each of the cotenants to enter into the agreement. \(^{370}\) Not only must the cotenants by law overcome significant transaction costs in some instances, but also those individual cotenants who believe that the default rules benefit them have little incentive to negotiate away such an advantage without receiving major concessions from their fellow cotenants. \(^{371}\)

These obstacles to private ordering become nearly impossible barriers as the number of cotenants grows. Transaction costs may prevent even those holding nearly all the interests in any given heir property parcel to restructure their ownership arrangement by private management. This suggests that government intervention is required to overcome the intransigence of individual “holdouts.”

The goal should be to allow majorities to act without unanimity; at the same time, individual interests should be protected through measures that permit exit from the group as well as fair value for the individual’s interest. What follows are two proposals that could be pursued either independently or as a package. One would require states to spend little, if any, money. The other, more comprehensive, proposal would require states to establish

\(^{367}\) Evelyn Alicia Lewis, Struggling with Quicksand: The INs and OUTs of Cotenant Possession Value Liability and a Call for Default Rule Reform, 1994 Wis. L. Rev. 331, 390.

\(^{368}\) Id.

\(^{369}\) Id. at 390-91.

\(^{370}\) Id. at 391.

\(^{371}\) Id.
land consolidation courts that would require short-term expenditures, but would be likely to produce more economically productive landholdings that would benefit the wider economy.

1. Allow Either a Majority or Super Majority of Those Holding Common Tenancy Interests to Restructure the Tenancy as a Limited Liability Company. Those who own an interest in heir property are often locked into an ownership structure that denies them the normal benefits of a fee simple interest. And heir property exacerbates some of the structural problems of the tenancy in common. The LLC, described below, provides more stability, better mechanisms to allocate management responsibility and reasonable exit options as compared to the tenancy in common.

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

A general partnership in many ways resembles a tenancy in common. Many of the default and immutable rules governing general partnerships work best for small firms with limited numbers of partners who know and trust one another. Analogous to each cotenant’s equal rights to possession of the whole property, a general partnership consists of partners with

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372 Members in an LLC face far less exposure to liability based upon the actions of their associates than do partners in a general partnership who are each subject to vicarious liability for the actions of their fellow partners.
373 See CHARLES R. O'KELLEY, JR. & ROBERT B. THOMPSON, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS 68 (2d ed. 1999).
374 Cf. LARRY E. RIBSTEIN, UNINCORPORATED BUSINESS ENTITIES 286 (1996). By 1996, all 50 states and the District of Columbia had enacted LLC statutes. Id.
375 See O’KELLEY & THOMPSON, supra note 373, at 70. Not only are partners in a general partnership able to limit their liability if the partnership converts to an LLC, but LLC statutes typically minimize the conversion costs that other entities must bear to convert their entities into LLCs. See, e.g., DEL. CODE ANN. tit. 6, § 18-214 (1998).
376 See O’KELLEY & THOMPSON, supra note 373, at 62.
equal rights to the management and profits of the enterprise. As in a tenancy in common, conflicts may arise between the partners in a partnership if the individual owners contribute substantially different amounts of money, service, or time to the business. Furthermore, the rules governing the exit of individual partners from a partnership are almost identical to the common-law rules governing partition actions. The filing of a partition action by an individual tenant in common usually results in a judicial sale of the property. In most cases, "any partner can withdraw from the partnership at will, force a judicial liquidating sale, and receive the net value of her partnership interest in cash." Although the ability of any individual partner to force a liquidation of a general partnership makes a general partnership an unstable business form, a general partnership is more stable than a tenancy in common because partnership default rules prevent partners from transferring their full partnership interests to third parties without the unanimous consent of the other partners.

In comparison, LLC statutes allocate more control to the ownership group than to individual members. At the same time, these statutes protect the economic interests of individual members. Examining certain provisions of the Delaware LLC statute demonstrates the degree to which at least one state legislature sought to reallocate power within unincorporated business enterprises. Like a corporation, LLCs in Delaware are deemed to have a perpetual existence unless an operating agreement specifies otherwise. Such continuity of life is normally unaffected by an individual member’s withdrawal from the entity. In order to dissolve an LLC, members holding two-thirds of the interests must consent to the dissolution unless the operating agreement provides otherwise.

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377 See id. at 63.
378 See id.
379 Id. at 129.
380 LARRY D. SODERQUIST ET AL., CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS 100 (4th ed. 1997). However, partners may freely assign their financial rights to third parties, including their rights to their share of the profits and losses and their right to receive distributions. Id. at 96.
382 Tit. 6, § 18-801(b). This section provides:

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

Id.
383 Tit. 6, § 18-801(a)(3). This section of the statute provides that an LLC may be dissolved in the following way:

Unless otherwise provided in a limited liability company agreement, upon the affirmative vote or written consent of the members of the limited liability company or, if there is more than 1 class or group of members, then by each class or group of members, in either case, by members who own more than two-thirds of the then-current percentage or other interest in the profits of the limited liability company owned by all of the members or by the members in each class or group, as appropriate.
ues after a member resigns for any reason, the resigning member is entitled to receive fair value for her interest as of the date the membership ceased.\(^{384}\) The LLC also has the unilateral right to acquire the interest of any member provided that fair value is paid.\(^{385}\) Like a general partnership, members may only assign their financial interest, but not their right to manage the LLC.\(^{386}\)

Just as a member may seek a partition sale of property owned under a tenancy in common, an LLC may be dissolved upon application of a member or manager if the court determines that “it is not reasonably practicable to carry on the business in conformity with a limited liability company agreement.”\(^{387}\) Although the specific judicial dissolution provision of the Delaware LLC statute may appear to allocate a great amount of power to an individual member seeking liquidation, the overall scheme of the Delaware LLC statute makes it clear that court-ordered dissolution should be ordered only in unusual circumstances. As indicated above, LLCs are deemed to have perpetual existence and the default statutory rules require two-thirds of the members to consent to a dissolution in cases in which a court-ordered dissolution is not sought.

Mechanisms for allocation of management responsibilities within an LLC provide flexibility. Absent a different agreement, decisions are made by those holding more than fifty percent of the interests in the profits of the company.\(^{388}\) However, the members of an LLC in Delaware may agree to vest complete or partial management of the entity in a manager or managers\(^{389}\) and may establish different classes or groups of members with different voting rights.\(^{390}\)

Interestingly, the Delaware statute includes several provisions that facilitate the ability of businesses organized under other forms of ownership to convert their ownership to LLC form (and, for that matter, for LLCs to convert to other forms of ownership). Other enumerated entities\(^{391}\) may convert to an LLC by filing a certificate of conversion\(^{392}\) and a certificate of formation as an LLC.\(^{393}\) Prior to converting, however, these other entities must comply with the rules that govern the preexisting ownership arrange-
ment, including rules that determine what proportion of members must agree to the proposed conversion to another form of ownership. Both certificates are simple in form, requiring limited information such as the names of the entities. In addition, LLCs may convert to other forms of ownership or may merge or consolidate with other entities provided that more than fifty percent of those holding an interest in the profits of the company agree, unless the LLC agreement provides otherwise.

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

While such revised statutes would allocate more power to the majority interest holders in a tenancy in common and provide them with a greater ability to control the disposition and use of the land, these statutes would not raise takings issues. Individuals would retain their economic interest in the property and such interests would likely increase in value because the land could be used more productively as the owners would be in a better position to secure financing. In the past two years, Congress has enacted laws that enable the owners of a majority of the undivided interests in Native American allotments located on the Fort Berthold Indian Reservation in North Dakota and on the former reservations of several tribes in Oklahoma

394 Tit. 6, § 18-214(h). Of course under current law, such a provision would prevent, for all practical purposes, those holding heir property to convert their ownership to an LLC because all of the interest holders would have to agree to the conversion.
395 Tit. 6, §§ 18-209, -216.
396 Such a provision would allow those members of the newly formed LLC who were tenants in common in possession for a period of time to remain in possession. In the operating agreement, however, the members of the LLC can allocate the duties and rights of the members based upon whether they are in possession or live away from the property. Such an allocation could provide for the amount of rental money, if any, the "in" tenants would owe to the "out" tenants. See generally Lewis, supra note 367.
to enter into mineral leases or agreements.\textsuperscript{397} Prior to enactment of these statutes, all of the tenants in common were required to consent to a mineral lease.\textsuperscript{398} Congress indicated its belief that the owners of this land had suffered significant economic losses because they could not consent to the exploration and development of the land by mining companies.\textsuperscript{399}

Even assuming for the sake of argument that the conversion of heir property to another form might raise takings issues, the states clearly have the authority to take such interests because the Supreme Court has greatly expanded the circumstances under which property may be taken for a “public use.” In \textit{Hawaii Housing Authority v. Midkiff},\textsuperscript{400} the Supreme Court held that a state seeking to exercise its powers of eminent domain need only demonstrate that the taking of private property is rationally related to the achievement of a public purpose. In addition, the \textit{Midkiff} Court did not view a taking that transferred property from one private individual to others as inconsistent with the public use requirement because the Court determined that the public use requirement could be satisfied even if only a small percentage of a community benefits from a taking.\textsuperscript{401} Furthermore, in the unlikely event that an individual’s interest declined in value due to the change in ownership form, such an individual should be entitled to receive, within a reasonable period of time after the conversion, the difference in the value of their interest prior to the conversion as opposed to the value from the ownership group.

2. \textit{State-Established Land Consolidation Courts}. Allowing those holding a majority interest in common property to convert to an ownership form that allocates more control to the group will stabilize the ownership of such land. Once ownership is stabilized, many current owners will need to clear title before the land can be used productively. For example, one of the more insoluble heir property problems has been the issue of the unknown heir. Given the possibility of unknown heirs, it is difficult to clear title on many heir property holdings, rendering it nearly impossible for those holding such property to use the property as collateral. Even if the majority interest holders could convert the tenancy in common to an LLC, the unknown heir problem would still need to be addressed in order to provide the known heirs with clear title. In short, enabling the majority interest holders to convert to an LLC would represent just one step in a process of “legal consolidation” that would enable the ownership group to use their land productively.


\textsuperscript{399} \textit{Id}.


\textsuperscript{401} \textit{Id.} at 244.
In this country, those who own an interest in heir property that has fallen into unproductive use have few options to improve the prevailing ownership structure, rendering exit through initiation of partition actions an attractive option. Other countries, in contrast, have developed institutions that enable interdependent owners who value the land for more than its mere exchange value to play a role in improving the ownership structure, or the special arrangement of the land holdings. Norway, for example, has created specific legal institutions that seek to consolidate land in a manner that is beneficial to all of those who may be affected by such consolidation. These Norwegian institutions provide a good model that could be replicated in this country with certain modifications.

In eighteenth-century Norway, as in many other parts of Europe, the successive subdivision practices that occurred after enclosure resulted in intense fragmentation of much of the rural land. After first enacting significant land consolidation legislation in 1821, the Norwegian philosophy that drove land consolidation evolved from the notion that fragmented landholdings should be aggregated on a one-time basis to a view that land consolidation "[must be] a continuous process, constantly readjusting the ownership structure to changing economies, technology and patterns of land use." To achieve this end, Norway established a permanent Land Consolidation Service ("Service") in 1859. From the beginning, the Service's decision-making body was organized as a court of law, and since 1950, these specialized tribunals have been called land consolidation courts. Currently, throughout the country, there are forty-one such consolidation "trial" courts and five land consolidation courts of appeals. The land consolidation "judges" (who are not required to be attorneys) must have a degree from the Agricultural University of Norway with substantive course work in land law, surveying, mapping, and land consolidation. In

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402 In Albert Hirschman's lexicon, the heir property owners have greater incentives to exit than to use their "voice" to improve the prevailing ownership structure. See ALBERT O. HIRSCHMAN, EXIT, VOICE AND LOYALTY (1970). In distinguishing "voice" from "exit," Hirschman states that:

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

Id. at 30.

403 Sevatdal, supra note 353, at 7.
404 Id. at 9.
406 Id.
407 Id.
408 Id.
addition, the land consolidation courts can call upon the expertise of the Service, which employs 275 people, many with specialized training.

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

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

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

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

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

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409 Austen, supra note 350, at 139. However, in specific circumstances, the Ministry of Agriculture may also initiate a land consolidation case. Id.

410 Sevatdal, supra note 353, at 3.

411 Id.

412 Id.

413 Austen, supra note 350, at 139.

414 See Graber, supra note 60, at 284 (noting that those who own heir property often need surveys of their land done); see also Letter from Jennifer Binkley, second-year law student, University of Wisconsin-
courts should be vested with the authority to order fractionated tenancies in common converted into other forms of ownership that are more stable and provide better management mechanisms with the concurrence of a majority of those holding an interest.

Like the proposal permitting those who own rural heir property to convert their form of ownership with less than unanimous consent, the establishment of state land consolidation courts would break unproductive ownership patterns weakening the rural land base. Access to such courts should not be limited to rural African American landowners, but could service all rural landowners across a broad spectrum of communities.

B. Restoration of Land Foreclosed Upon by the USDA or Provision of Alternative Land

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

415 In an interview with Judge Per Kåre Sky of the Norwegian Land Consolidation Court, Judge Sky stated that the Norwegian land consolidation courts are increasingly handling consolidation cases addressing those who own undivided interests under a form called "personal joint ownership," a form of ownership analogous to a tenancy in common. Electronic Interview with Judge Per Kåre Sky, Norwegian Land Consolidation Court of Nord- and Midhordland (Sept. 21, 1999). Although the courts have the power to divide the land in kind, the judges sometimes try to assist the common owners to make agreements that regulate the ownership of the land or to enter into buy-sell agreements with one another. However, in answering a follow-up question, Judge Sky later stated that the consolidation courts in Norway do not have the power to force buying and selling among the common owners or to convert the personal joint ownership holdings into other forms of ownership. Electronic Interview with Judge Per Kåre Sky, Norwegian Land Consolidation Court of Nord- and Midhordland (Sept. 24, 1999).

416 The Pigford consent decree provides that if an arbitrator rules in favor of a class member who elects to proceed under Track B, the class member is entitled to relief including the following:

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

opportunities to Mr. Beverly or to all of the other African American farmers.\footnote{Pigford v. Glickman, 185 F.R.D. 82, 103-04 (1999).}

This is simply not true. Throughout this nation’s history, the federal government has distributed land to individuals, states, and private entities with less individualized claims than those black farmers who lost land directly as a result of the federal government’s discrimination.\footnote{Richard White, It’s Your Misfortune and None of My Own: A New History of the American West 137-40, 145-47 (1991) (noting that beginning in the eighteenth century, Congress began awarding land to individual states and private entities to promote particular governmental and societal goals, including encouraging enlistment in the military, facilitating interstate commerce by making rivers more navigable, and helping western farmers who settled land under the Homestead Act of 1862 obtain access to markets through expansion of the railroad system).} For example, the government allocated huge tracts of federal land to mostly white homesteaders in the late nineteenth and early twentieth centuries in order to help these people enter into the economic mainstream of society.\footnote{See id. at 143-45, 433; see also David B. Danbom, Born in the Country: A History of Rural America 113-14, 143-44 (1995); Lanza, supra note 125, at 18; Oliver & Shapiro, supra note 117, at 14-15. The attempt to create a significant class of African American landowners under the Southern Homestead Act of 1866 ultimately failed, in part due to discrimination against black applicants and black homesteaders who initially were able to obtain land under the Act. Id. at 79-87, 122-24.} Furthermore, many land grant universities throughout the country came into operation only after the federal government provided the necessary land.\footnote{Danbom, supra note 419, at 113, 119; see also White, supra note 418, at 142.} In these instances, land in the government’s inventory was transferred in order to serve specific federal policies.

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

Given the demonstrated significance of African American landownership and the acknowledged, widespread discriminatory conduct of the USDA, the USDA should return any formerly black-owned land in its inventory to any prior owners who are members of the Pigford class. Addi-
tionally, the USDA’s inventory obviously includes other land, including land that was foreclosed upon for reasons wholly unconnected to the discriminatory conduct established in the *Pigford* lawsuit. Consistent with the charge of the Freedmen’s Bureau to distribute “abandoned lands,” some of the land from the USDA’s inventory should be reallocated to the black farmers in the *Pigford* class whose land was foreclosed upon but subsequently transferred to another party. Such provision of “in lieu” land would be consistent with land reform measures adopted by other countries that have attempted to make whole individuals and groups who were unjustly dispossessed of their land.422 In short, if the federal government were to adopt a policy that recognized the importance of black, rural landownership, land restoration and acquisition could be assured.

C. Legal Services Attorneys with Specialized Training Should Be Hired to Provide Assistance to Heir Property Owners

Congress should expand the mission of legal services to allow legal services attorneys to provide legal assistance to poor landowners, including those who own an interest in heir property. Such an expanded mission will necessarily require additional funding for legal services offices to meet the needs of these newly eligible clients. For example, local legal services organizations would need to hire attorneys with training or experience in estate planning, real estate transactions, property, tax, business organizations, and environmental law.423 In order to begin building a cadre of lawyers interested in working with poor, rural landowners, these legal services offices could also establish internship programs that would allow law students to acquire specific expertise in land-related cases.424

In addition to handling individual cases, legal services offices should conduct regular community legal education workshops to educate poor, rural landowners about the laws that impact their ability to retain ownership of their land. These workshops could address issues such as land records, tax obligations and tax redemption, liens and foreclosure, adverse possession, and mineral, mining, water, and timber rights. The legal services attorneys could also address legal problems that normally crop up in tenancies in common, such as how to allocate responsibility between cotenants for costs associated with maintaining the property, how to deal with the

422 For example, South Africa adopted the Restitution of Land Rights Act in 1994. Under the Act, those successful claimants who lost land due to the government’s discriminatory acts since 1913 are entitled to relief that may include restoration of their original land, the provision of “in lieu” land, or monetary compensation.

423 See Graber, *supra* note 60, at 284.

424 In fact, a clinical legal externship program this author directs has begun to train law students to work with rural landowners. Since the externship program was started four years ago, sixteen law students from the University of Wisconsin, Stanford, the University of Tennessee, and Howard University have worked throughout rural America during the summer with rural landowners whose lack of access to legal services places their landownership at risk.
issues of waste, and how to redeem property after a tax sale. Further, local community activists (or in some instances landowners themselves) could be trained to conduct title searches at local county courthouses so that those who own an interest in land can determine who else has a claim to the property. To help reduce further fractionation, there must be continuous education about the importance of making wills. Legal services offices should develop form wills that can be modified with little effort. More broadly, such community legal education programs could also help rural landowners begin to do financial planning that would help landowners avoid losing their land—as so many poor, rural landowners have lost their land—due to financial distress.

D. Placing African American Heritage Land into Trust

The federal government, the courts, and the general public recognize that certain Native American-owned ancestral land constitutes a vital part of the Native American heritage. Now, the federal government should recognize that the small amount of rural land still under black landownership represents a part of the African American heritage. At a minimum, land currently owned by African Americans that was initially acquired by black people either prior to or within a generation of the close of the Civil War should receive special federal protection. According to a report by the Emergency Land Fund in 1980, only a small percentage of this land currently remains in the families of the original black landowner.

In addition to this land, land set aside for specific black communities during the New Deal resettlement programs should be eligible for special federal protection. Although the total number of rural acres set aside for these black communities was small, these communities served as a beacon for many rural black people who believed that landownership could transform their lives. In the past few years, rural sociologists, anthropologists, and other academics have begun to study anew the important role these communities played in uplifting the hopes of rural African Americans across the South.

Given the unique status of the two categories of land described above, the federal government should recognize this land as African American heritage land. Owners of such heritage land should be eligible for federal support

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


427 Other land that could be categorized as African American heritage land would be land still under black ownership that once served as the sites for historically black colleges and universities that were opened after the end of the Civil War, but have now ceased operation.
that could include financial assistance earmarked for helping to restore historically important buildings on the land, either federal management of the property under a trust relationship or federal assistance in helping these landowners establish private land trusts, and the building of museums or archives that would document the history of the acquisition and use of the land by the black landowners.

CONCLUSION

At the end of the Civil War, the federal government failed to redistribute land to African Americans. Without such governmental assistance, many African Americans made heroic sacrifices to purchase land on their own. However, the fifteen-million-acre land base that many black families built up in the South between the end of the Civil War and 1910 has been almost completely wiped out. In recent decades, thousands of black families have lost their land due to partition sales, many of which were initiated by outsiders who acquired an interest in a tenancy in common with the sole intention of forcing a sale. Although heir property continues to represent an especially unstable form of ownership, those who own such property find it nearly impossible to reorganize their land under a form that would provide better mechanisms to foster continued ownership by the group because of the requirement that all of the "cotenants by law" agree to any change in the default rules governing tenancies in common.

President Clinton has spoken passionately about the threat posed to our society by the growing divide in access to technology between the wealthy and those who are less privileged. The inability of certain groups to participate fully in our society—and in the global society—due to their inability to access the Internet and other computer technology represents but one example of a technological divide separating more privileged groups from others. Those who own heir property are essentially locked into a substandard, antiquated form of landownership that presents an easy target for land speculators. The newer forms of ownership that the law has developed in order to assure greater continuity of ownership currently remain beyond the reach of those owning heir property.

Federal and state governmental bodies need only decide that the fractionated heir property problem is worth addressing. At least in the Native American context, in the past year, the federal government has decided that this problem merits policy intervention. In November 1999, President Clinton signed into law the "Indian Land Consolidation Act Amendments of 2000." This public law represents Congress's latest effort to improve the widespread problem of fractionation of Native American allotments. Interestingly enough, the section of the public law that sets forth the policy ob-

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jectives of the law, expressly indicates that heir property holdings should be consolidated in a manner that enhances tribal sovereignty, self-sufficiency, and self-determination. A policy that sought to improve the fractionated heir property problem that impacts African Americans would not support widespread partition sales, despite the fact that partition sales certainly improve fractionation. Just as policymakers should be concerned about addressing the Native American heir property problem in a way that enhances the ability of tribes to be both more politically self-determining and economically more self-sufficient, such policymakers should respond to the crisis in land loss in African American communities caused by partition sales of land held under tenancies in common, given the established links between landownership, community, and democratic participation.

429 Id. at §102. ("It is the policy of the United States -- (1) to prevent the further fractionation of trust allotments made to Indians; (2) to consolidate fractional interests and ownership of those interests into usable parcels, (3) to consolidate fractional interests in a manner than enhances tribal sovereignty; (4) to promote tribal self-sufficiency and self-determination; and (5) to reverse the effects of the allotment policy on Indian tribes.")