The Anticommons Intersection of Heirs Property and Gentrification

Throughout history, internal and external pressures on Black landowners have resulted in the fragmentation of ownership through heirs property. This fragmentation is analogous to the erosion of community ties within minoritized neighborhoods susceptible to gentrification. Both contexts contribute directly to involuntary exit and land loss within the Black community. This Note analyzes the history of Black property ownership within the United States to illustrate the roots of heirs property and gentrification and evaluates traditional responses to these phenomena through the lens of the tragedy of the anticommons. In doing so, it highlights flaws in existing solutions to heirs property. It culminates with a proposed Uniform Act to mitigate and prevent gentrification-induced involuntary exit that incorporates elements of both the Uniform Partition of Heirs Property Act and responses to the tragedy of the anticommons.

INTRODUCTION

Josephine Wright's family has owned land on Hilton Head Island since Reconstruction, but the land's complex inheritance structure and her family's inability to pay the rising taxes resulted in its 2014 sale at auction for only $35,000.[1] This was a fraction of the land's value, and developers reaped the rewards—the land is set to be the site of a 147-unit vacation rental complex.[2] One hundred miles

1. *See* James Pollard, *Developers Have Black Families Fighting to Maintain Property and History*, ASSOCIATED PRESS, https://apnews.com/article/black-landowners-property-gentrification-south-carolina-7eeb7b1bcb70e845ffec7eeba23f594b (last updated Aug. 12, 2023, 9:09 AM) [https://perma.cc/3T2U-MXLD]. For further discussion of heirs property and land loss within the Gullah Geechee community on Hilton Head Island, see Ken Makin, *In Hilton Head, a Dispute over a Shed and a Porch Captures the Plight of Local Black Landowners*, ANDSCAPE (Sept. 11, 2023), https://andscape.com/features/in-hilton-head-a-dispute-over-a-shed-and-a-porch-captures-the-plight-of-local-black-landowners/ [https://perma.cc/M9MG-5ZVS].

2. *See* Pollard, *supra* note 1. Though her family was forced to sell twenty-nine of its thirty acres, Mrs. Wright retained an interest in the one remaining acre, and her attempt to hold out against the resort development has garnered national attention. *Id.* In response to her refusal to

north, Charleston's Black population declined by more than two-thirds from 1980 to 2020, largely due to rising housing costs and an influx of white residents.[3] Today, in Charleston's Union Heights neighborhood—originally founded by formerly enslaved South Carolinians following the Civil War—residents anticipate encroachment by transplants seeking lower rents and affordable houses.[4] While local homeowners appreciate the investment in their neighborhood, North Charleston Councilman Michael Brown worries that the increasing demand and rising costs are putting pressure on local tenants who require affordable housing.[5] Though the pressures on Mrs. Wright and Mr. Brown's communities may appear distinct, they are two sides of the same coin: fragmentation in ownership resulting in Black land loss.

From the Constitution's sanctioning of slavery, through Reconstruction's failure to deliver on its promise of "forty acres and a mule,"[6] to the use of racially restrictive covenants and redlining to exclude Black families from property ownership, property law in the United States has long served as a mechanism for the oppression of minoritized communities—all while white Americans accrued generational wealth through property ownership.[7] Landownership is a "significant contributor[ ] to the creation of wealth and [a] driver[ ] of intergenerational economic mobility,"[8] as well as a "vehicle for human development" that is vital to participation in democratic society and

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sell, she alleges she has been subject to "a consistent and constant barrage of tactics of intimidation, harassment, trespass, to include this litigation in an effort to force her to sell her property." Answer at 3, Bailey Point Investment, LLC. v. Josephine Wright, No.: 2023-CP-07-00326 (S.C. Ct. Com. Pl. 14th Jud. Cir. Apr. 25, 2023).

3. David Slade, *North Charleston's South End Became a Plaything for Landlords. Now It's Gentrifying.*, POST & COURIER (Aug. 24, 2023), https://www.postandcourier.com/boomandbalance/north-charleston-s-south-end-became-a-plaything-for-landlords-now-it-s-gentrifying/article_254f949c-2270-11ee-8b59-cfc1932cdad6.html [https://perma.cc/XA3U-R23D].

4. *Id.*

5. *Id.* Note that homeowners make up a "small minority" of the population in North Charleston neighborhoods, which have a far greater population of renters. *Id.*

6. This is the legacy of General Sherman's infamous "March to the Sea," during which he proclaimed in a field order that every freedman would receive "forty acres of land at rental for three years with an option to buy." Barton Myers, *Sherman's Field Order No. 15*, NEW GA. ENCYC., https://www.georgiaencyclopedia.org/articles/history-archaeology/shermans-field-order-no-15/ (last updated Sept. 30, 2020) [https://perma.cc/47SJ-5LGX]; Roy W. Copeland, *In the Beginning: Origins of African American Real Property Ownership in the United States*, 44 J. BLACK STUD. 646, 655–56 (2013); *see infra* Subsection I.A.1 (discussing General Sherman's Field Order).

7. *See infra* Section I.A.

8. Thomas W. Mitchell, Sarah Stein & Ann Carpenter, *Expansion of New Law in Southeast May Stave Off Black Land Loss*, FED. RSRV. BANK OF ATLANTA: PARTNERS UPDATE 1 (Oct. 2020), https://scholarship.law.tamu.edu/facscholar/1438/ [https://perma.cc/UE9A-HHWB].

community empowerment.[9] The unstable property rights of minoritized populations thus serve to perpetuate structural disadvantages.

Today, Black-owned or occupied land is particularly vulnerable to fragmentation, which occurs when ownership is increasingly divided among multiple owners who can hold out and block efficient use.[10] Two examples of this phenomenon that are particularly relevant among Black communities are heirs property and gentrification.[11] Heirs property results when ownership of an individual plot of land becomes increasingly fragmented over generations of intestate inheritance,[12] so

9. *See* Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505, 535–37 (2001) [hereinafter Mitchell, *From Reconstruction to Deconstruction*]; *see also* Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549, 608 (2001) (highlighting "alternative economic uses" and the "subjective value of keeping the land in the family" as benefits to landownership aside from farm income).

10. *See* Thomas W. Mitchell, *Historic Partition Law Reform: A Game Changer for Heirs' Property Owners*, *in* HEIRS' PROPERTY AND LAND FRACTIONATION: FOSTERING STABLE OWNERSHIP TO PREVENT LAND LOSS AND ABANDONMENT 65, 67 (Cassandra J. Gaither, Ann Carpenter, Tracy Lloyd McCurty & Sara Toering eds., 2019) [hereinafter Mitchell, *Historic Partition Law Reform*] (explaining why Black-owned land is particularly vulnerable to this fragmentation); Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 621, 624 (1998) [hereinafter Heller, *Tragedy of the Anticommons: Marx to Markets*] (describing how divided ownership can lead to this underuse); *see also* Michael Heller, *The Tragedy of the Anticommons: A Concise Introduction and Lexicon*, 76 MOD. L. REV. 6, 10, 12 (2013) [hereinafter Heller, *Tragedy of the Anticommons: Introduction*] (discussing how multiple owners can lead to underuse).

11. *See infra* Sections I.B-C, II.A-B. Heirs property and gentrification are not entirely distinct phenomena, as the fragmented ownership of heirs property, which appears in both rural and urban areas, can leave it vulnerable to gentrification. *See, e.g.*, David Slade, *Tangled Titles: Philadelphia Explores Heirs' Property Solutions to Boost Generational Wealth*, POST & COURIER (Apr. 8, 2022), https://www.postandcourier.com/news/philadelphia-explores-heirs-property-solutions-to-boost-generational-wealth/article_0370ced0-9c12-11ec-ab5a-73fceb01dab2.html [https://perma.cc/2AJT-WMT3] (discussing heirs property in Philadelphia); JAMES YAGLEY, LANCE GEORGE, CEQUYNA MOORE & JENNIFER PINDER, HOUS. ASSISTANCE COUNCIL, THEY PAVED PARADISE . . . GENTRIFICATION IN RURAL COMMUNITIES 35–44 (2005), https://ruralhome.org/wp-content/uploads/storage/documents/gentrification.pdf [https://perma.cc/LDF8-TLUB] (discussing gentrification of land formerly owned by the Gullah Geechee community on Hilton Head Island). The presence of heirs property, however, is not the *only* contributing factor to gentrification, and this Note treats them as distinct phenomena in order to address their effects on the ability of Black communities to accumulate wealth and political capital. *See infra* Section I.C and Part II.

12. Intestate succession is the process, governed by state law, by which heirs inherit interests in property from an individual who failed to make a will. *See* Mitchell, *Historic Partition Law Reform*, *supra* note 10, at 67 ("If someone who owns real property dies without a will, those deemed under State intestacy laws to be the heirs of the deceased person may be entitled to an ownership interest in real property owned by the decedent."). A substantial population of the United States do not make wills or other estate plans, but minoritized and low-income populations experience particularly high rates of intestacy. *See id.* at 67–68 (describing the "substantial racial element to the patterns of intestate succession" and the high rates of intestacy among low-income Americans). While intestate succession is not inherently harmful, the default rules governing intestate succession often result in ownership structures and power dynamics that leave cotenants vulnerable to exploitation, which induces involuntary exit. *See infra* Subsections I.B.1–I.B.2 (discussing how tenancies in common and intestate succession create unstable landownership).

that individuals holding an interest lack incentives to maintain and use the land.[13] Gentrification, on the other hand, often results from developers capitalizing on the fragmented ownership of a community and the lack of sufficient social or political capital to prevent intrusion.[14] Fragmentation in these contexts is particularly harmful because it leaves property owners vulnerable to involuntary exit when third parties with better resources can exploit decentralized ownership structures and force a sale.[15]

These problems are not unique to the Black community. Heirs property also affects other low-income and minoritized communities, including white families in rural Appalachia, Mexican-Americans in New Mexico and Texas, and indigenous communities throughout the country.[16] And gentrification is also particularly harmful to other underrepresented groups, such as urban Latino communities.[17] While race is not the only factor contributing to these forms of fragmentation, both gentrification and heirs property significantly affect Black populations.[18]

This Note examines the similarities between heirs property and gentrification as forms of fragmentation that lead to displacement in rural and urban minoritized communities. It specifically focuses on their impact on the Black community.[19] It suggests that both gentrification and heirs property should be understood as tragedies of the anticommons,[20] and existing responses to each phenomenon can inform the understanding of both issues, facilitating the exploration of alternate solutions that may prove more effective and sustainable.

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13. *See infra* Section I.B.

14. *See infra* Section I.C.

15. *See infra* Subsections I.B.1, I.C.1.

16. *See* UNIF. PARTITION OF HEIRS PROP. ACT prefatory note at 5–6 (UNIF. L. COMM'N 2010).

17. *See* Mitchell et al., *supra* note 8, at 2; Rachel D. Godsil, *The Gentrification Trigger: Autonomy, Mobility, and Affirmatively Furthering Fair Housing*, 78 BROOK. L. REV. 319, 326 (2013).

18. *See* Godsil, *supra* note 17; UNIF. PARTITION OF HEIRS PROP. ACT prefatory note at 5 (UNIF. L. COMM'N 2010).

19. This is not to say that other communities do not also experience these phenomena. For a discussion on allotment and fractional land in Indigenous communities, see generally DAVID H. GETCHES, CHARLES F. WILKINSON, ROBERT A. WILLIAMS, JR., MATTHEW L.M. FLETCHER & KRISTEN A. CARPENTER, CASES AND MATERIALS ON FEDERAL INDIAN LAW 375–79 (7th ed. 2016); *What Is Fractionation?*, BUREAU OF INDIAN AFFS., https://www.bia.gov/bia/ots/dtlc/fractionation (last visited Aug. 30, 2023) [https://perma.cc/7E5F-9T52]. For a discussion of the impact of demographic, economic, spatial, and temporal characteristics on gentrification, see John A. Powell & Marguerite L. Spencer, *Giving Them the Old "One-Two": Gentrification and the K.O. of Impoverished Urban Dwellers of Color*, 46 HOW. L.J. 433, 436–54 (2003).

20. Professor Heller coined the term "anticommons" in his 1998 article, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*. *See* Heller, *Tragedy of the Anticommons: Marx to Markets*, *supra* note 10. *See infra* Section I.D for discussion on the tragedy of the anticommons.

Part I provides a detailed look at the history of Black property ownership within the United States to illustrate the roots of heirs property and gentrification. It also defines heirs property, gentrification, and the tragedy of the anticommons to highlight similarities among all three phenomena. Part II analyzes the traditional responses to involuntary exit resulting from heirs property and gentrification, as well as macrolevel solutions to the tragedy of the anticommons. In doing so, this Note highlights flaws in the Uniform Partition of Heirs Property Act ("UPHPA") in order to encourage further efforts to address the root causes of fragmentation in the heirs property context. Finally, Part III proposes a new Uniform Act to mitigate and prevent gentrification-induced involuntary exit that incorporates elements of both the UPHPA and responses to the tragedy of the anticommons.

I. BACKGROUND

A. Black Property Ownership

1. Post–Civil War Developments and Rural Landownership

After the Emancipation Proclamation and the Thirteenth Amendment's enactment following the Civil War, many expected the government to redistribute land to the newly freed slaves.[21] During his infamous "March to the Sea," General Sherman fueled these expectations by issuing a field order declaring the land from "[t]he islands of Charleston south, the abandoned rice fields along the rivers for thirty miles back from the sea, and the country bordering the St. Johns River, Florida" abandoned and reserving it for the settlement of freedmen in forty-acre plots (the "forty acres and a mule" promise).[22]

Congress's establishment of the Freedmen's Bureau in March 1865 further bolstered expectations: the agency's founding legislation "promised every male citizen . . . forty acres of land at rental for three years with an option to buy."[23] Additionally, federal legislation attempted to redistribute land to the newly freed slaves.[24] For example,

21. *See* Mitchell, *From Reconstruction to Deconstruction*, *supra* note 9, at 524.

22. Myers, *supra* note 6; Copeland, *supra* note 6, at 655; *see* Mitchell, *From Reconstruction to Deconstruction*, *supra* note 9, at 525; Waymon R. Hinson, *Land Gains, Land Losses: The Odyssey of African Americans Since Reconstruction*, 77 AM. J. ECON. & SOCIO. 893, 902 (2018).

23. Mitchell, *From Reconstruction to Deconstruction*, *supra* note 9, at 525; *see also* Copeland, *supra* note 6, at 655–56.

24. *See The Road Not Taken After the Civil War*, UVA L.: COMMON L. (Oct. 2019), https://www.law.virginia.edu/commonlaw/show-notes-road-not-taken-after-civil-war [https://perma.cc/36UV-B9X6].

the Southern Homestead Act of 1866 opened forty-six million acres of land for freedmen to settle in eighty-acre parcels,[25] and the U.S. Revenue Act of 1862 allowed the United States to seize and auction the land of Southerners who did not pay taxes.[26]

Reconstruction policies, however, disappointed expectations of land redistribution and reform.[27] By 1866, the Freedmen's Bureau had returned most of the land it controlled to its previous white owners.[28] Moreover, former landowners displaced by General Sherman demanded their land's return and appealed to President Andrew Johnson—who ultimately pardoned many Confederate generals and restored their real property.[29]

Despite the state's overwhelming failure to redistribute land, prevalent use of discriminatory credit practices, and racial violence, Black southerners managed to acquire fifteen million acres of land between 1865 and 1910.[30] In the agricultural sector alone, Black farm owners made up roughly one sixth of all southern landowners by 1910.[31] But 1915 proved to be a turning point—"the end of an epoch."[32] The significant increase in Black landownership following the Civil War suddenly reversed. This reversal is partially attributed to major geopolitical events and socioeconomic factors. World War I decreased European immigration while increasing labor demand, opening the door for Black industrial employment opportunities and thus driving a massive migration of Black southerners to the industrial North and West.[33]

This trend continued throughout the subsequent decades, thanks mostly to the particular challenges that the Great Depression presented for Black farmers in the South. Not only did Black farmers endure collapsing prices and bank failures, but the New Deal programs that supported white farmers throughout this period provided limited

25. Southern Homestead Act of 1866, ch. 127, 14 Stat. 67 (repealed 1876); Mitchell, *From Reconstruction to Deconstruction*, *supra* note 9, at 525.

26. Revenue Act of 1862, ch. 119, 12 Stat. 432.

27. *See* Mitchell, *From Reconstruction to Deconstruction*, *supra* note 9, at 525–26; Hinson, *supra* note 22, at 904.

28. Mitchell, *From Reconstruction to Deconstruction*, *supra* note 9, at 526.

29. *See* Copeland, *supra* note 6, at 657–61 (discussing the process through which President Johnson conceded to the demands of the Confederates); Mitchell, *From Reconstruction to Deconstruction*, *supra* note 9, at 526.

30. *See* Mitchell, *From Reconstruction to Deconstruction*, *supra* note 9, at 526.

31. *Id.*

32. Robert Higgs, *Accumulation of Property by Southern Blacks Before World War I*, 72 AM. ECON. REV. 725, 730 (1982).

33. *See id.*; Loren Schweninger, *A Vanishing Breed: Black Farm Owners in the South, 1651-1982*, 63 AGRIC. HIST. 41, 50 (1989).

aid to their Black counterparts.[34] These dynamics continued to push Black farmers to the industrial North, exacerbating the decrease in Black landownership.[35] Despite these aggravating factors, Black farm ownership remained relatively steady until 1950, when the mechanization of farming drove many small farmers out of business.[36] Ultimately, from 1950 to 1974, the number of Black farm owners dropped eighty percent in the South alone, from roughly one hundred eighty-seven thousand to roughly thirty-eight thousand.[37] As of 2000, there were fewer than nineteen thousand Black farmers in America.[38]

Although white farm ownership also declined with industrialization, Black farm ownership declined at a much greater rate.[39] This disparity is largely attributable to factors that made life more challenging for Black landowners who opted to remain in the South—namely, the violence, intimidation, and discrimination that Black southerners endured.[40] Additionally, white farmers enjoyed exclusive tax benefits, loans, and price supports.[41] These advantages, coupled with the patterns of violence and intimidation, left Black farmers vulnerable to predatory real estate practices by white southerners, resulting in the loss of Black-owned farmland.[42] This rendered Black-owned heirs property particularly vulnerable to partition sales, as further discussed in Section I.B of this Note.[43]

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34. *See* Schweninger, *supra* note 33, at 50.

35. *See id.*

36. *See id.* at 50–52.

37. *Id.* at 52.

38. Dagan & Heller, *supra* note 9, at 605.

39. *See id.* ("[B]lack Americans continue to abandon farms at a rate three times that of white Americans."); Mitchell, *From Reconstruction to Deconstruction*, *supra* note 9, at 527.

40. *See* Schweninger, *supra* note 33, at 54.

41. *See id.*

42. *See id.*

43. *See* Mitchell, *From Reconstruction to Deconstruction*, *supra* note 9, at 511; UNIF. PARTITION OF HEIRS PROP. ACT prefatory note at 4–5 (UNIF. L. COMM'N 2010). Foreclosure (loss of property due to failure to make payments), adverse possession (obtaining a legal right to land after trespass and use for a certain number of years), and eminent domain (the right of the government to expropriate private property for public use with payment of compensation) are also significant contributors to Black land loss. *See* Mitchell, *From Reconstruction to Deconstruction*, *supra* note 9, at 51; Sidney Richardson, *Foreclosure Defined: What It Is, How to Avoid It and What It Means for You*, ROCKET MORTG. (Mar. 31, 2023), https://www.rocketmortgage.com/learn/foreclosure-definition [https://perma.cc/W5Q9-PCGV]; Erica Gellerman, *What Is Adverse Possession in Real Estate?*, ROCKET MORTG. (May 1, 2023), https://www.rocketmortgage.com/learn/adverse-possession [https://perma.cc/68JH-5ZJU]; *History of the Federal Use of Eminent Domain*, U.S. DEP'T OF JUST., https://www.justice.gov/enrd/history-federal-use-eminent-domain (last updated Jan. 24, 2022) [https://perma.cc/ZK3S-AXSE].

2. Suburbanization and Redlining

As Black-owned farmland rapidly decreased during the twentieth century, urban minoritized communities faced resource deprivation and barriers to suburban housing.[44] Housing discrimination ultimately pushed minoritized communities into inner-city neighborhoods while white families migrated to the suburbs.[45] This Subsection traces the history of these discriminatory policies, which resulted in low-income and working-class neighborhoods—often inhabited by Black and Latino families—that are highly susceptible to gentrification today.[46]

All levels of government, as well as groups of private citizens, perpetuated housing discrimination against urban minoritized communities through both extralegal and legal mechanisms.[47] Residents of white neighborhoods frequently deployed harassment and violence against Black families seeking to integrate, all while law enforcement turned a blind eye.[48] As part of these efforts to resist housing integration, white residents and municipal governments also capitalized on available legal mechanisms—a long list including exclusionary zoning; racially restrictive covenants; discriminatory practices in federal programs (such as the Federal Housing Administration ("FHA"), Veterans Administration ("VA"), and Home Owner's Loan Corporation ("HOLC")), federal highway construction, and public housing; and the Internal Revenue Service's granting of tax-exempt status to organizations that promoted residential segregation.[49]

In the early twentieth century, many municipalities adopted zoning ordinances segregating Black and white residents.[50] Baltimore adopted the first such ordinance in 1910, prohibiting Black individuals from purchasing homes on majority white blocks and vice versa.[51] Many

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44. *See* Godsil, *supra* note 17, at 327.

45. *See generally* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017).

46. Godsil, *supra* note 17, at 326–27; *infra* Section I.C.

47. Godsil, *supra* note 17, at 326–29.

48. *See id.*; ROTHSTEIN, *supra* note 45, at 139–51.

49. *See* Godsil, *supra* note 17, at 327–31 (explaining the roles of racially restrictive covenants and federal programs in contributing to gentrification and housing discrimination); ROTHSTEIN, *supra* note 45, at 17, 44–45, 77, 101 (discussing these government-sponsored sources of segregation). This section is only intended to provide a brief summary of the discriminatory housing practices resulting in the creation of minoritized neighborhoods that are susceptible to gentrification. For a deeper discussion of de jure segregation in housing, see ROTHSTEIN, *supra* note 45.

50. ROTHSTEIN, *supra* note 45, at 44.

51. *Id.*

southern cities soon followed.[52] And while northern cities lacked the sizeable Black populations of the South, northern leaders and press expressed support for these policies.[53] The first challenges to these segregation ordinances emerged soon thereafter; just seven years after the first segregation ordinance in Baltimore, the Supreme Court held Louisville's racial zoning ordinance unconstitutional in *Buchanan v. Warley*.[54] In the decision, the Court reasoned that the Fourteenth Amendment protects "freedom of contract" and the racial zoning ordinance interfered with property owners' rights to choose to whom to sell their property.[55] Despite *Buchanan*, cities continued to utilize racial zoning ordinances with slight modifications, and many successfully avoided judicial scrutiny throughout the latter half of the twentieth century.[56]

After the Court struck down racial zoning, many white homeowners and suburban developers sought to use the courts to enforce private racially restrictive covenants: restrictions in deeds limiting the sale and use of residences to white buyers and owners.[57] These covenants also typically included restrictions on home size and aesthetics, which effectively excluded minoritized homeowners by prohibiting multifamily housing and requiring larger lot sizes.[58] While new developments were able to implement racially restrictive covenants, existing neighborhoods were unable to do so.[59] Instead, these neighborhoods attempted to enforce segregation with petitions, through which neighborhood improvement associations collected signatures from owners pledging not to sell or rent their homes to people of color.[60] In 1948, the Supreme Court ruled in *Shelley v. Kraemer* that courts could not constitutionally enforce racially restrictive covenants because doing so would be an impermissible form of state action, violating the

52. Including Atlanta, Birmingham, Dallas, Louisville, New Orleans, Oklahoma City, Richmond, and St. Louis. *Id.* at 45.

53. *See id.* (discussing *The New Republic's*—a New York City-based magazine—support for racial segregation in housing).

54. 245 U.S. 60 (1917).

55. *Id.*; *see* ROTHSTEIN, *supra* note 45, at 45.

56. *See* ROTHSTEIN, *supra* note 45, at 46–48 (discussing the racial zoning ordinances of cities such as Indianapolis, New Orleans, Richmond, Birmingham, Atlanta, West Palm Beach, Orlando, Austin, Kansas City, and Norfolk).

57. Carol M. Rose, *Property Law and Inequality: Lessons from Racially Restrictive Covenants*, 117 NW. U. L. REV. 225, 231 (2022).

58. *Id.*; Godsil, *supra* note 17, at 328.

59. *See* Rose, *supra* note 57, at 232. To be enforceable, a covenant must originate with the sale or lease of the property—something not possible in neighborhoods that were already developed. *Id.*

60. *Id.*

Equal Protection Clause of the Fourteenth Amendment.[61] Despite this ruling, however, racially restrictive covenants continued to serve as an impediment to homeownership.[62]

Federal programs sought to encourage white homeownership via suburbanization, while simultaneously preventing integration of white neighborhoods to preserve white property values.[63] The HOLC's lending program, established under the New Deal to rescue defaulting homeowners, created color-coded maps of every U.S. city to reflect lending risk levels.[64] On these maps, the safest neighborhoods were green and the riskiest were red.[65] Regardless of the socioeconomic status of its residents, any neighborhood containing Black residents was automatically coded red—marking the origin of the term "redlining."[66] The FHA and VA also promulgated loan programs that effectively subsidized white flight to the suburbs by granting optimal conditions to white buyers via prime down payments, interest rates, and repayment periods, while withholding these benefits from minoritized buyers.[67] Further, as an insurer of bank-created mortgages, the FHA greatly controlled who could obtain a mortgage at all.[68] Its internal policies encouraged discrimination against minoritized mortgage applicants by instructing agents to view restrictive covenants (including racially restrictive covenants) favorably, discouraging loans in urban neighborhoods, favoring mortgages in areas with natural barriers (such as highways separating Black and white residents), and blocking mortgages for neighborhoods requiring school integration.[69]

In addition to these federal programs, the construction of federal and local highways in major cities often destroyed low-income and

61. 334 U.S. 1, 23 (1948); *see* Godsil, *supra* note 17, at 328; ROTHSTEIN, *supra* note 45, at 85.

62. *See* Rose, *supra* note 57, at 235–36 (discussing how voluntary racially restrictive covenants were not outlawed, and how these covenants can still serve as a powerful signal of neighborhood preferences); Godsil, *supra* note 17, at 328 (discussing how contractors were often unable to obtain financing to build homes in white subdivisions for minoritized families and how covenants with aesthetic restrictions continued to impose barriers on minoritized families that did not always fit the stereotypical white suburban family mold); ROTHSTEIN, *supra* note 45, at 85–90 (discussing how long it took for the FHA to comply with the *Shelley* line of cases, cease insuring mortgages with restrictive covenants, and start insuring mortgages for homes in racially inclusive communities). For further discussion of the legacy of racially restrictive covenants, see Rose, *supra* note 57.

63. *See* ROTHSTEIN, *supra* note 45, at 60–61, 93 (discussing the FHA's justification of its racial policies and the promotion of "Better Homes in America," which suggested that white families move away from urban areas in order to avoid "racial strife").

64. *Id.* at 63–64; Rose, *supra* note 57, at 234.

65. ROTHSTEIN, *supra* note 45, at 63–64; *see also* Rose, *supra* note 57, at 234.

66. *See* ROTHSTEIN, *supra* note 45, at 64; Rose, *supra* note 57, at 234.

67. *See* Godsil, *supra* note 17, at 330.

68. *See* ROTHSTEIN, *supra* note 45, at 64.

69. *See id.* at 65–66.

working-class neighborhoods in order to benefit suburban commuters.[70] Further, federal public housing programs, initially only available for working- and middle-class *white* families, evolved into segregated institutions during the New Deal and World War II and remained so throughout the postwar period.[71]

Despite its obligation to withhold tax benefits from organizations engaged in discriminatory practices, the IRS also perpetuated racial discrimination by granting tax-exempt status to institutions like churches, hospitals, colleges, and neighborhood associations that effectuated barriers to housing and integration for people of color.[72] These institutions often led legal battles to enforce racially restrictive covenants.[73] For example, a church sponsored the defense of the racially restrictive covenant at issue in *Shelley v. Kraemer*, funding the effort to evict the Black family at the center of the case.[74] Additionally, the University of Chicago organized and aided property owners' associations in defending racially restrictive covenants and evicting African Americans from neighborhoods surrounding the school—ultimately spending $100,000 on such legal services from 1933 to 1947.[75]

Taken together, these factors effectively blocked home- and landownership for minoritized communities. Government action directly resulted in their historic inability to relocate to suburban developments.[76] Even if they were not impeded from moving into a suburban development via a racially restrictive covenant, minoritized families often could not obtain the financing necessary to purchase property thanks to discriminatory federal regulations.[77] At the same time, the redlining of inner-city neighborhoods hindered investment by restricting access to resources and capital, resulting in conditions conducive to gentrification.[78] The socioeconomic and legal factors restricting Black landownership in both rural and urban settings since the Civil War ultimately produced the communities defined by heirs property ownership structures or widespread susceptibility to gentrification.

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70. *See* Godsil, *supra* note 17, at 330–31.

71. *See* ROTHSTEIN, *supra* note 45, at 17–26, 36–37.

72. *Id.* at 101–02.

73. *Id.* at 103–05.

74. *Id.* at 103–04.

75. *Id.* at 105.

76. *See id.* at 59.

77. *See id.* at 64–66 (discussing the FHA's discriminatory policies).

78. *See* Godsil, *supra* note 17, at 331 (discussing the "central role of government in creating the deteriorating conditions that now lend themselves to gentrification"); *infra* Section I.C; *see also* Powell & Spencer, *supra* note 19, at 436–39 (discussing the racial dynamics of gentrification).

B. Heirs Property

Heirs property is "real property held in tenancy in common" for which there is no agreement binding all cotenants.[79] At least one of the cotenants must have acquired title from a living relative.[80] Additionally, either twenty percent or more of the cotenants must be relatives, or at least twenty percent or more of the property interests must be held by someone who acquired them from a relative.[81] Through the increasingly fragmented ownership of individual parcels of land, heirs property leads to inefficient use and involuntary exit, making it a leading cause of Black land loss.[82]

While the exact amount of land held in heirs property is unknown, estimates suggest that roughly forty-one percent of Black-owned land in the South is held in heirs property, equivalent to 1.6 million acres, or approximately $6.6 billion.[83] Further, while partition sales of heirs property are believed to be a leading cause of Black-owned land loss, this problem is not unique to the Black community.[84] Other low-income and minoritized communities experience land loss as a result of heirs property's unstable ownership structure.[85] Heirs property has the potential to result in grave consequences for the development of generational wealth and political capital, as landownership significantly contributes to economic security and generational wealth, the formation of social ties, and the promotion of democratic participation—especially within minoritized communities.[86]

1. Tenancies in Common

A tenancy in common is the default ownership structure for two or more individuals, or cotenants, who inherit real property under most state laws.[87] All inheritors acquire an undivided interest in the property

79. UNIF. PARTITION OF HEIRS PROP. ACT § 2(5) (UNIF. L. COMM'N 2010); *see infra* Subsection I.B.1 for a discussion of tenancies in common.

80. UNIF. PARTITION OF HEIRS PROP. ACT § 2(5) (UNIF. L. COMM'N 2010).

81. *Id.*

82. *See* UNIF. PARTITION OF HEIRS PROP. ACT prefatory note at 4–7 (UNIF. L. COMM'N 2010).

83. Mitchell et al., *supra* note 8, at 2; *see also* Thomas W. Mitchell, *Destabilizing the Normalization of Black Land Loss: A Critical Role for Legal Empiricism*, 2005 WIS. L. REV. 557, 576–79 (2005) (discussing the lack of reliable data) [hereinafter Mitchell, *Destabilizing the Normalization*].

84. *See* UNIF. PARTITION OF HEIRS PROP. ACT prefatory note at 5–6 (UNIF. L. COMM'N 2010).

85. *Id.*; *see* Mitchell et al., *supra* note 8, at 1–2, and accompanying text.

86. *See* Dagan & Heller, *supra* note 9, at 608; Mitchell, *From Reconstruction to Deconstruction*, *supra* note 9, at 532–44.

87. *Id.* at 1.

and are entitled to possess the whole.[88] Any tenant may alienate their own interest without the consent of others.[89] Upon death, their interests may be transferred via a will or the laws of intestacy, the default rules governing inheritance when there is no will.[90] Because of these default rules, any cotenant may bring outsiders into the ownership community via the sale or transfer of their interest.[91]

Every cotenant also has a universal right to file a lawsuit petitioning a court to partition the property, either in kind or by sale.[92] A partition in kind results in the physical division of the property in accordance with each cotenant's interest, so all cotenants retain an interest in their own parcel of the land.[93] A partition by sale involves the sale of the property, often at auction and for a price below market value, and sale proceeds are divided in accordance with each cotenant's interest.[94] State laws generally indicate a preference for the physical division of property through partitions in kind, as a "forced sale of a person's property . . . [is] an extraordinary remedy which undermines fundamental property rights."[95] Courts, however, order partition sales in almost every case—even where physical division of the property would be relatively easy, or when most cotenants vehemently oppose partition by sale—because they primarily consider potential economic benefits over noneconomic value of physical property.[96] Further, cotenants who seek to oppose a petition for partition generally bear some responsibility for attorney's fees and costs, which further dissuades cotenants from asserting their property rights.[97] Thus, it is relatively easy for real estate speculators to buy a small interest in

88. Mitchell, *From Reconstruction to Deconstruction*, *supra* note 9, at 512. As opposed to only having access to a percentage of the parcel equivalent to their fractional interest. *See id.* (comparing tenancies in common and joint tenancies).

89. UNIF. PARTITION OF HEIRS PROP. ACT prefatory note at 1 (UNIF. L. COMM'N 2010); *see* Mitchell, *From Reconstruction to Deconstruction*, *supra* note 9, at 512 ("[A] tenant in common may alienate her interest during life and at death without seeking the consent of her other cotenants.").

90. UNIF. PARTITION OF HEIRS PROP. ACT prefatory note at 1 (UNIF. L. COMM'N 2010); *see supra* note 12 and accompanying text (defining intestacy).

91. UNIF. PARTITION OF HEIRS PROP. ACT prefatory note at 1 (UNIF. L. COMM'N 2010); Mitchell, *From Reconstruction to Deconstruction*, *supra* note 9, at 513.

92. UNIF. PARTITION OF HEIRS PROP. ACT prefatory note at 1 (UNIF. L. COMM'N 2010); Mitchell, *From Reconstruction to Deconstruction*, *supra* note 9, at 513.

93. UNIF. PARTITION OF HEIRS PROP. ACT prefatory note at 1–2 (UNIF. L. COMM'N 2010); Mitchell, *From Reconstruction to Deconstruction*, *supra* note 9, at 513.

94. UNIF. PARTITION OF HEIRS PROP. ACT prefatory note at 2 (UNIF. L. COMM'N 2010); *see also* Mitchell, *From Reconstruction to Deconstruction*, *supra* note 9, at 513.

95. UNIF. PARTITION OF HEIRS PROP. ACT prefatory note at 2 (UNIF. L. COMM'N 2010).

96. *Id.*; *see also* Mitchell, *From Reconstruction to Deconstruction*, *supra* note 9, at 513–14.

97. UNIF. PARTITION OF HEIRS PROP. ACT prefatory note at 2 (UNIF. L. COMM'N 2010).

family-owned tenancies in common, petition for a partition by sale, and purchase the land at auction for a fraction of its market value.[98]

The default rules of tenancies in common also provide little to no structure for the allocation of property-management responsibilities.[99] Common-law rules establish the rights of ousted cotenants, the distribution of rental income, and the right to contribution or accounting for ongoing, necessary costs.[100] Still, the rules may not cover all repairs or investments in the property, and they vary among states.[101] Because of the lack of formal management structures, cotenants in tenancies in common may opt to avoid any expenses for the maintenance and management of the property—such as taxes, mortgages, and repairs—yet still retain their interest in the property.[102] As a result, the current system incentivizes free riding without guaranteeing compensation for cotenants who elect to cover maintenance costs.[103]

Because the default rules create opportunities for exploitation, tenancies in common are often regarded as one of the least stable forms of property ownership.[104] Those with economic means are able to contractually mitigate the lack of formal management structure or obtain professional help to reorganize ownership.[105] But those who cannot afford professional legal help or do not understand the legal structure remain at risk of exploitation under the default rules.[106]

2. Intestate Succession and Fragmentation in Ownership

Cotenants in tenancies in common—specifically low-income or minoritized cotenants—are particularly vulnerable to unstable ownership structures when the property is transferred across generations without a will via intestate succession.[107] Fragmented

98. *See id.* ("[A]n unscrupulous real estate speculator purchases a very small interest . . . seeking a court-ordered partition by sale. Often such a speculator submits the winning bid in the subsequent auction sale of the property even though the winning bid represents just a fraction of the property's market value.").

99. *See* Mitchell, *From Reconstruction to Deconstruction*, *supra* note 9, at 512.

100. *Id.* at 512–13.

101. *See id.*; Dagan & Heller, *supra* note 9, at 611–12, 612 nn.243–44 (discussing differences among jurisdictions).

102. Mitchell, *From Reconstruction to Deconstruction*, *supra* note 9, at 512–13.

103. *Id.*

104. UNIF. PARTITION OF HEIRS PROP. ACT prefatory note at 3 (UNIF. L. COMM'N 2010).

105. *See id.*

106. *See id.*

107. *See id.* ("This phenomenon is explained in large part by the fact that many low to middle-income property owners transfer their real property by intestate succession instead of by will, which is consistent with studies that have documented low will-making rates among Americans of more modest economic means.").

ownership results as shares become smaller and generations grow in size and number of cotenants.[108] Often composed of distant relatives, cotenants lack meaningful connections to overcome collective action problems, incentivize equitable division of responsibilities, or encourage efficient use of the property.[109] For example, in most states, if an individual with three children purchased property and later passed away without a will, the land would pass to their three children in a tenancy in common, and each would own an equal one-third share. If each child had two children, upon the death of the second generation of owners, each one-third share would split into two equal parts, so each member of the third generation would hold a one-sixth share, and so on. As the ownership pool grows, the likelihood of one or more cotenants selling their interest in the heirs property to a real estate speculator or independently petitioning for a partition also increases.[110]

In addition to potentially losing family land via partition sales, heirs property poses significant problems prior to partition. This form of ownership often results in a lack of clear record title, as those who hold interests may be geographically dispersed and heirs may be either unlocatable or unknown.[111] As a result, it is difficult to develop the land; owners often face challenges in obtaining financing because they cannot mortgage a fractional interest, and those who seek to develop or improve the land risk bearing the cost while other cotenants free ride.[112] It is also difficult for cotenants in tenancies in common to qualify for government aid in the wake of a natural disaster because such programs require clear title.[113]

3. The Uniform Partition of Heirs Property Act

The Uniform Partition of Heirs Property Act ("UPHPA") was written in 2010 to address land loss from court-ordered partition sales

108. *See* Mitchell, *From Reconstruction to Deconstruction*, *supra* note 9, at 517–18. The story of John Brown's property is illustrative: he purchased eighty acres of land in Mississippi in 1887. *Id.* at 518. By 1978, the property had been passed down through intestate succession as a tenancy in common, and there were sixty-seven heirs who had an interest in the property—and the smallest held a 1/19440 interest in the land. *Id.*

109. *See id.*

110. *See id.* at 517–19.

111. *See id.* at 518 ("And as the number of interests increases, it becomes difficult to locate and keep track of the owners . . . ."); Dagan & Heller, *supra* note 9, at 606 (explaining that the interests become more fractured with every generation).

112. *See* Mitchell, *From Reconstruction to Deconstruction*, *supra* note 9, at 518; Dagan & Heller, *supra* note 9, at 614 (explaining why most institutions will not provide loans on these fractional interests).

113. *See* UNIF. PARTITION OF HEIRS PROP. ACT prefatory note at 6 (UNIF. L. COMM'N 2010). For example, owners of interest in heirs property in New Orleans faced many difficulties in obtaining federal aid from HUD in the wake of Hurricane Katrina. *Id.*

of properties held in tenancies in common.[114] At present, it is the most comprehensive response to the harms created by fragmentation of land through intestate succession.[115] Twenty-one states, the District of Columbia, and the U.S. Virgin Islands have enacted the UPHPA in its exact or substantially similar form, and six states have introduced the bill.[116] The UPHPA only applies to property owned by tenants in common that is not subject to a written agreement between or among cotenants governing the ownership of the property.[117] It initiates three different reforms: a right of first refusal for cotenants when one seeks to initiate a partition by sale, consideration of factors other than market value when determining whether to order a partition in kind or by sale, and an open-market sale requirement.[118] This Subsection outlines these reforms in further detail.

The UPHPA ensures that cotenants receive the right of first refusal. Accordingly, when cotenants seek to initiate a partition action for land defined as heirs property under the UPHPA, they must post notice of the action on the property within ten days in order to protect the due process rights of the other cotenants.[119] The court must then determine the fair market value of the property as a whole by ordering an appraisal by a disinterested, licensed real estate appraiser assuming a sole ownership structure held in fee simple—that is, without taking into account that the land is fragmented under a tenancy in common—unless the evidentiary value of an appraisal is outweighed by its cost or the parties agree to another method of valuation.[120] After the appraisal, courts are required to give notice to all interested parties of both the appraisal and their legal right to file an objection within thirty days.[121] Courts must also conduct a hearing to determine fair market value of the property, which may be informed by the court-ordered appraisal and "any other evidence of value offered by the party."[122]

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114. UNIF. PARTITION OF HEIRS PROP. ACT (UNIF. L. COMM'N 2010).

115. *See* Mitchell, *Historic Partition Law Reform*, *supra* note 10, at 72.

116. *Partition of Heirs Property Act*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=50724584-e808-4255-bc5d-8ea4e588371d (last visited Sept. 27, 2023) [https://perma.cc/3J7V-FKP4]. States that have enacted the UPHPA include Alabama, Arkansas, California, Connecticut, Florida, Georgia, Hawaii, Illinois, Iowa, Maryland, Mississippi, Missouri, Montana, Nevada, New Mexico, New York, South Carolina, Texas, Utah, Virginia, and Washington. *Id.* States that have introduced the UPHPA include Kentucky, Idaho, Massachusetts, Michigan, New Jersey, and North Carolina. *Id.*

117. UNIF. PARTITION OF HEIRS PROP. ACT § 2(5)(A) (UNIF. L. COMM'N 2010).

118. Mitchell et al., *supra* note 8, at 2.

119. UNIF. PARTITION OF HEIRS PROP. ACT § 4 (UNIF. L. COMM'N 2010).

120. *Id.* § 6(a)-(d).

121. *Id.* § 6(e)-(f).

122. *Id.* § 6(f).

If the cotenant seeking partition requests partition by sale, fellow cotenants are granted a mandatory forty-five day period during which any other cotenant may elect to purchase the interests of the cotenant(s) requesting partition.[123] The purchase price is the fair market value of the entire parcel multiplied by the partitioning cotenant's fractional ownership.[124] The purchasing cotenant will then be granted at least a sixty-day period to issue payment for the interest(s) of the cotenant(s) who sought partition.[125] The UPHPA also provides for an additional twenty days during which other cotenants may pay for the petitioning cotenant's interest if the cotenant who sought to exercise the right of first refusal is unable to pay within the sixty-day period.[126] In addition to the right of first refusal, the UPHPA provides cotenants the option to purchase the interests of other cotenants who did not appear in court, thus giving active cotenants an option to consolidate ownership among those most willing to actively manage and maintain the property.[127]

As a second reform, the UPHPA requires that courts consider a holistic range of factors when determining whether to order a partition by sale or in kind. Specifically, it mandates that courts consider the following factors: the practicality of physically dividing the property among the cotenants; the potential for a significantly lower aggregate market value of the individual parcels, as opposed to the value of the property sold as a whole; evidence of the "collective duration of ownership or possession" by cotenants and their predecessors; sentimental attachment to the property; the lawful use of the property; the cotenants' contributions to taxes, insurance, and other expenses; and any other relevant factor(s).[128] Per the UPHPA, no single factor should be considered dispositive without "weighing the totality of all relevant factors and circumstances."[129] If other cotenants do not purchase the petitioning cotenant's interest, the UPHPA requires a partition in kind unless it will "result in [great] [manifest] prejudice to the cotenants as a group."[130] These factors are designed to ensure that each cotenant is treated fairly and equitably in a partition action to prevent adverse consequences.[131]

123. *Id.* § 7(b).
124. *Id.* § 7(c).
125. *Id.* § 7(e).
126. *Id.* § 7(f).
127. *Id.* § 7(g)-(h).
128. *Id.* § 9(a).
129. *Id.* § 9(b).
130. *Id.* § 8(a).
131. UNIF. PARTITION OF HEIRS PROP. ACT prefatory note at 8 (UNIF. L. COMM'N 2010).

As a final reform, where a court has ordered a sale, the UPHPA requires that it be an open-market sale. The property must be sold at a price set by the court during its valuation of the property, unless it would be more "economically advantageous" to sell the property via sealed bids or an auction.[132] This helps ensure that the property is not sold off to an anonymous buyer for a significantly lower price.

The sponsors and drafters of the UPHPA have also identified additional strategies to mitigate vulnerabilities created by heirs property. These strategies include increasing access to estate-planning resources, subsidizing legal services for those with an interest in heirs property, providing landowners with technical-assistance programs, and creating family trees to identify those with interests in the property.[133]

C. Gentrification

Gentrification generally entails a process by which outsiders move into an area and develop it, with new neighborhood investment resulting in higher property values and integration.[134] Neighborhoods susceptible to gentrification are generally characterized by low property values, high crime rates, deficient amenities, deteriorating housing, substandard schools, high percentages of renters as compared to homeowners, proximity to employment centers, diverse cultural and street life, and racial and ethnic diversity.[135] Decades of racially discriminatory housing practices have resulted in low-income, minoritized communities with many of these characteristics.[136] Thus, these neighborhoods are highly susceptible to gentrification, and their residents are often disproportionately affected by displacement pressures that force involuntary exit, often through eviction.[137]

1. Displacement

Some view gentrification as a positive force capable of revitalizing a community and promoting economic growth, arguing that it "allows for the development of land based on the market's needs."[138] These advocates caution that entrenched resistance to development

132. UNIF. PARTITION OF HEIRS PROP. ACT § 10(a)-(b) (UNIF. L. COMM'N 2010).

133. *See* Mitchell et al., *supra* note 8, at 3.

134. *See* Godsil, *supra* note 17, at 319.

135. *Id.* at 325–26.

136. *See supra* Subsection I.A.2.

137. *See* Godsil, *supra* note 17, at 325–26.

138. Greyson Havens-Morris & Walter E. Block, *Moving Forward, Gentrification*, 36 PROB. & PROP. 24, 26 (2022).

could result in inefficient use that prevents the entire community from reaping economic benefits.[139] For those confident that a rising tide lifts all boats, gentrification may not look so bad.

But the benefits of economic development—increased income, decreased poverty, and reduced crime—are not always shared with long-term residents who cannot afford the rising cost of living or feel alienated by cultural shifts in the community.[140] Displacement of such residents comes in different forms: direct displacement occurs when rent hikes, building renovations, and rising property taxes force residents to move, while exclusionary displacement occurs when housing choices are limited and low-income or minoritized families are unable to enter economically developed areas.[141] Further, displacement pressures increase the likelihood of involuntary exit by reducing access to the support services that residents rely on.[142] Even if gentrification does not directly displace residents, it can uproot culturally significant institutions within a neighborhood, such as churches and locally owned businesses, thereby disrupting community support systems.[143] This disruption makes the community even more susceptible to outsiders seeking to drive cycles of "economic development" that force involuntary exit and thus perpetuates barriers to collective action and communal bargaining.[144]

2. Intra-neighborhood Fragmentation

We can compare the ownership of neighborhoods susceptible to gentrification to the ownership of heirs property. In heirs property, many cotenants share an interest in the same, highly fragmented parcel. Similarly, owners and tenants in neighborhoods susceptible to gentrification share individual interests within their community, and the neighborhood can be viewed as the ultimate "parcel." In the gentrification context, scholars have discussed this fragmentation as a barrier to economic development and efficient use of land;[145] when a neighborhood is broken up into "unusably small parcels," it can result

139. *Id.*

140. *Gentrification and Neighborhood Revitalization: What's the Difference?*, NAT'L LOW INCOME HOUS. COAL. (Apr. 5, 2019), https://nlihc.org/resource/gentrification-and-neighborhood-revitalization-whats-difference [https://perma.cc/8D6T-AY53] [hereinafter *Gentrification and Neighborhood Revitalization*]; Godsil, *supra* note 17, at 320.

141. *Gentrification and Neighborhood Revitalization*, *supra* note 140.

142. *Id.*

143. *Id.*

144. *Id.*

145. Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465, 1468 (2008).

in wasteful underuse, much like a parcel of heirs property that cotenants are unable to develop or maintain due to collective action barriers.[146]

Beyond the implications for economic development, when fragmentation in ownership is paired with displacement pressures or weak social ties, individual owners and tenants are vulnerable to outside developers. Much like an investor who purchases a parcel of heirs property to force a sale, higher-income outsiders can enter the community with the purchase of an individual piece of land within the neighborhood parcel.[147] While these outsiders may not be able to force something equivalent to a partition sale because they do not hold an interest in the other individual lots,[148] their entry ultimately creates and perpetuates displacement pressures.[149]

3. Proposed Solutions

Various solutions have been proposed to address gentrification-based displacement, but no flexible, comprehensive response has been widely adopted by local governments.[150] For the purposes of this Note, I divide existing antigentrification measures in two categories: land-use controls seeking to reduce gentrification's harms on whole communities and protections of individual property rights seeking to promote individual use.[151]

Those residents seeking a community-wide approach may consider using zoning or permit requirements to protect community interests, guarantee a certain amount of affordable housing, or prevent significant changes in neighborhood composition or aesthetics.[152] Other land-use responses include community land trusts ("CLTs"), community benefits agreements ("CBAs"), regulation of short-term rentals, vacancy taxes, and opportunity zones.[153] CLTs are nonprofits that own land and use it for low-income housing or other community purposes to guarantee that the property remains affordable to local

146. *See supra* Subsection I.B.2.

147. *See* Powell & Spencer, *supra* note 19, at 435–36; *supra* note 91 and accompanying text.

148. But note that developers could seek to use eminent domain instead. *See* Heller & Hills, *supra* note 145, at 1474.

149. *See Gentrification and Neighborhood Revitalization*, *supra* note 140.

150. *See id.* (describing different local policy solutions to prevent displacement).

151. These "trends" are imperfect, non-exclusive, slightly overlapping categories used for the sake of highlighting general trends and shortcomings of the existing responses.

152. Godsil, *supra* note 17, at 333. Zoning can allow for aesthetic restrictions to preserve neighborhood character, and it can mandate different density, size, or use restrictions—such as providing for more multifamily residences or restricting businesses allowed in residential zones. *See id.* at 328–29.

153. *Id.*; *Gentrification and Neighborhood Revitalization*, *supra* note 140.

residents.[154] CLTs can sell land or homes to low-income homeowners but retain the right to repurchase the home once the homeowner moves.[155] CBAs allow communities to contract with developers to guarantee that residents retain influence over development projects within their community.[156] Short-term rentals tend to correlate with gentrification in that they result in fewer long-term rental units, higher rents, and higher property values—creating displacement pressure and potentially leading to direct displacement.[157] As a result, some have proposed taxing these units or implementing regulations to limit their creation and use.[158] Vacancy taxes increase the cost of "speculation," or the practice of purchasing cheap land in areas susceptible to gentrification and waiting for a profitable development opportunity to arise.[159] Opportunity zones provide tax benefits for developers and businesses to invest in low-income or struggling neighborhoods.[160]

On the other hand, antigentrification measures that focus on individuals include extending vouchers to cover increased rental costs for long-term residents and local businesses, constructing affordable housing, implementing rent controls, and providing low-cost guaranteed loans to allow for home purchases.[161] Further, Small Area Fair Market Rents, which are based on rents within a ZIP code, aim to ensure that housing vouchers' values align with the neighborhood rental market to allow long-term residents to remain in higher-income, gentrified areas.[162] Additionally, although Low-Income Housing Tax Credits have a limit of thirty years, many states have extended the length of these federal credits to prevent the cost of housing from converting to the market rate.[163] Just-cause eviction ordinances and tenant options to purchase also protect the rights of existing tenants who may be negatively impacted or displaced by rent increases from gentrification.[164] Just-cause eviction ordinances prevent displacement of renters when landlords decide to not renew a lease contract by stipulating that landlords may only evict if the tenant violates the lease.[165] Tenant options to purchase address similar concerns by

154. *Gentrification and Neighborhood Revitalization*, *supra* note 140.
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *See id.*
165. *Id.*

creating rights of first refusal for renters when landlords attempt to sell or convert residential units.[166]

D. Fragmentation and the Tragedy of the Anticommons

The anticommons is a phenomenon that occurs when multiple owners seek to block each other from exploiting a property's resources, resulting in underuse.[167] While anticommons need not always be "tragedies,"[168] underuse is often inefficient and results in social harms.[169]

The anticommons phenomenon is the natural counterpart to—and often a result of efforts to correct—the "tragedy of the commons," as recognized by Garrett Hardin.[170] A tragedy of the commons occurs when individuals acting in their own rational self-interest overuse a common resource to maximize their own wealth.[171] Generally viewed as a justification for private property, the primary responses to the tragedy of the commons are to either regulate, privatize, or cooperate (the last of which is generally only successful in small communities).[172] These responses aim to reduce consumption of the resources, but can inadvertently result in the fragmentation of ownership characteristic of tragedies of the anticommons.[173]

Like the tragedy of the commons, private intervention, state intervention, or community cooperation can correct the tragedy of the anticommons.[174] Private intervention to reduce fragmented ownership consists of private contracting—often by developers—to "assemble" land, which requires the consent of the landowners who hold the fragmented property.[175] State regulation of fragmented ownership ranges from hybrid property regimes, such as licensing requirements,

166. *Id.*

167. *See* Heller, *Tragedy of the Anticommons: Introduction*, *supra* note 10, at 23.

168. For example, conservation easements intentionally fragment ownership in order to promote environmental preservation. *See id.* at 25. But note that Heller asserts that these conservation easements will likely result in tragedies of the anticommons in the future when the protected land is necessary for development. *Id.*

169. For instance, developers of prescription drugs may be unable to produce lifesaving medication because of the multitude of patents they have to purchase in order to produce the drugs; U.S. airports are generally unable to create new runways because multiple landowners hold the necessary land and effectively block such projects. *See id.* at 6–7.

170. Garett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244 (1968).

171. *See* Heller, *Tragedy of the Anticommons: Introduction*, *supra* note 10, at 7.

172. *Id.*

173. *See id.* at 8–9.

174. *See id.* at 11–12; Heller & Hills, *supra* note 145, at 1468.

175. *See* Heller & Hills, *supra* note 145, at 1468, 1472–74.

to expropriation of fragmented rights through eminent domain.[176] A controversial process, eminent domain allows the government to acquire private land for public use so long as it provides just compensation—often fair market value—to the landowners.[177]

According to Professor Heller, community cooperation is the most effective way to overcome tragedies of the anticommons, particularly when "close-knit" owners organize.[178] But regulators or private parties can also facilitate and encourage cooperation through various mechanisms designed to overcome collective action problems.[179] In *The Liberal Commons*, Professors Dagan and Heller suggest a theoretical framework for analyzing and improving commons regimes.[180] They argue that both too little and too much privatization can be detrimental and suggest promoting community ownership through social norms operating alongside background legal rules in order to discourage fragmentation.[181] To prevent free riding, Professors Dagan and Heller discourage exploitation and overuse to the detriment of others and instead encourage communal decisionmaking through infrastructure to allow individuals to exit without destroying commonly held property.[182]

1. Land Assembly Districts

In a 2008 article, Professors Heller and Hills proposed a new mechanism to promote community cooperation and address inefficient underuse stemming from fragmented landownership: the Land Assembly District ("LAD").[183] Under a LAD, owners of small parcels that comprise a larger, fragmented area of land are able to collectively decide, via a majority vote, whether to assemble their property into a single parcel in anticipation of negotiations with or a sale to a developer for compensation proportional to each owner's share.[184] The majority

176. *See id.* at 1467–68; Heller, *Tragedy of the Anticommons: Introduction*, *supra* note 10, at 18.

177. *See* Heller & Hills, *supra* note 145, at 1474–75.

178. *See* Heller, *Tragedy of the Anticommons: Introduction*, *supra* note 10, at 18.

179. Heller & Hills, *supra* note 145, at 1470. For example, corporations, partnerships, trusts, condominiums, gas and oil unitization, class actions, business improvement districts ("BIDs"), community development corporations ("CDCs"), and marriages are all forms of group property or organizations designed to resolve problems stemming from the commons and anticommons. *See id.* at 1472, 1514.

180. Dagan & Heller, *supra* note 9, at 554–55.

181. *Id.* at 564–66, 572–79.

182. *See id.*

183. Heller & Hills, *supra* note 145, at 1467–68.

184. *See id.* at 1469–71.

vote thus has the power to bind other owners.[185] This system allows interested parties to determine whether a developer's price is sufficient by referencing their own subjective valuation of the land, instead of being forced to sell by a private developer secretly purchasing property or by a judge in a partition action.[186]

Any resident of a significantly fragmented parcel or outside assembler can propose a LAD to city planners, detailing its boundaries, uses, and board of directors in accordance with local legislation.[187] City planners can establish rules regarding the boundary between LADs and eminent domain,[188] and approve LADs by certifying their necessity to resolve problems of fragmentation.[189] Once a LAD is approved, the assembler must give notice to all affected landowners and residents, hold town halls for neighbors to hear the case for land assembly, and allow neighbors to vote (most likely based on the relative size of each neighbor's property) whether or not to approve the LAD.[190]

LADs only have jurisdiction over land that is significantly fragmented among several owners for the sake of "redevelopment of economically or aesthetically underperforming neighborhoods."[191] Collectively, the residents within a LAD have broad discretion to determine a total price to be apportioned based on relative property size, negotiate to sell the neighborhood they represent, shop for proposals, and accept or reject developers' proposals via a secondary vote.[192]

Finally, in accordance with Professors Heller and Dagan's emphasis on voluntary exit, all landowners within the LAD have the right to opt out of the proposal, even if it was approved by a majority vote.[193] Dissenters cannot retain a physical interest in their property, but they can demand that their property be purchased through eminent domain.[194] In this case, dissenters would receive fair market value instead of the agreed-upon LAD price.[195] As a result, though a majority

185. *See id.* at 1496.

186. *See id.* at 1469–71.

187. For more on who could initiate a LAD, see *id.* at 1488–89.

188. Heller and Hills assert that land assembly for certain other purposes, such as developing transportation infrastructure, should remain within the scope of eminent domain, while LADs should be used to tackle fragmentation in areas that are the target of economic development efforts. *Id.* at 1489–90.

189. *See id.* at 1489.

190. *See id.* at 1491–92.

191. *See id.* at 1492–93.

192. *See id.* at 1492–96.

193. *See id.* at 1496.

194. *See id.*

195. *See id.*

vote might bind the whole, individual dissenters retain some degree of agency.

II. ANALYSIS

The harms of heirs property and gentrification are the result of fragmented ownership—either of single parcels of land or entire neighborhoods. Individuals who possess increasingly fractional interests in heirs property frequently lack the resources to independently maintain or develop the property.[196] Moreover, they encounter collective action barriers in consolidating property interests or making improvements jointly.[197] As the number of cotenants in a parcel of heirs property increases, so do the odds that one will seek to exit through a forced partition sale, which may be contrary to the other cotenants' desires.[198]

Analogous patterns play out in neighborhoods susceptible to gentrification. These neighborhoods may underutilize the community's resources due to internal and external pressures, affecting the residents' quality of life and leading to involuntary exit.[199] But blocking development by encouraging holdouts also reflects a form of fragmentation resulting in inefficiency and underuse that ultimately prevents residents from capitalizing on the resources of their community.[200] While blocking economic development may equally result in underutilization of community resources, development itself can be harmful due to the reality of involuntary exit; long-term residents of newly gentrified areas are often pushed out and thus do not reap the subsequent economic benefits.[201] The inefficient use and involuntary exit resulting from fragmentation of both heirs property and neighborhoods susceptible to gentrification should be viewed as tragedies of the anticommons.[202]

Various proposals attempt to address the harms resulting from each type of fragmentation, including a uniform act addressing heirs

196. *See supra* notes 111–112 and accompanying text.

197. *See supra* Section I.B.

198. *See supra* Section I.B.

199. Such as crime rates, lack of trust among neighbors, or lack of capital due to historic underinvestment in minoritized communities. *See supra* Subsection I.A.2 and Section I.C.

200. *See* Heller & Hills, *supra* note 145, at 1469, 1472–82.

201. *See supra* Section I.C.

202. *See* Heller, *Tragedy of the Anticommons: Marx to Markets*, *supra* note 10, at 685–87 (describing heirs property issues among Indigenous communities as a tragedy of the anticommons). *But see* Yun-chien Chang, *Tenancy in "Anticommons"? A Theoretical and Empirical Analysis of Co-ownership*, 4 J. LEGAL ANALYSIS 515, 522–23 (2012) (asserting that tenancies in anticommons resulting in the sale of Black-owned farmland are not inherently tragic, as the sale ends inefficient use).

property and an array of land use regulations targeting gentrification-induced involuntary exit. Solutions to both problems, however, fail to address the root cause of instability: fragmentation. Viewing both issues through the broader lens of the tragedy of the anticommons clarifies the proposed solutions' weaknesses.[203]

This Section uses the lens of the tragedy of the anticommons to analyze the proposed solutions to both heirs property and gentrification. First, it details three key shortcomings within the UPHPA and provides a case study of these shortcomings through an analysis of *Laurel Grove, LLC v. Sullivan*.[204] Next, it outlines limitations of existing solutions designed to reduce or prevent gentrification-induced involuntary exit. Finally, it analyzes the applicability of traditional and novel solutions to the tragedy of the anticommons to heirs property and gentrification.

A. Resolving Heirs Property Disputes: The Limitations of the UPHPA

The UPHPA provides a set of mandatory procedures for courts resolving heirs property disputes.[205] It is a valuable first step towards addressing involuntary exit and fragmentation, as it requires greater notice,[206] creates a "right of first refusal" for cotenants via a buyout provision,[207] and encourages judges to consider noneconomic factors when determining whether to order a partition in kind or by sale.[208] The UPHPA fails, however, to account for certain significant barriers: the potential cost of executing the buyout provision, the burden of demonstrating the "manifest prejudice" required to block a partition by sale, and the inaccessibility and expense of legal representation for those who perhaps need it most—all of which demonstrate that, in present form, the UPHPA is merely a band-aid on a much deeper wound.[209]

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203. *See supra* Subsections I.B.3, I.C.3.

204. No. 2019-001518, 2022 WL 1563162 (S.C. Ct. App. May 18, 2022).

205. *See* Morton v. Pitts, 851 S.E.2d 141 (Ga. Ct. App. 2020) (trial court was required to grant appraisal under UPHPA); Faison v. Faison, 811 S.E.2d 431 (Ga. Ct. App. 2018) (trial court was required to follow procedure of UPHPA and grant appraisal); Matabane v. Whatley, 873 S.E.2d 730 (Ga. Ct. App. 2022) (trial court was required to consider whether a partition in kind was appropriate under UPHPA before dismissing petition).

206. But not perfect notice, as heirs may be widely geographically dispersed. *See* Heidi Kurniawan, Comment, *Beyond Institutions: Analyzing Heirs' Property Legal Issues and Remedies Through a Black History Lens*, 22 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 148, 163 (2022).

207. UNIF. PARTITION OF HEIRS PROP. ACT § 7 (UNIF. L. COMM'N 2010).

208. *Id.* §§ 8-9.

209. *Id.* § 8.

1. The Buyout Provision

When a cotenant requests a partition by sale, any other cotenant (or group of cotenants) can purchase the requesting cotenant's share, in cash, for the proportional amount of the entire parcel's fair market value.[210] Cotenants who seek to retain an interest in the land are thus theoretically able to use this as a defense against parties who seek to purchase and develop the land.[211] The cost of purchasing the fractional interest at fair market value will almost certainly be less than the cost of bidding on the entire parcel in a partition by sale.[212] Moreover, this provision has the potential to reduce property fragmentation by consolidating fractional interests.[213]

The UPHPA fails, however, to account for cotenants who lack the financial resources to purchase the fractional interest at fair market value, which can require significant capital.[214] Rather, it assumes that cotenants "have sufficient cash on hand to execute the buyout provision," or that "cotenants are able and willing to work together to pool their liquid assets."[215] To the contrary, the instability of heirs property is often most detrimental to low-income owners, and the lack of clear title makes it incredibly difficult to obtain financing for the property.[216] Further, the UPHPA provisions relating to property appraisals and fair market value determinations are designed to prevent the undervaluation of property.[217] While these provisions are intended to protect cotenants, they increase buyout prices and ultimately leave low-income owners vulnerable—a developer could purchase an interest and then request a partition by sale, knowing that the cotenants cannot afford to execute the buyout provision.[218] Ultimately, unless this is addressed, the UPHPA will remain flawed because the buyout provision is not always a feasible solution for the population that needs it the most.

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210. *Id.* § 7.

211. *See* Kurniawan, *supra* note 206, at 160.

212. *See* Avanthi Cole, Note, *For the "Wealthy and Legally Savvy": The Weaknesses of the Uniform Partition of Heirs Property Act as Applied to Low-Income Black Heirs Property Owners*, 11 COLUM. J. RACE & L. 343, 360, 362 (2021).

213. *See id.*

214. *See id.* at 360–63; UNIF. PARTITION OF HEIRS PROP. ACT (UNIF. L. COMM'N 2010).

215. Cole, *supra* note 212, at 361–62.

216. *See supra* Subsection I.B.2; *see also* Kurniawan, *supra* note 206, at 162; Cole, *supra* note 212, at 361.

217. UNIF. PARTITION OF HEIRS PROP. ACT §§ 6, 10, prefatory note at 2 (UNIF. L. COMM'N 2010).

218. *See* Cole, *supra* note 212, at 362 (citing Mitchell, *Destabilizing the Normalization*, *supra* note 83, at 568 n.39).

2. "Manifest Prejudice"

The UPHPA declares that a court shall order a partition in kind unless doing so will result in "great," "manifest" prejudice.[219] Per the UPHPA, courts should consider seven factors in a totality of the circumstances analysis to gauge whether "manifest prejudice" will result from a partition in kind.[220] Demonstrating that these factors counsel against a finding of manifest prejudice can be difficult for cotenants seeking partition, however. [221] The nature of heirs property often thwarts productive use, documentation of intestate transfers, and payment of taxes and maintenance fees—all of which may push a court towards a partition by sale.[222] Further, courts continue to order partition sales without providing a detailed explanation of the factors that may cause "great" or "manifest" prejudice to the cotenants—despite the UPHPA labeling these sales as "extraordinary remed[ies] which undermine[ ] fundamental property rights."[223] This ultimately calls into question the efficacy of the UPHPA in preventing involuntary exit through forced sales.

3. Inaccessibility and Expense of Representation

In addition to the issues presented by the buyout and partition-in-kind provisions, the UPHPA fails to effectively address the ongoing fragmentation of heirs property through intestate succession and the lack of access to legal resources among those holding interests.[224] The

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219. UNIF. PARTITION OF HEIRS PROP. ACT § 8 (UNIF. L. COMM'N 2010).

220. These factors are: the practicality of physically dividing the property among the cotenants; the potential for a significantly lower market value of the individual parcels, as opposed to if the property were sold as a whole; evidence of the "collective duration of ownership or possession" by a cotenant and their predecessors; sentimental attachment to the property; the lawful use of the property; the cotenants' contributions to taxes, insurance, and other expenses; and any other relevant factor(s). *Id.* § 9(a)(1)-(7); *see supra* text accompanying notes 128–129.

221. *See* Cole, *supra* note 212, at 366.

222. *See id.*

223. UNIF. PARTITION OF HEIRS PROP. ACT, prefatory note at 2 (UNIF. L. COMM'N 2010); *see* Laurel Grove, LLC v. Sullivan, No. 2019-001518, 2022 WL 1563162, at *1 (S.C. Ct. App. May 18, 2022) (affirming the master-in-equity's order which, among other matters, refused to order partition in kind and ordered "the Property to be sold at auction without a hearing if the Property failed to sell on the open market within ninety days"); *see also* Stephens v. Claridy, 346 So. 3d 519, 523 (Ala. 2021) ("§ 35-6A-9(a) [of the Code of Alabama, which lists the relevant factors,] does not require a circuit court to provide a detailed written analysis of each factor, nor does it require a written analysis regarding whether a partition in kind would result in great prejudice to any particular cotenant."); Manson v. McNeil, No. 1210006, 2022 WL 3700593 (Ala. Aug. 26, 2022). *But see* Bruhn Farms Joint Venture v. Kuehl, No. 21-1707, 2022 WL 5078275 (Iowa Ct. App. Oct. 5, 2022) (affirming partition in kind); Howard v. Todd, CV 22-55-M-DWM, 2022 WL 1044972 (D. Mont. Apr. 7, 2022) (determining a partition in kind petition by analyzing various factors in detail).

224. *See* Cole, *supra* note 212, at 367–69 (discussing problems with legal fees); Kurniawan, *supra* note 206, at 162–63 (same).

drafters of the UPHPA recognized that additional solutions could further mitigate the inefficiencies and harms resulting from heirs property, such as providing access to estate-planning resources, legal-service subsidies, technical-assistance programs, and family trees.[225] The Act itself, though, does not address the root causes of fragmentation that have spanned generations.[226] Rather, it prioritizes the procedural rights of cotenants who risk losing their property interests upon the filing of a partition action.[227] The UPHPA's treatment of legal fees, which can be insurmountable for low-income owners, further illustrates this oversight.[228] Even if owners recover the fair market value of their property or retain an interest via a partition in kind, legal fees may deplete any remaining benefit.[229] Moreover, many states allocate the initiating cotenant's fees to the cotenants who unsuccessfully resisted the partition action[230]—another issue the UPHPA fails to address.[231]

4. *Laurel Grove, LLC v. Sullivan*

The case *Laurel Grove, LLC v. Sullivan* is illustrative of the UPHPA's shortcomings.[232] Here, the South Carolina Court of Appeals held that the appointed special master correctly found that a partition in kind would result in manifest injury to the cotenants under the UPHPA as adopted.[233] Yet, the court failed to elaborate on any of the UPHPA's factors.[234] This decision allowed Laurel Grove, a local real estate developer who initiated the partition action, to purchase the property in October 2022 for $98,141,[235] an amount significantly less than the cotenant's $165,000 appraisal of the property.[236] Moreover, this sale disregarded the cotenants' wishes to divide the land in a partition in kind.[237] On appeal, the cotenants proceeded pro se, while

225. *See* Mitchell et al., *supra* note 8.

226. *See id.* (identifying additional legal strategies for correcting fragmentation via heirs property).

227. *See* UNIF. PARTITION OF HEIRS PROP. ACT prefatory note at 3 (UNIF. L. COMM'N 2010) (discussing how the UPHPA seeks to remedy procedural abuses).

228. *See* Cole, *supra* note 212, at 367–69.

229. *See id.*

230. UNIF. PARTITION OF HEIRS PROP. ACT prefatory note at 2 (UNIF. L. COMM'N 2010).

231. Cole, *supra* note 212, at 368.

232. No. 2019-001518, 2022 WL 1563162 (S.C. Ct. App. May 18, 2022).

233. *Id.* at *1.

234. *Id.*

235. Order of Distribution and Attorney's Fees at 4, *Laurel Grove*, 2022 WL 1563162 (No. 2018-CP-23-00883).

236. Objection to the Appraisal at 1–2, *Laurel Grove*, 2022 WL 1563162 (No. 2018-CP-23-00883).

237. *Id.*; Appellants' Initial Reply Brief at 4–6, *Laurel Grove*, 2022 WL 1563162 (No. 2019-001518).

Laurel Grove was represented by an attorney from Fox Rothschild, a large and well-resourced firm.[238] Further, on December 13, 2022, the Court ordered that the proceeds from the partition by sale cover the costs of the dispute, including the appraiser's fee and $35,717 in Laurel Grove's attorney's fees.[239]

Not only was the property in *Laurel Grove* subject to partition by sale against the cotenants' wishes and for a price less than their appraisal, but the cotenants also lacked legal representation, appealed pro se, and were ultimately forced to pay the opposing party's attorney's fees.[240] This case reflects the inherent ambiguities of the UPHPA's "manifest prejudice" standard that guides court decisions to grant partitions in kind or partitions by sale.[241] Furthermore, it underscores the overarching problem of the UPHPA's tendency toward repeated, expensive, and complex interactions with the court system for cotenants who hold heirs-property interests and seek to clear title.[242] In other words, those who are most susceptible to the harms of heirs property often lack sufficient financial resources to take advantage of their legal rights under the UPHPA, and this fundamental barrier to participation benefits opposing parties who, like Laurel Grove, can afford sophisticated representation.[243] This is particularly problematic because the UPHPA was established to address the harmful effects of heirs property, but its ability to do so effectively is hindered by its inaccessibility to the people experiencing involuntary exit.[244]

B. Reducing Gentrification-Induced Involuntary Exit

Existing antigentrification solutions have not been comprehensively implemented by private actors nor local, state, and national governments.[245] This lack of a cohesive response is partly explained by the fact that each local community is unique and has different needs. Still, the current legal treatment of gentrification generally assumes that economic development should take precedence, and local measures can subsequently correct any resulting involuntary exit and displacement.[246] When combined with the lack of baseline

238. *See Laurel Grove*, 2022 WL 1563162.

239. Order of Distribution and Attorney's Fees, *supra* note 235, at 7.

240. *See id.* at 4, 7; Objection to the Appraisal, *supra* note 236, at 1–2; Appellants' Initial Reply Brief, *supra* note 237, at 4–6, 8.

241. *See supra* Subsection II.A.2.

242. *See supra* Subsection II.A.3.

243. *See supra* Subsection II.A.3.

244. UNIF. PARTITION OF HEIRS PROP. ACT prefatory note at 1 (UNIF. L. COMM'N 2010).

245. *See Gentrification and Neighborhood Revitalization*, *supra* note 140.

246. *See* Havens-Morris & Block, *supra* note 139, at 28.

protections for all low-income and minoritized neighborhoods, this prioritization of capital interests undermines community ownership and autonomy. Further, the existing solutions are inadequate to fully remedy involuntary exit: land-use regulations appear best suited to *prevent* development from inducing displacement, but they are subject to majoritarian influences that may prioritize economic development over preventing displacement.[247] Individual protections, on the other hand, are generally *responses* to ongoing economic development, focusing on keeping rents down and mitigating *already-existing* displacement pressures.[248] Without baseline protections, proposed responses to gentrification skirt the larger, underlying problem and perpetuate a cycle of development and displacement.

1. Land-Use Controls

Land-use controls may reduce and prevent the harms of involuntary exit by precluding developers from entering communities and by promoting uses of community land that align with residents' interests and needs.[249] Zoning, for example, allows municipalities to protect against certain changes that may not align with the neighborhood's interests or city plan, while taxes and regulations on short-term rentals can prevent neighborhood costs from skyrocketing.[250] These controls, however, may be subject to majoritarian influence by populations less susceptible to gentrification, who generally have greater political influence.[251] For example, the zoning process is typically dominated by middle- or upper-middle-class residents whose neighborhoods are not typically targets of gentrification.[252] Further, some land-use controls may prove to be ineffective, as Professor Godsil discusses, because gentrification does not necessarily result in a change in property use; rather, it may simply result in a change in the *user*.[253]

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247. *See* Godsil, *supra* note 17, at 333–34.

248. *See Gentrification and Neighborhood Revitalization*, *supra* note 140 (highlighting the ability of rent controls and Small Area Fair Market Rents to minimize displacement by placing a cap on rents).

249. *See* Godsil, *supra* note 17, at 333 (discussing the ability of residents to regulate land uses and aesthetics they feel strongly about through zoning); *Gentrification and Neighborhood Revitalization*, *supra* note 140.

250. Godsil, *supra* note 17, at 333; *Gentrification and Neighborhood Revitalization*, *supra* note 140.

251. Godsil, *supra* note 17, at 333–34.

252. *Id.*

253. *Id.*

Like zoning, CLTs and CBAs are land-use controls that facilitate community planning and cooperation.[254] These solutions tend to be applied by private actors as opposed to state or local governments; CLTs are nonprofits that may receive government subsidies or donations, and CBAs involve contracting between developers and community groups that may be public or private.[255] Notably, CLTs can be particularly expensive to implement, and CBAs may require a great deal of social or political capital on the part of the community to overcome collective action barriers to contracting as a group.[256] As such, these solutions may be inaccessible to the low-income, minoritized neighborhoods that need them most.

2. Individual Protections

Individual protections generally seek to mitigate rising costs to prevent displacement in the first place or, at the very least, to provide alternative, affordable housing to those most vulnerable to displacement. For example, vouchers, construction of affordable housing, rent controls, low-cost guaranteed loans, Small Area Fair Market Rents, and Low-Income Housing Tax Credits all aim to reduce the cost of living for certain individuals.[257] Additionally, just-cause eviction ordinances and tenant options to purchase seek to prevent involuntary exit by creating legal rights for those who wish to stay despite landlords' decisions to exit voluntarily.[258] These solutions, while certainly important to protect victims of involuntary displacement, operate similarly to the UPHPA in the context of heirs property: a band-aid on the negative effects that does little to address the root cause.[259] While it is true that permitting those susceptible to involuntary exit to remain in the community may allow them to benefit from economic development, placing restrictions on the cost of living and protecting tenant rights alone may be insufficient in curing the fragmentation that actually caused the vulnerability.[260] This approach overlooks the value of communal decisionmaking, which could reduce collective action problems and power imbalances in the first place.[261]

254. *Gentrification and Neighborhood Revitalization*, *supra* note 140.
255. *Id.*
256. *Id.*; *see infra* Subsection II.C.1 (discussing the shortcomings of private contracting).
257. *Gentrification and Neighborhood Revitalization*, *supra* note 140.
258. *Id.*
259. *See supra* Subsection I.C.3.
260. *See supra* Section I.C.
261. *See supra* notes 178–182 and accompanying text.

C. An Anticommons Approach to Heirs Property and Gentrification

Although distinct phenomena, fragmentation of both heirs property and urban neighborhoods undergoing gentrification may inflict similar harms of inefficient use and involuntary exit. The literature surrounding the tragedy of the anticommons provides an interesting point of convergence, one that could provide a better perspective on both issues and allow for more sustainable solutions.[262] Existing solutions to the tragedy of the anticommons—private contracting, eminent domain, and a middle ground encouraging communal decisionmaking—provide valuable insight when applied to heirs property and gentrification.[263]

1. Private Contracting

Private contracting gives individual owners the opportunity to bargain, but often presents a collective action problem: owners have the ability to hold out for higher prices, potentially resulting in either overpayment for less valuable resources or underuse of valuable resources.[264] In the context of heirs property, relying entirely on private contracting would allow cotenants to bargain with each other so that whoever valued the parcel most could (theoretically) compensate the others to use the property.[265] In communities susceptible to gentrification, similar bargaining could occur between residents and developers.[266] Discrepancies in resources, however, would allow wealthy developers to take advantage of cotenants or residents who place more sentimental value on the land but lack the capital to resist—a dynamic augmented by the existing legal framework that enables partition actions for tenancies in common, as well as rent increases in neighborhoods undergoing gentrification.[267]

2. Eminent Domain

Eminent domain serves as a mechanism for overcoming holdouts that may result from private contracting, but it ultimately leads to courts, rather than the market, making decisions regarding the value

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262. *See, e.g.*, Heller & Hills, *supra* note 145; Heller, *Tragedy of the Anticommons: Introduction*, *supra* note 10.

263. *See* Heller & Hills, *supra* note 145, at 1472–87 (describing various issues with private land assembly and eminent domain).

264. *Id.* at 1472–73.

265. *See id.*

266. *See id.*

267. *See supra* Subsections I.B.1, I.C.1.

of property.[268] As a result, it effectively eliminates bargaining power and compensation for the land's sentimental value.[269] The problems with this are clear in the context of heirs property, where courts historically favor partitions by sale regardless of the nonmoving tenants' attachment to the land.[270] Further, the use of eminent domain in urban improvement projects can have disproportionate, detrimental effects on minoritized communities without any option for recourse.[271]

3. LADs: Room for a Middle Ground?

LADs are a more equitable, democratic middle ground between private contracting and eminent domain that can restore autonomy to property owners vulnerable to involuntary exit.[272] While Professors Heller and Hills intended LADs to be a solution for communities facing development pressures, the framework can also extend to the community of owners within a parcel of heirs property.[273] In both instances, local governments may empower a majority of owners (neighborhood residents or cotenants) to collectively determine the best use of their property—whether that be selling to a developer or retaining individual property interests.[274]

This framework restores the community's decisionmaking power, creating a form of democratic self-governance that may incentivize cooperation and strengthen community bonds.[275] Questions remain as to whether individual owners and cotenants *should* be the ones to wield this power, and, if so, whether they have the resources and capacity to do so. Professors Heller and Hills assert that the community decisionmaking framework of LADs best reconciles the values of private ownership and democratic process when compared with private contracting and eminent domain.[276] Nonetheless, LADs still have drawbacks. In the case of heirs property, for example, it may not be possible to locate all cotenants for participation in the decisionmaking process—even assuming they are best equipped to

268. *See* Heller & Hills, *supra* note 145, at 1474–75.

269. *Id.*

270. And to some extent still do when determining what constitutes "manifest prejudice" under the UPHPA. *See supra* Section II.A.

271. *See* Nashville I-40 Steering Comm. v. Ellington, 387 F.2d 179 (6th Cir. 1967) (upholding the denial of a temporary injunction seeking to halt the construction of a highway that would adversely impact an African American community because there was no evidence of discriminatory intent), *cert. denied* 390 U.S. 921 (1968).

272. *See* Heller & Hills, *supra* note 145.

273. *See id.* at 1469–71.

274. *See id.*

275. *See id.* at 1515.

276. *See id.* at 1497–98.

balance competing interests.[277] Moreover, in the case of communities subject to gentrification, the question remains as to whether renters could participate in the LAD, or if landlords would instead represent their interests.[278] Further, there remains a chance that courts will still be required to step in to "apply general legal rules to specific factual circumstances" involving LADs, thus detracting from the community's decisionmaking power.[279]

LADs' incentivization of community decisionmaking also increases communities' bargaining power as they seek to prevent developers from assembling land secretly for less than fair market value.[280] Further, the "self-interest of each landowner [is] linked to the collective goal of getting the highest total price for the neighborhood."[281] This incentivizes owners to bargain for the property's subjective and assembly value in addition to fair market value.[282] Although this could be a positive, welfare-enhancing effect, it could also result in inefficiencies, such as a developer overpaying for a less valuable parcel or a LAD rejecting a socially desirable offer.[283] Further, as is the case under the UPHPA, developers may still circumvent the LAD framework to exert influence over the decisionmaking process.[284]

Finally, LADs preserve the opportunity for voluntary exit, as they enable individuals to sell their property if a LAD decides not to assemble the land.[285] But LADs could face a similar problem as the partition-by-sale-versus-partition-in-kind dilemma of heirs property: if the majority decides on a sale, dissenting individuals may have no option but to seek a higher fair-market value under eminent domain instead of retaining their property interest.[286] These shortcomings highlight the need for a framework that considers both the collective and individual interests of community members in the decisionmaking process.

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277. *See supra* note 111 and accompanying text.

278. For a discussion of the voting rights of tenants, see Heller & Hills, *supra* note 145, at 1504–07.

279. Daniel B. Kelly, *The Limitations of Majoritarian Land Assembly*, 122 HARV. L. REV. F. 7, 15–17 (2009) (discussing how courts would still have to engage in statutory interpretation, as well as the risk of eminent domain challenges).

280. *See* Heller & Hills, *supra* note 145, at 1468; *see supra* note 98 and accompanying text.

281. Heller & Hills, *supra* note 145, at 1501.

282. Kelly, *supra* note 279, at 12–13 ("LADs . . . allow existing owners to bargain with an assembler over whether or not to sell their neighborhood.").

283. *Id.* at 11.

284. *See supra* notes 217, 231–243 and accompanying text.

285. Heller & Hills, *supra* note 145, at 1496.

286. *See id.* at 1496–97.

III. SOLUTION

A. A Uniform Act

In order to better address the root causes of gentrification-induced involuntary exit, this Note proposes the adoption of a Uniform Act similar to the UPHPA that implements a LAD framework for communities vulnerable to gentrification.[287]

This proposed Uniform Act would first narrowly define what constitutes a "community vulnerable to gentrification" to delineate the boundaries of the Act's application.[288] It would also explicitly define the class of people who qualify to participate in the LAD as all "residents," thereby including owners, landlords, and leaseholders. Additionally, the Act would define what constitutes a "developer" so as to clarify what sort of action could prompt the formation of the LAD.[289]

The Act would also implement a notice requirement to both landlords and tenants. This would be triggered when an individual owner indicates an interest in selling to a developer, or when developers seriously inquire about assembling multiple parcels of land. Local legislatures could further determine what constitutes a "notice-triggering event," which would be the functional equivalent of initiating a partition action.[290] This notice requirement would prevent developers from secretly purchasing land for lower than fair market value.[291]

If the notice-triggering event is an individual expressing interest in selling to a developer, the Uniform Act would then provide a statutory right of first refusal so that any tenant, community land trust, or other local party could purchase the property interest from the exiting party.[292] In the event that the community could not afford to purchase the property interest of the exiting party, the Act would provide a forum through which the community could enter into a CBA with the developer to restrict the developer's ability to alter the

287. *See id.*; UNIF. PARTITION OF HEIRS PROP. ACT (UNIF. L. COMM'N 2010).

288. *See* UNIF. PARTITION OF HEIRS PROP. ACT § 2(5) (UNIF. L. COMM'N 2010) (restricting the definition of heirs property to property that is not subject to an agreement binding all cotenants, as the harms of heirs property are typically greatest to those who lack the resources to enter such agreements); Godsil, *supra* note 17, at 335 (introducing the concept of a "gentrification trigger," a means to determine whether gentrification of a neighborhood is occurring, based on increases in rental and home prices).

289. *See* UNIF. PARTITION OF HEIRS PROP. ACT § 2 (UNIF. L. COMM'N 2010) (failing to provide a definition of "developer").

290. *See id.* § 4; Heller & Hills, *supra* note 145, at 1490–92 (describing the negotiation procedures leading up to the final vote to form a LAD and the final vote).

291. *See* Heller & Hills, *supra* note 145, at 1468; *supra* note 98 and accompanying text.

292. *See* UNIF. PARTITION OF HEIRS PROP. ACT § 7 (UNIF. L. COMM'N 2010).

neighborhood's character.[293] The Act would also provide a standard for determining a fair market value that incorporates, to some extent, the assembly and subjective value of the parcel to the party exiting.[294]

If the notice-triggering event is a developer expressing interest in assembling community land, the Uniform Act would provide for the formation of a LAD among community members instead of requiring a court determination of fair market value in an eminent domain proceeding.[295] The Act would enable the LAD's owners and leaseholders to vote on assembling the land, as well as a price.[296] It would provide specific procedures to inform the community of the development plan, its intended benefits, and how those benefits would accrue to the community.[297] It would also guarantee rights to refuse the plan and require a venue for public debate.[298] Placing decisions in the hands of the community, as opposed to the courts, requiring full disclosure, and guaranteeing a forum for debate would preserve owner autonomy while empowering communities to make their own decisions and reap economic benefits.

The Uniform Act would need to carefully consider protections for minority residents to prevent majoritarian decisions that infringe on their rights. Enforcing geographic limitations for the LADs would prevent other neighborhoods from exerting undue influence.[299] The Uniform Act would also provide mechanisms to quickly appeal LAD decisions to assemble land before owners are required to exit, especially in situations where there is evidence that developers exercised undue influence over the LAD voting process or a majority egregiously violated the rights of the minority.[300]

B. A Uniform Response

The Uniform Act would allow local governments to implement a more streamlined approach in addressing concerns about gentrification

293. *See Gentrification and Neighborhood Revitalization*, *supra* note 140.

294. *See* UNIF. PARTITION OF HEIRS PROP. ACT § 6 (UNIF. L. COMM'N 2010).

295. *Contra id.* §§ 8-9 ("If the court does not order partition in kind under subsection (a), the court shall order partition by sale pursuant to Section 10 or, if no cotenant requested partition by sale, the court shall dismiss the action.").

296. *See* Heller & Hills, *supra* note 145, at 1496.

297. *Id.* at 1492–96.

298. *Id.*

299. *See id.* at 1500.

300. For example, if the proposed plan would disproportionately harm a select group of residents.

in minoritized communities by providing a baseline response.[301] Because states would have the ability to tailor statutory definitions and thresholds to accommodate local needs, the Act preserves a degree of local flexibility and discretion. At the same time, it strives to provide all communities under the Act with a baseline level of protection and democratic participation in economic development decisions that could fundamentally alter their neighborhoods.[302] A uniform level of protection for minoritized communities susceptible to gentrification is significant in that it could help counteract and remedy years of housing segregation.[303]

Like LADs, the Uniform Act would still be subject to statutory interpretation of key terms—such as "community vulnerable to gentrification" or "developer"—by local courts.[304] This could result in variations across jurisdictions and antidemocratic control of a process that is intended to be community-coordinated. Judicial review, however, could help balance competing interests and protect the due process rights of all parties, thus legitimizing the system in place under the Act.

C. Allowing Voluntary Exit

The Act's right-of-first-refusal provision channels the UPHPA by allowing individuals to exit a community susceptible to gentrification if they so wish, while collecting the full value of their land in a way that reduces harm to community members left behind.[305] Unlike the UPHPA, community members would have the option to influence the use of the parcel regardless of whether they could afford to purchase it—by either entering into a CBA with a developer or exercising their right of first refusal.[306] Additionally, developers retain the opportunity to bargain with the community on a more level playing field to make improvements or change the use of the land.[307]

Like a tenant in common who opposes a court-ordered partition sale, however, if the LAD does approve the sale of a community to a developer, an individual owner would be unable to retain a physical

301. *See* Kelly, *supra* note 279, at 17 ("Given this variability in state law [regarding property rights and the use of eminent domain], a novel proposal like LADs is certainly worthy of consideration . . . .").

302. *See* UNIF. PARTITION OF HEIRS PROP. ACT § 12 (UNIF. L. COMM'N 2010).

303. *See supra* Subsection I.A.2.

304. *See* Kelly, *supra* note 279, at 15–17; UNIF. PARTITION OF HEIRS PROP. ACT § 2 (UNIF. L. COMM'N 2010).

305. *See* UNIF. PARTITION OF HEIRS PROP. ACT § 7 (UNIF. L. COMM'N 2010).

306. *See supra* Subsection II.B.I.

307. *See supra* Subsections II.A.1, II.B.1.

interest in the land.[308] Still, this effect is partially mitigated by the inclusion of all community members in the decisionmaking process, rather than relying on a court to make the decision.[309]

D. Building Community Trust

Finally, a solution that allows for resident participation is likely to foster stronger communal ties and knowledge while providing a forum where the community may overcome collective action problems.[310] This, in turn, will enable equitable and stable community development.[311] Some parties may object to prioritizing what may be viewed as a noneconomic interest in preserving a community or an economically inefficient use of resources.[312] But this Act would merely seek to level the playing field between communities and developers with large resource discrepancies in order to allow these communities to grow on their own terms, without the involuntary exit of long-term residents.[313]

CONCLUSION

Despite increasing attention to ownership disparities resulting from generations of segregation and unequal protection of property rights, Black-owned land—especially within lower-income communities—continues to be vulnerable to fragmentation and loss.[314] Heirs property and gentrification are two phenomena that significantly affect Black landowners and occupants.[315] While they are the result of distinct social and legal mechanisms—such as redlining,

308. Heller & Hills, *supra* note 145, at 1496–97.

309. *Compare id.* at 1491 (discussing the power of neighbors within a LAD to affect outcomes), *with* UNIF. PARTITION OF HEIRS PROP. ACT §§ 8-9 (UNIF. L. COMM'N 2010) (mandating the court consider whether to order a partition in kind or by sale).

310. *See* CTR. FOR HEIRS' PROP. PRES., GENTRIFICATION: AN ANALYSIS OF PLACE BASED STRATEGIES FOR PRESERVING AFRICAN AMERICAN NEIGHBORHOODS IN AMERICA 31 (2020), https://www.heirsproperty.org/wp-content/uploads/2020/09/Gentrification-Report-rev.pdf [https://perma.cc/JMM5-ES3X]:

> No matter the tools and programs used, community organizations, residents, and stakeholders that are able to control the revitalization process tend to be the most successful at avoiding the full negative impacts of gentrification. . . . It is the marrying of capital with community . . . which has created the most durable African American neighborhoods in this country.

311. *See id.*

312. *See, e.g.*, Havens-Morris & Block, *supra* note 138, at 26–27.

313. *See supra* Subsection I.C.1.

314. *See supra* note 10 and accompanying discussion.

315. See Godsil, *supra* note 17; UNIF. PARTITION OF HEIRS PROP. ACT prefatory note at 5 (UNIF. L. COMM'N 2010).

suburbanization, and intestate inheritance—viewing both issues through the lens of the tragedy of the anticommons reveals their similarities. This view, in turn, highlights flaws in existing responses and informs future approaches to reducing fragmentation and property loss. A Uniform Act incorporating elements of both LADs and the UPHPA—solutions to both the tragedy of the anticommons and heirs property—would streamline legal responses to gentrification, allow for voluntary exit without undermining the interests of other community members, and foster trust and investment within the community.

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* J.D. Candidate, 2024, Vanderbilt Law School; B.A., 2021, University of South Carolina. Special thanks to Professor Christopher Serkin, who helped guide the research and drafting of this Note and sparked my interest in property law, and to the *Vanderbilt Law Review* editors who supported me through the research, writing, and editorial process, particularly Susie Ness, Andie Steiner, Sabrina Apple, Ari Goldfine, Vivian Ren, Christian Dunn, and Jackson Miner. Thank you also to my parents, Lisa and David White, for their constant and unwavering support.