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**“THE LOSS IN MY BONES”:
PROTECTING AFRICAN AMERICAN HEIRS’ PROPERTY
WITH THE PUBLIC USE DOCTRINE**

April B. Chandler*

INTRODUCTION

The Spanish moss swayed gently in the ancient live oaks, and the pungent smell of the salt marsh rolled in with the tide as Johnny Rivers sat on the steps of his home, reminiscing. “Never wanted to be anywhere else . . . I thought I would die here,”¹ he says of the land he lived on for sixty-nine years. Patriarch of a family of twenty-seven children, grandchildren, and great-grandchildren, Johnny Rivers was born on this seventeen acre tract on Clouter Creek near the Cainhoy Peninsula of Charleston, South Carolina.² His father, Hector Rivers, son of a former slave, acquired the land in 1888, and Rivers family members have been born, reared, and buried on it ever since.³ Unfortunately, despite never having missed a tax payment, on September 27, 2001, twenty-five members of the Rivers family were evicted in the largest eviction carried out by the Berkeley County Sheriff’s Department in at least the last nine years.⁴ The court ordered the Rivers family to accept an offer of \$910,000 from an investor who then put the land back on the market eight months later for three million dollars.⁵ Had the judge permitted the Rivers family to sell on the open market rather than convey their land to the only buyer who ever had the opportunity to make an offer, perhaps Hector Rivers’s heirs could have reaped the full value of their land.⁶

Johnny Rivers, who shared title to the land with more than thirty family members scattered as far as New York, Florida, and Georgia,⁷ could officially claim

* B.A., College of Charleston, 1999; J.D., William & Mary School of Law, 2006. The author would like to thank the editorial board of the *William & Mary Bill of Rights Journal* for their assistance and encouragement.

¹ Tony Bartelme, *Heirs Property Tangle Leads to Loss of Land*, POST & COURIER (Charleston, S.C.), Dec. 24, 2000, at A1 [hereinafter Bartelme, *Heirs Property Tangle*].

² *Id.*

³ *Id.*; Tony Bartelme, *Families Evicted From Heirs’ Property; Deputies Enforce Court’s Directive After Relative’s Lawsuit Leads to Sale Order*, POST & COURIER (Charleston, S.C.), Sept. 28, 2001, at B1 [hereinafter Bartelme, *Families Evicted*].

⁴ *Id.*

⁵ Tony Bartelme, *Heirs Land at Risk*, POST & COURIER (Charleston, S.C.), June 23, 2002, at B1 [hereinafter Bartelme, *Heirs Land*].

⁶ *Id.*

⁷ Tony Bartelme, *Father Dreads Family’s Eviction In Heirs’ Property Dispute*, POST & COURIER (Charleston, S.C.), Sept. 27, 2001, at A1.

only 3.515 percent of the proceeds after attorneys' fees.⁸ "I feel the loss in my bones,"⁹ he said. "I feel like part of my body is gone, but I'm still living."¹⁰ Today, that seventeen acre tract has been subdivided into "Pinefield Plantation."¹¹ A recent search of properties for sale in the new subdivision turned up a five thousand square foot mansion on a .3 acre lot with a deep water dock selling for 2.5 million dollars.¹² A second property included a .29 acre tract, a 4,900 square foot house, and a deep water dock available for just over two million dollars.¹³

Johnny Rivers's story is being repeated all over the South.¹⁴ "In Berkeley County[, South Carolina,] alone, more than 1,300 properties involving more than 17,000 acres are listed on tax rolls as belonging to the 'heirs of . . .'"¹⁵ Because he shared title to the land with family members scattered across the country, many of whom had never even seen the land, Johnny Rivers had no legal recourse when some of those family members decided to sell the property. Under the current property law system, families who have lived on the same land for generations have little protection when developers wish to take advantage of their fractured, problematic titles by purchasing an interest in the land at below market value.¹⁶ In order to ensure that these families receive a fair price for their land if they are forced to sell, the statutory system should be revised.

James Madison stated: "Government is instituted to protect property of every sort . . . This being the end of government, that alone is a just government, which *impartially* secures to every man, whatever is his *own*."¹⁷ Thousands of African American farmers in the Southeast lack record title to their land and are unable to enjoy fully the benefits of land ownership.¹⁸ Although the families have lived on the land for generations and pay the property taxes, they risk losing their property to developers who can afford to buy them out at court-ordered auctions. As the price of desirable coastal property has skyrocketed over the last decade, developers have become adept at finding fractured titles, purchasing a family member's interest in

⁸ Bartelme, *Heirs Land*, *supra* note 5. See *infra* Part II for a discussion of intestate succession.

⁹ Bartelme, *Heirs Property Tangle*, *supra* note 1.

¹⁰ *Id.*

¹¹ Real estate flyers on file with author.

¹² *Id.*

¹³ *Id.*

¹⁴ David J. Dietrich & Julius J. Zschau, *Preliminary Report of the Property Preservation Task Force*, 2004 A.B.A. SEC. REAL PROP. PROB. & TR. L. 7.

¹⁵ Bartelme, *Heirs Property Tangle*, *supra* note 1.

¹⁶ HEIRS' PROPERTY PRESERVATION PROJECT, HEIRS' PROPERTY 2 (2002), available at <http://www.scej.org/bookv4.pdf> [hereinafter HEIRS' PROPERTY].

¹⁷ James Madison, *Property*, NAT'L GAZETTE, Mar. 29, 1792, reprinted in 1 THE FOUNDERS' CONSTITUTION 598 (Philip B. Kurland & Ralph Lerner eds., 1987).

¹⁸ Bartelme, *Heirs' Property Tangle*, *supra* note 1.

the land for a small price, and going into court to force division of the land.¹⁹ Because it is impracticable to divide the land physically among the many title holders, courts most often order a partition sale — usually an auction — and the land is sold to the highest bidder, generally at below-market value.²⁰ The auctions are private affairs; usually, only the developer and the family bid on the land, and the family who cannot afford to outbid a large development company is forced to leave the land of its forefathers for pennies on the dollar.²¹

This alarming trend threatens more and more African American landowners in the Southeast. Historically, poor, rural landowners, especially African Americans, were reluctant to write wills, and land traditionally passed to family members through the laws of intestacy.²² In the last century, African Americans have lost nearly thirteen million acres of farmland in the United States.²³ According to the 2002 Census of Agriculture conducted by the United States Department of Agriculture (USDA), African American farmers owned 2,196,264 acres of farmland in the United States and rented or leased 1,159,527 acres.²⁴ By comparison, white farmers owned 534,480,132 acres and rented or leased another 345,513,400 acres.²⁵ African Americans are the principal operators on only 1.36 percent of all the farms in the United States.²⁶ From 1920 to 1978, the number of farms operated by African Americans in the United States declined at a rate of 93.8 percent compared with a 56.4 percent rate for white farm operators.²⁷ The rapid loss of African American-

¹⁹ See generally Todd Lewan & Dolores Barclay, *Torn From the Land: Black Families Lose Land Through Legal Maneuvering*, OAKLAND TRIB., Dec. 9, 2001, at A1.

²⁰ *Id.*

²¹ For a fascinating series that examines African American land loss over the last 150 years due to this type of auction as well as other, more violent land loss, see Todd Lewan and Dolores Barclay, *Torn From the Land*, Associated Press, Dec. 2, 2001. This three-part series includes the personal stories of many families across the Southeast and was the result of an eighteen-month investigation that included interviews with more than one thousand people and examination of tens of thousands of public records.

²² 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, 518–19 (2001).

²³ See generally Lewan & Barclay, *supra* note 19; HEIRS' PROPERTY, *supra* note 16.

²⁴ BUREAU OF THE CENSUS, U.S. DEP'T OF AGRIC., 2002 CENSUS OF AGRIC. SELECTED FARM CHARACTERISTICS BY RACE OF PRINCIPAL OPERATOR, available at <http://www.nass.usda.gov/census/census02/operatorsbyrace/opbyrace.txt>. According to the census, which is taken every five years and represents the most accurate data available for farm ownership and operation, in 2002 there were 29,090 farms in the United States where the principal operator was African American and 2,067,379 farms where the principal operator was white.

Id.

²⁵ *Id.*

²⁶ *Id.* As of 2002, 2,129,082 farms were in operation in the United States. *Id.*

²⁷ John G. Casagrande, Jr., *Acquiring Property Through Forced Partitioning Sales: Abuses and Remedies*, 27 B.C. L. REV. 755, 756 (1986).

owned farmland can be traced to several factors; however, this Note will focus on land lost through forced partition sales.

Part I of this Note traces the history of African American land ownership in the South, its dramatic rise during Reconstruction, and its subsequent fall after 1910. It notes several historical reasons for the land loss, including difficulty in receiving fair loans, natural disasters, the Great Migration, and racism. Part I also charts current landownership among African American farmers and the threats those landowners face today. In 1999, a major class action lawsuit against the federal government resulted in more than 13,000 African American farmers receiving compensation for discriminatory lending practices by the USDA.²⁸ Unfortunately, this settlement was “too little, too late” for many of the farmers who were forced to sell their land because they could not obtain loans from the USDA or because the USDA foreclosed on their farms after discriminating against them during the loan process. Further, even after paying out over eight hundred million dollars, the USDA has not revised any of its policies.²⁹

Part II of this Note defines and explains the problem of heirs’ property — land passed intestate through several generations such that the owners and interests become varied and scattered. Usually, such land is at risk to family turmoil and to developers who seek out the land specifically because it lacks protection. Part II estimates the number of title holders affected by heirs’ property and explains how the rules of tenancy in common operate to put heirs’ property title holders at extreme risk to developers.

Developers may purchase a small interest in the land from one family member and petition the court for a partition sale.³⁰ Despite a stated preference for partition in kind expressed in most states’ partition statutes, the majority of judges accept the plea for a partition sale.³¹ Usually, these sales are auctions, and the only two parties present are the developer and the family. Unless the family can outbid the developer, its land is sold, generally at well below market value. By accepting the partition sale, judges place the burden on the defendant family members to prove that partition in kind is an economically worthwhile undertaking. Because the partition statutes express a preference for partition in kind, courts should be required to shift that burden onto the plaintiffs to prove that physical partition is impossible, substantially impracticable, or would significantly devalue the land.

²⁸ *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999).

²⁹ *Mitchell*, *supra* note 22, at 528–29.

³⁰ This paragraph is a generalized description of a process used by many developers to acquire valuable heirs’ property at rock-bottom prices. While the actual details of any family’s experience may vary, newspaper reporters are finding remarkably similar stories all over the South. This is exemplified in the Bartelme series. *See supra* notes 1, 3, 5, 7; *see also* Lewan and Barclay, *supra* note 21.

³¹ *See infra* notes 73–75 and accompanying text.

Part III of this Note explains the power of eminent domain and examines the Supreme Court's development of takings power. The Court has distinguished between regulatory takings and physical exactions of property that require just compensation.³² If a regulatory taking does not destroy all economically viable use of the land, and the state's regulation can be justified, the Court will uphold such takings as legitimate uses of the state's eminent domain power, and the state does not need to pay owners for the loss of their property.³³ Thus, a regulatory taking imposing restrictions on the ability of heirs' property owners to sell or to partition their land should withstand the rational-basis scrutiny of the Court.

Part IV of this Note traces the Supreme Court's Public Use Clause jurisprudence. Although the clause was originally intended to protect against government taking private property except in specific, limited circumstances, the Supreme Court has extended the Public Use Clause to protect against social injustice³⁴ as well as to cover situations where the only public benefit is a purely economic one.³⁵ This section analyzes the development of the jurisprudence from a narrow view to a broad view that permits courts to defer to a legislature's stated purpose. It then applies the Takings Clause to a proposed statutory reform to protect heirs' property. Imposing statutory restrictions on the ability of heirs' property owners to sell their portion of the land would be a regulatory taking; however, such restrictions can be justified as protecting a rapidly dwindling cultural resource. Therefore, an "external judicial check"³⁶ of any restrictions imposed on heirs' property to protect it from developers would likely find that protection of the property's existing use is necessary to forestall the harm that threatens to arise from the current lack of protection of this land.

This Note proposes that heirs' property advocates work with existing case law to argue for protection of heirs' property in order to prevent families from having to sell their property at below market value. Shifting the burden of proof onto developers to prove that partition in kind is impossible would help protect the families who live on the land. Even if the majority of the land was sold, those who wish to keep the land in their family would have a better chance of retaining their portion. Although, to this point, developers have used regulatory takings to their advantage by inducing the government to condemn private land under a public use guise, the same precedent can be used by heirs' property advocates. The public need for preserving this land as a valuable cultural and historical treasure can easily be justified under the current public purpose doctrine. Because the courts are so deferential to the state's justification,

³² See *infra* Part III.

³³ See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

³⁴ See, e.g., *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

³⁵ See *Kelo v. City of New London*, 125 S. Ct. 2655 (2005).

³⁶ *Id.* at 2673 (O'Connor, J., dissenting).

regulations that provide greater protection to heirs' property owners would surely survive rational basis scrutiny.

I. HISTORY OF AFRICAN AMERICAN LAND OWNERSHIP IN THE SOUTH

After the Civil War, the four million newly freed slaves who hoped to attain land ownership for themselves soon saw their hopes dashed. With no savings or income, the freedmen were unable to buy land, even with the dramatic drop in land prices that accompanied Reconstruction.³⁷ General Sherman's field order Number Fifteen deeded millions of acres of land from Georgia to the South Carolina Sea Islands to freed slaves,³⁸ and in 1865, Congress established the Bureau of Refugees, Freedmen, and Abandoned Lands to open up forty-six million acres of land in Alabama, Arkansas, Florida, Louisiana, and Mississippi to homesteaders.³⁹ Although the Freedmen's Bureau specified that applicants could not be discriminated against on the basis of race, the vast majority of this land ended up in white hands.⁴⁰ Many former slaves turned to sharecropping, a system that shared with slavery similar patterns of control

³⁷ UNITED STATES COMMISSION ON CIVIL RIGHTS, *THE DECLINE OF BLACK FARMING IN AMERICA* 14 (1982) [hereinafter *DECLINE OF BLACK FARMING IN AMERICA*].

³⁸ *Homecoming . . . Sometimes I Am Haunted By Memories of Red Dirt and Clay* (PBS television broadcast Feb. 3, 2000). A transcript of the film is available at <http://www.newsreel.org/transcripts/homecomi.htm>.

³⁹ Michael L. Lanza, "One of the Most Appreciated Labors of the Bureau": *The Freedmen's Bureau and the Southern Homestead Act*, in *THE FREEDMEN'S BUREAU AND RECONSTRUCTION: RECONSIDERATIONS* 67, 67 (Paul A. Cimbala & Randall M. Miller eds., 1999).

⁴⁰ *Homecoming . . . Sometimes I Am Haunted By Memories of Red Dirt and Clay*, *supra* note 38.

General we want Homesteads; we were promised Homesteads by the government; . . . [W]e are left in a more unpleasant condition than our former You will see this Is not the condition of really freemen. You ask us to forgive the land owners of our land. You only lost your right arm. In war and might forgive them. The man who tied me to a tree & gave me 39 lashes & who stripped and flogged my mother & my sister & . . . who combines with others to keep away land from me well knowing I would not Have any thing to do with him if I had land of my own — that man, I cannot well forgive. Does it look as if He Has forgiven me, seeing How He tries to keep me In a Condition of Helplessness[?]

Id. (alteration in original) (quoting Letter from Henry Bram et. al, Committee of Freedmen on Edisto Island, South Carolina, to Major General Oliver Otis Howard, Commissioner, Freedmen's Bureau (Oct. 20 or 21, 1865)). See also Thomas C. Holt, "To Make the World Anew": *The Black Role in Reconstruction*, Center for the Study of the American South, at <http://www.unc.edu/depts/csas/Conferences/remembering%20reconstruction%20holt.html> (last visited Nov. 7, 2005) (quoting the entire letter).

and dominance.⁴¹ Those who were able to purchase land generally could afford fewer acres and less fertile soil than their white counterparts. Banks refused to lend to African American farmers who were then forced to borrow from local merchants at high interest rates.⁴² Those merchants extended financing only for cotton, "a safe cash crop that would have a ready market in the event of foreclosure."⁴³ The farmers were thereby prevented from engaging in crop rotation and could not obtain financing from their lenders for fertilizers to replenish their nutrient-deprived soil.⁴⁴ Cotton prices rose dramatically in the early 1900s, however, and the creation of African American farming colleges and lending institutions improved the literacy rate, range of farming skills, and ability to engage in self-determination for these small farmers.⁴⁵ By 1910, African American farm ownership peaked at fifteen million acres.⁴⁶ These new landowners "saw the possession of land as a symbol of a new beginning, a new independence."⁴⁷ This positive turn in fortune did not last long.

With the advent of World War I in 1914, the price of cotton plummeted as Europe ceased its transatlantic trading.⁴⁸ While banks extended credit to white farmers during this time, many African American farmers were forced "to sell their land for a fraction of its value."⁴⁹ More devastating yet, the boll weevil spread north from Mexico, across Texas, and east through Alabama, Georgia, and the Carolinas.⁵⁰ By 1921, the boll weevil had ravaged the entire South, and cotton yield was in many instances cut nearly in half.⁵¹ The establishment of Jim Crow

⁴¹ DECLINE OF BLACK FARMING IN AMERICA, *supra* note 37, at 17. For a description of the hardships of sharecropping, see *Homecoming . . . Sometimes I Am Haunted By Memories of Red Dirt and Clay*, *supra* note 38.

I was sharecropping 'fore [the Great Depression], and I had sharecropped about 3 or 4 years. That means working with the white man. It was rough, from sun up to sun down, men making \$.40 women making \$.30, \$2.20 for five and a half days at \$.40 a day. Folks furnish the houses and everything we was living in and you have to do just like they said do because they was, we was working for them, you know. They couldn't treat a dog any worse. We couldn't say, couldn't talk much about it. The black folks couldn't talk too much about it, you'd be missin' and nobody know where you is.

Id. (quoting "Uncle AB, former Sharecropper").

⁴² DECLINE OF BLACK FARMING IN AMERICA, *supra* note 37, at 20.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 21.

⁴⁶ BLACK ECONOMIC RESEARCH CENTER, ONLY SIX MILLION ACRES: THE DECLINE OF BLACK OWNED LAND IN THE RURAL SOUTH 19 (Robert S. Browne ed., 1973).

⁴⁷ Loren Schweninger, *Black Property Owners in the South 1790–1915*, at 145 (1990).

⁴⁸ DECLINE OF BLACK FARMING IN AMERICA, *supra* note 37, at 23.

⁴⁹ *Id.* at 23–24.

⁵⁰ *Id.* at 24.

⁵¹ *Id.*

legislation and the lure of higher wages in Northern factories also factored heavily into post-Depression era African American land loss.⁵²

The more recent figures on African American farm loss show a continued and alarming rate of decline. Between 1978 and 1987, the number of African American-owned farms declined by 23 percent, compared with a rate of 6.6 percent for white-owned farms.⁵³ In 1990, Congress found that African American-owned farms “were going out of business at a rate three times that of white farms.”⁵⁴ The cycle of loss was exacerbated by discriminatory lending practices by the Farmers’ Home Administration, lack of assistance from the USDA, and lack of access to the most desirable farmland.⁵⁵

African American farmers filed a class action lawsuit against the USDA in 1997, alleging “(1) that the [USDA] willfully discriminated against them and other similarly situated African American farmers on the basis of their race when it denied their applications for credit[,] . . . and (2) that . . . the USDA failed properly to investigate and resolve their complaints.”⁵⁶ Farm loans and other benefits available to farmers from the USDA are administered by county commissioners — local farmers elected to the commission by other local farmers.⁵⁷ Not surprisingly, when the lawsuit was filed, only 37 of the 8,148 county commissioners nationwide were African American.⁵⁸

In 1999, the USDA and the plaintiffs in the class action suit entered into a settlement in which each individual claimant could choose from three options to pursue his claim.⁵⁹ As of August 17, 2005, 13,997 African Americans had each been

⁵² *Id.* at 25–26.

⁵³ Phylliss Craig-Taylor, *African American Farmers and the Fight for Survival: The Continuing Examination for Insights Into the Historical Genesis of This Dilemma*, 26 N.C. CENT. L.J. 21, 23 (2003).

⁵⁴ Kristol Bradley Ginapp, Note, *Jim “USDA” Crow: Symptomatic Discrimination in Agriculture*, 8 DRAKE J. AGRIC. L. 237, 243 (2003).

⁵⁵ *Id.* at 243–44.

⁵⁶ *Pigford v. Glickman*, 185 F.R.D. 82, 86 (D.D.C. 1999).

⁵⁷ Mitchell, *supra* note 22, at 528.

⁵⁸ *Id.* “In 1994, minorities accounted for 4.7 percent of those eligible to vote for county commissioner seats; however, just 2.9 percent of the county committee elected in 1994 were minorities.” *Id.* at 528 n.144.

⁵⁹ See Ginapp, *supra* note 54, at 245–46 (explaining the three options available for claimants). The opt-out date for plaintiffs was March 21, 1999. Track A allows claimants with “substantial evidence” to recover \$50,000 for credit discrimination or \$3,000 for non-credit discrimination. *Id.* at 245. As of August 17, 2005, 22,237 claims had been accepted by the facilitator under Track A. USDA Office of Civil Rights, *Pigford v. Veneman: Consent Decree In Class Action Suit By African American Farmers, Statistics on Claims*, at <http://www.usda.gov/cr/OCR/Pigford/status.htm> (last visited Aug. 30, 2005). The second option available to claimants, Track B, provides “a settlement tailored to ‘individual circumstances.’” Ginapp, *supra* note 54 at 246. However, the track requires proof by a preponderance of the evidence that the claimant has been a victim of discriminatory practices. *Id.*

awarded either \$50,000 or \$3,000 (depending on which track they chose) as restitution for discriminatory practices by the USDA.⁶⁰ Unfortunately, many of those who filed successful claims had already lost their farms and gone through bankruptcy as a result of their inability to receive fair treatment from the USDA.⁶¹ According to Professor Thomas Mitchell:

Given the historic and stubborn refusal of these commissioners to treat black farmers fairly, even after repeated federal studies over the past decades documented blatant discrimination against black farmers by USDA officials . . . , disparity in government support for black farmers is likely to recur despite the settlement of the *Pigford* lawsuit.⁶²

Moreover, the settlement of the *Pigford* class action suit failed to move the USDA to reform its lending practices or to take the power to determine loans out of the hands of local commissioners.⁶³

Only 181 claimants have been accepted by the facilitator under this track. USDA Office of Civil Rights, *supra* note 59. Finally, claimants who choose not to accept Track A or Track B can opt out and continue with individual claims. Ginapp, *supra* note 54 at 246.

⁶⁰ USDA Office of Civil Rights, *supra* note 59. In 63 percent of the cases filed under Track A, the farmer prevailed, resulting in a total of \$686,300,000 paid out to African American farmers against whom the USDA discriminated. *Id.* (last visited Aug. 30, 2005).

⁶¹ Ginapp, *supra* note 54, at 246–47 (discussing the feeling among the claimants that the settlement itself is discriminatory).

The Black Farmers and Agriculturalists Association ("BFAA"), many of whose members were part of [the] initial class in *Pigford*, think that the consent decree should be thrown out because it has only had the effect of ruining the lives of black farmers. BFFA [sic] claims that most people who recover under the consent decree and receive the \$50,000 payment no longer farm or own farmland, nor do they have any outstanding loans with the USDA.

The few deserving black farmers who do get the settlement generally must use the money to pay costs related to their previous bankruptcy. The plain fact is that the settlement is "too little, too late." When these black farmers were unable to secure financing from the USDA initially, they were constructively forced to default on other loans and thus, forced off their land. Black farmers have also lost their land in conjunction with the consent decree when they have been denied the settlement and the USDA forecloses on their land.

Id. (internal citations omitted).

⁶² Mitchell, *supra* note 22, at 528–29.

⁶³ *Id.*

II. TENANCY IN COMMON AND PARTITION STATUTES

A. *Tenancy in Common*

Tenancies in common created through intestacy laws differ from volitional tenancies in common in important ways.⁶⁴

A tenancy in common created consensually resembles a closely held corporation: there tends to be a small number of co-owners, each member of the ownership structure knows the other owners, and the owners are likely to live within close proximity of one another. A tenancy in common created under the laws of intestacy, by contrast, bundles together groups of people who may possess little actual connection to one another and perhaps lack even knowledge of one another's identity.⁶⁵

Under a tenancy in common created by intestacy laws, the number of interests increases and their sizes vary as title passes through each successive generation of lineal heirs.⁶⁶ Over time, the owners of individual interests are likely to move away and spread out across the country.⁶⁷

With heirs' property, the land often lacks record title.⁶⁸ Moreover, it becomes difficult for the interest holders living on the land to coordinate decisions regarding the land because all the title holders value their interests differently.⁶⁹ When these values differ, conflicts arise.⁷⁰ In Johnny Rivers's family, Johnny and his sister, Blondell Wigfall, had a disagreement that resulted in her calling a lawyer who located all the heirs and started the partition suit.⁷¹

B. *Partition Sales*

A partition is the division of the property among the title holders according to the size of their interests.⁷² State statutes tend to provide that partition in kind is the preferred remedy,⁷³ permitting a judge to divide the land in kind according to the

⁶⁴ *Id.* at 517.

⁶⁵ *Id.*

⁶⁶ *Id.* at 518.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Bartelme, *Heirs Property Tangle*, *supra* note 1.

⁷² See Mitchell, *supra* note 22, at 513.

⁷³ *Id.* at 513 & n.40 (citing every state's partition statute and noting that South Carolina's

title.⁷⁴ However, the number of heirs in many heirs' property disputes renders this type of division impracticable since each heir would receive such a small allotment of land as to render their interest valueless. In these situations, the court will most often order a partition sale and division of the proceeds.⁷⁵

The partition statutes that favor physical partition should be enforced as written. A court should not order a partition sale merely because physical division of the land is difficult. If the physical division is impossible because the division into such small portions would render the land completely worthless, then a partition sale can be ordered; however, such a sale should be held on the open market and not at an auction where the land is sold below market value. Moreover, the burden should be placed on the plaintiff to prove that such physical partition is impossible or that it would render the land economically worthless. Currently, the burden is on the defendant to prove that in-kind partition is both worthwhile and easily achieved.⁷⁶ If they are unable to succeed with either argument, courts usually order an auction.⁷⁷ Such an auction is no better financially for the title holders than physical division and sale would be and results in the loss of land even for those who would prefer to remain. In Johnny Rivers's case, partitioning his family's land would have given him approximately half of an acre on which to live.⁷⁸ Such a lot is only slightly larger than the subdivided mansion lots⁷⁹ that resulted from the sale forced by the judge. Further, the other Rivers family members who wished to sell should have been allowed to do so on the open market where their tracts, even without the lots

statute does not provide a preference for in-kind division). South Carolina's statute, S.C. CODE ANN. § 15-61-10 (1977 & West Supp. 2005), states:

All joint tenants and tenants in common who hold . . . an estate for a term of life or years with the other that has an estate of inheritance or freehold in any lands, tenements or hereditaments shall be compellable to make severance and partition of all such lands, tenements, and hereditaments.

Id.

⁷⁴ Mitchell, *supra* note 22, at 513.

⁷⁵ Casagrande, *supra* note 27, at 757 (noting that because African American cotenants are often economically disadvantaged, they cannot afford to purchase their land back at auction). "Furthermore, these partitioning sale actions are sometimes instigated by lawyers to collect fees, and by judges who personally benefit by purchasing the properties." *Id.* The author explains: "One probate judge who entered public service with almost no land ownership now owns approximately 15,000 acres of land in a county that is 80 percent black." *Id.* at n.27.

⁷⁶ See *id.* (tracing the development of partition actions and arguing for a burden shift to protect minority interests).

⁷⁷ See, e.g., *supra* note 21 and accompanying text.

⁷⁸ Bartelme, *Heirs Property Tangle*, *supra* note 1.

⁷⁹ Real estate flyer on file with author.

retained by the Rivers family members who wished to stay, could have fetched close to three times the amount the judge ordered them to accept.⁸⁰

III. REGULATORY TAKINGS AND PUBLIC PURPOSE

A. *The Fifth Amendment and Regulatory Takings*

The Fifth Amendment provides that “private property [shall not] be taken for public use, without just compensation.”⁸¹ This “eminent domain” principle gives the government power to take private property for public use, providing that just compensation is paid.⁸² However, if the state merely regulates the property in accordance with its police powers, no compensation need be paid even though the owner’s rights might be restricted or his property devalued as a result of the regulation.⁸³

⁸⁰ Bartelme, *Heirs Land At Risk*, *supra* note 5.

⁸¹ U.S. CONST. amend. V. According to Chief Justice Rehnquist in *First English Evangelical Lutheran Church of Glendale v. County of L.A.*,

As its language indicates, and as the Court has frequently noted, this provision does not prohibit the taking of private property, but instead places a condition on the exercise of that power. This basic understanding of the [Fifth] Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.

482 U.S. 304, 314–15 (1987) (citations omitted) (emphasis in original).

⁸² See *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (holding that although a city must show a logical nexus for its exaction, it must also show that the permit conditions bear a “rough proportionality” to the negative impact of the development on the public); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992) (holding that an exaction must be logically related to the specific need if a regulation denies “all economically beneficial uses” of land, it is a categorical taking unless the state can justify its actions as preventing a common law nuisance); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987) (holding that an exaction must be logically related to the specific public need to which the owner’s building contributes); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (holding that “the extent to which the regulation has interfered with distinct investment-backed expectations” must be considered by the court when determining whether to impose economic loss on the landowner alone); *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (stating “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”).

⁸³ *Agins v. City of Tiburon*, 447 U.S. 255 (1980). In order for a land use regulation to avoid being a taking, the regulation must “substantially advance legitimate state interests” and the regulation must not “den[y] an owner economically viable use of his land.” *Id.* at 260.

If a land use regulation imposes a burden on a relatively few landowners, it is generally subject to a regulatory takings attack.⁸⁴ "The basis of the concern for the regulation's effect on a parcel's economic viability is the opinion that isolated individuals should not have to bear the costs of community-wide social programs."⁸⁵ Accordingly, government restrictions have been successfully challenged on the ground that individual property owners are forced to bear the burden of programs that are meant to benefit the public as a whole:

Where individual property owners are singled out to bear the cost of advancing the public interest, considerations of justice and fairness demand that these individuals not be forced to contribute more than their proportionate share of the burden. In effect, the Court has recognized a constitutional limitation to compelling isolated individuals to privately subsidize desired social programs, especially where the individuals have not uniquely contributed to the social problem being addressed. Considerable judicial opinion supports the well-established proposition that the Fifth Amendment prevents the government from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."⁸⁶

B. Evolution of Regulatory Takings Jurisprudence

The Court's decisions in the area of regulatory takings can be viewed on a spectrum.⁸⁷ At one end, traditional eminent domain actions are subject to "non-controversial, straightforward rules requiring payment of just compensation."⁸⁸ At the other end, a regulation that is promulgated for the public welfare is a valid police power, and property owners who are affected by such a regulation receive no compensation for the infringement on their rights:⁸⁹

[O]nce a regulation crosses some invisible line such that it has substantially the same impact on the property owner as a physical confiscation, it ceases to be a valid police power action

⁸⁴ Raymond R. Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward a New Theory of Takings Jurisprudence*, 40 AM. U. L. REV. 297, 353 (1990).

⁸⁵ *Id.* at 351.

⁸⁶ *Id.* at 351–352 (quoting *Penn Cent. Transp. Co.*, 438 U.S. at 123) (citations omitted).

⁸⁷ Lynda J. Oswald, *Property Rights Legislation and the Police Power*, 37 AM. BUS. L.J. 527, 530 (2000).

⁸⁸ *Id.* at 530–31.

⁸⁹ *Id.* at 531.

and becomes instead a “regulatory taking.” Although the Supreme Court has never been able to articulate precisely where the dividing line between valid police power actions and regulatory takings lies, it is clear that the Court is willing to tolerate extensive interference with property interests before a regulatory taking will be found.⁹⁰

The Court has identified two categories of per se regulatory takings: those involving a physical appropriation of land⁹¹ and regulations which destroy all economically beneficial use of the property.⁹² However, most regulatory takings issues do not fall into either category, and the Court has developed some tests to determine whether a regulation should be categorized as a taking or as a valid use of the police power.⁹³

Prior to 1922, the Takings Clause was limited to cases where the government physically appropriated private property. However, in *Pennsylvania Coal Co. v. Mahon*,⁹⁴ the Court recognized that a regulation that substantially interferes “with a property owner’s rights is itself a compensable exercise of the eminent domain power.”⁹⁵ For the first time, the Court set forth the difference between an invalid taking and a valid exercise of the police power.⁹⁶ The statute at issue had the effect of rendering mineral rights virtually worthless because it placed such extreme conditions on the mining of coal.⁹⁷ Justice Holmes wrote: “The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”⁹⁸

Penn Central Transportation Co. v. New York City was one of the first cases to delineate how far the government can regulate before the statute becomes a taking.⁹⁹ In *Penn Central*, the Court held that New York City’s Landmarks Preservation Law did not constitute a taking of the plaintiff’s property.¹⁰⁰ The Court articulated a three part test to determine whether a regulation is a taking.¹⁰¹ The Court considered “[t]he

⁹⁰ *Id.*

⁹¹ *See* *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434–35 (1982) (holding that a physical occupation of property is a taking “without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner”).

⁹² *See* *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992).

⁹³ Oswald, *supra* note 86, at 532.

⁹⁴ 260 U.S. 393 (1922).

⁹⁵ Oswald, *supra* note 86, at 530.

⁹⁶ *Pa. Coal Co.*, 260 U.S. at 418.

⁹⁷ *Id.* at 414–15.

⁹⁸ *Id.* at 415.

⁹⁹ 438 U.S. 104 (1978).

¹⁰⁰ *Id.* at 138.

¹⁰¹ *Id.* at 124.

economic impact of the regulation on the claimant,"¹⁰² "the extent to which the regulation has interfered with distinct investment-backed expectations,"¹⁰³ and the "character of the governmental action."¹⁰⁴

The majority held that so long as landmark preservation is carried out as part of a comprehensive scheme, development of individual landmarks may be undertaken without effecting an unconstitutional taking.¹⁰⁵ The Court, in determining that a taking had not occurred, reasoned that because New York City gave the owners "transferable development rights" that they could use to increase the size of the other buildings they owned, the economic impact on the owner of a landmark building was too small to rise to the level of a taking.¹⁰⁶ The effect of the holding was that the government's regulation can be a taking if it severely affects private property even if the government does not physically occupy the land.

Following *Penn Central*, the Court developed its regulatory takings jurisprudence further in *Lucas v. South Carolina Coastal Council*,¹⁰⁷ in which the Court found that when a regulation deprives a landowner of all economically viable use, the landowner will benefit from a presumption that a taking has occurred.¹⁰⁸ The Court further held that a regulation which substantially advances a legitimate state interest will not be considered a taking.¹⁰⁹

The decisions in *Nollan v. California Coastal Commission*¹¹⁰ and *Dolan v. City of Tigard*¹¹¹ further developed regulatory takings jurisprudence. Between the two cases, the Court espoused the notion that there must be an "essential nexus"¹¹² and a "rough proportionality"¹¹³ between the purpose of the regulation and the regulation itself. In determining the appropriate nexus between a physical exaction and the governmental purpose, Justice Scalia wrote that the "'substantial advance[ment]' of a legitimate state interest" is the standard by which the Court should test the abridgement of property rights.¹¹⁴

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 138.

¹⁰⁶ *Id.* at 137.

¹⁰⁷ 505 U.S. 1003 (1992).

¹⁰⁸ *Id.* at 1015.

¹⁰⁹ *Id.* at 1016.

¹¹⁰ 483 U.S. 825 (1987).

¹¹¹ 512 U.S. 374 (1994).

¹¹² *Nollan*, 483 U.S. at 837.

¹¹³ *Dolan*, 512 U.S. at 391.

¹¹⁴ *Nollan*, 483 U.S. at 841. See also Zygmunt J.B. Plater & William Lund Norine, *Through the Looking Glass of Eminent Domain: Exploring the "Arbitrary and Capricious" Test and Substantive Rationality Review of Governmental Decisions*, 16 B.C. ENVTL. AFF. L. REV. 661, 704 (1989).

Nollan and *Dolan* demonstrate a harsher review by the Court of land use regulations. With these two cases, the Court advanced a scheme whereby: (1) the means chosen by the local government unit must “substantially advance” a legitimate aim;¹¹⁵ and (2) any yield required by an owner must be “roughly proportional” to the harm caused by the new land use.¹¹⁶ As the majority said in *Dolan*: “We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation”¹¹⁷

C. Evolution of Public Purpose Jurisprudence

The Constitution places only two constraints on the ability of government to take private property. The property must be taken for public use, and just compensation must be paid.¹¹⁸ “‘Just compensation’ requires only that the government pay for the land that it takes, but the public use limitation is a substantive constraint on the exercise of eminent domain.”¹¹⁹ State courts have developed two opposing views regarding the public use limitation. The first view argues that the public use requirement is fulfilled simply when a benefit to the public results from the taking.¹²⁰ The second view holds that “the public use requirement is satisfied only when the public actually uses or retains the right to use the taken property.”¹²¹ Although the second, narrower view was popular until the nineteenth century, the broad view has always dominated.¹²²

1. Narrow View of Public Use Clause

The traditional view of public use meant that the land taken would be used for the general public. The government could take property for itself, but it was not to take land from A and give it to B.¹²³ This conservative approach meant that the land must be used by and for the entire public. In *Kohl v. United States*,¹²⁴ the Supreme Court held that eminent domain “is a right belonging to a sovereignty to take private

¹¹⁵ *Nollan*, 483 U.S. at 834.

¹¹⁶ *Dolan*, 512 U.S. at 391.

¹¹⁷ *Id.* at 392.

¹¹⁸ U.S. CONST. amend. V.

¹¹⁹ Derek Werner, Note, *The Public Use Clause, Common Sense, and Takings*, 10 B.U. PUB. INT. L.J. 335, 341–42 (2001) (footnote omitted).

¹²⁰ *Id.* at 343.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Calder v. Bull*, 3 U.S. (3 Dall) 386, 388 (1798).

¹²⁴ 91 U.S. 367 (1875).

property for its own public uses, and not for those of another."¹²⁵ The narrow view incorporated the belief that government's power to eminent domain should be limited to certain specific circumstances.

2. Broad View of Public Purpose

In 1916, the Supreme Court decided *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*,¹²⁶ which allowed condemnation of land and water rights so a power company could manufacture and sell hydroelectric power to the public.¹²⁷ The Court's decision in this case began the "watering down" of the public use requirement.¹²⁸ In conferring a public benefit, the new use must only have a value equal to or greater than the current use in order for a taking to be permissible.¹²⁹ "Therefore, review is almost non-existent because '[s]ome portion of the public will always benefit (just as others will lose) because of the resulting changes in relative prices.'"¹³⁰

The effect of "watering down" the Public Use Clause is that minorities are no longer protected from majoritarian abuse.¹³¹ Instead, any majority who has captured political power can easily take the land of "politically disfavored minorities,"¹³² and legislatures can justify almost any arbitrary purpose as a public use, thus allowing the majority to condemn the land of "the politically impotent to benefit the politically influential."¹³³

3. The Court's Shift to Public Purpose

In 1954, the Court used the broad view of the Public Use Clause to uphold the constitutionality of the District of Columbia Redevelopment Act of 1945.¹³⁴ The *Berman* Court held that a city planning committee could condemn a shop in order

¹²⁵ *Id.* at 373–74.

¹²⁶ 240 U.S. 30 (1916).

¹²⁷ *Id.* at 33.

¹²⁸ Peter J. Kulick, Comment, *Rolling the Dice: Determining Public Use in Order to Effectuate a "Public-Private Taking" — A Proposal to Redefine "Public Use,"* 2000 L. REV. MICH. ST. U. DET. C.L. 639, 647–48 (2000).

¹²⁹ Werner, *supra* note 120, at 343.

¹³⁰ *Id.* (alteration in original) (quoting RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 170 (1985)).

¹³¹ *Id.* at 346.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Berman v. Parker*, 348 U.S. 26 (1954).

to combat urban blight.¹³⁵ The business owner claimed the plan was an unconstitutional taking because he was not using his property for private uses but for public ones, yet, under the plan, the site would be redeveloped for private, not public use.¹³⁶ The Court reasoned that the legislature, not the judiciary, should guard public need; therefore, the Court played only a small role in determining whether eminent domain was being exercised for a public purpose.¹³⁷ The Court stated in *Berman*:

We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to served by social legislation This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.¹³⁸

In 1984, the Supreme Court relied on *Berman* and held that the Public Use Clause permitted the State of Hawaii to transfer real property from one private owner to another.¹³⁹ The settlers of the Hawaiian Islands developed a feudal system in which one high chief controlled land and assigned subchiefs to develop it.¹⁴⁰ No person owned land privately; as Hawaii was developed, however, Americans tried to wrest control of the land from the chiefs.¹⁴¹ The Americans were unsuccessful, and ownership of land in Hawaii was concentrated among a very few landowners who rented out parcels to individual families.¹⁴² To redress the problem, the

¹³⁵ *Id.* at 35.

¹³⁶ *Id.* at 31.

¹³⁷ Elizabeth A. Taylor, Note, *The Dudley Street Neighborhood Initiative and the Power of Eminent Domain*, 36 B.C. L. REV. 1061, 1066 (1995).

¹³⁸ *Berman*, 348 U.S. at 32.

¹³⁹ *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984).

¹⁴⁰ *Id.* at 232.

¹⁴¹ *Id.*

¹⁴² *Id.* The problem was so pervasive that, "while the . . . governments owned almost 49% of the State's land, another 47% was in the hands of only 72 private landowners. . . . The legislature concluded that concentrated land ownership was responsible for skewing the State's residential fee simple market, inflating land prices, and injuring the public tranquility

government of Hawaii created a plan whereby the privately owned tracts were condemned by the government, subdivided into small lots, and sold to the former lessees of the land.¹⁴³ The lessor owners were paid fair market value for their land; however, they sued the state claiming the plan was an unconstitutional taking.¹⁴⁴ The Court held that it "w[ould] not substitute its judgment . . . as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'"¹⁴⁵ With this statement, the Court endorsed the broad view that it will not disturb a state's determination that an act purports a public use. As long as the state could have a rational public use in mind, the Court will uphold the state's action.¹⁴⁶ After concluding that the public purpose was a proper one, Justice O'Connor further concluded that the Court could not "condemn as irrational the [Hawaii Land Reform] Act's approach to correcting the land oligopoly problem."¹⁴⁷ Despite the Court's mandate that the judiciary engage in a constitutionally required rational basis scrutiny of the legislature's stated purpose, the Court clearly deferred to the legislature's decision to redistribute land from one private owner to another under the public use doctrine.¹⁴⁸ Further, the Court's "combination of rational basis analysis with the public-purpose inquiry is significant because it . . . was a fundamental part

and welfare." *Id.* (citations omitted).

¹⁴³ *Id.* at 233.

¹⁴⁴ *Id.* at 234 n.2, 234–35.

¹⁴⁵ *Id.* at 241 (quoting *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 680 (1896)).

¹⁴⁶ Justice O'Connor noted:

The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose. The Court long ago rejected any literal requirement that condemned property be put into use for the general public. "It is not essential that the entire community, nor even any considerable portion, . . . directly enjoy or participate in any improvement in order [for it] to constitute a public use."

Id. at 243–44 (alterations in original) (quoting *Rindge Co. v. Los Angeles*, 262 U.S. 700, 707 (1923)).

¹⁴⁷ *Haw. Hous. Auth.*, 467 U.S. at 242. Justice O'Connor continued:

The Act presumes that when a sufficiently large number of persons declare that they are willing but unable to buy lots at fair prices the land market is malfunctioning. When such a malfunction is signalled, the Act authorizes HHA to condemn lots in the relevant tract. The Act limits the number of lots any one tenant can purchase and authorizes HHA to use public funds to ensure that the market dilution goals will be achieved. This is a comprehensive and rational approach to identifying and correcting market failure.

Id.

¹⁴⁸ *Id.* at 242–43.

of the holding.”¹⁴⁹ After *Midkiff*, federal courts were free to validate any regulation so long as it conceivably could benefit the public. *Berman* and *Midkiff* “vest[ed] state and federal authorities with almost unlimited power to condemn property provided that the government pays just compensation, no matter whether the property could be characterized as fungible or ‘property for personhood.’”¹⁵⁰

The judiciary’s deference to legislative determinations of public use was solidified in *Kelo v. City of New London*.¹⁵¹ The Supreme Court held that economic development satisfies the Court’s “traditionally broad understanding of public purpose.”¹⁵² The decision was surprising for several reasons, including the apparent flip-flop of philosophies between the conservative and liberal justices on the Court. The Court’s liberal justices joined the majority opinion, written by Justice Stevens, which stressed the ability of state and local governments to determine the proper use of eminent domain.¹⁵³ The conservative justices, who generally raise federalism concerns, wanted to constrain local legislative decisions with strict judicial interpretation of the public use requirement.¹⁵⁴ The decision is a pristine grant of condemnation power to local governments because *Kelo* presented no social justifications such as the clearance of slums in *Berman* or the equalization of land ownership in *Midkiff*.

The City of New London wished to exercise its eminent domain power over a neighborhood in order to raze the houses and bring development to the economically “‘distressed municipality,’”¹⁵⁵ however, unlike *Berman*, the residential property in question was not blighted. Condemnation proceedings were initiated by the planning committee against the neighborhood’s homeowners who refused to sell.¹⁵⁶ Justice Stevens wrote that the plans came about as a response to the dire conditions in the city and were the result of careful consideration by the planning committee.¹⁵⁷ As with all the other takings cases, the Court’s determination turned on whether the City’s development plan served a public purpose.¹⁵⁸ Justice Stevens examined *Berman* and *Midkiff* to conclude: “For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.”¹⁵⁹

¹⁴⁹ Plater & Norine, *supra* note 115, at 703.

¹⁵⁰ Mitchell, *supra* note 22, at 552.

¹⁵¹ 125 S. Ct. 2655 (2005).

¹⁵² *Id.* at 2665-66.

¹⁵³ *Id.* at 2665.

¹⁵⁴ *Id.* at 2672-73 (O’Connor, J., dissenting).

¹⁵⁵ *Id.* at 2658 (plurality opinion).

¹⁵⁶ *Id.* at 2660.

¹⁵⁷ *Id.* at 2665.

¹⁵⁸ *Id.* at 2663.

¹⁵⁹ *Id.* at 2664.

The majority opted not to adopt a bright line rule that economic development is not a public use. Rather, Justice Stevens held that, although "the government's pursuit of a public purpose will often benefit individual parties,"¹⁶⁰ "[b]y focusing on a property's future use, as opposed to its past use, our cases are faithful to the text of the Takings Clause."¹⁶¹ After *Kelo*, the government's ability to take private property seems unconstrained, given that some public benefit could arise from nearly any private transfer of ownership.

Justice Kennedy's concurrence emphasized specific facts in *Kelo* that may serve as future guidance on how governments must constrain their eminent domain power, and he was careful to consider the city's actual objective. He noted that the taking was "in the context of a comprehensive development plan meant to address a serious city-wide depression."¹⁶² He urged that when economic development is the purpose, and private parties will benefit, the court must conduct careful enquiry into the facts to determine whether the "stated public purpose . . . is only incidental to the benefits that will be confined on private parties of a development plan."¹⁶³ Justice Kennedy concluded that the precaution taken by the planning committee, the anonymity of the benefitted parties, and the careful scrutiny by the trial court all mandated that the committee's plan survive the rational scrutiny established by the Court in *Berman* and *Midkiff*.¹⁶⁴

Justice O'Connor wrote the dissent, joined by Chief Justice Rehnquist and Justices Scalia and Thomas. She argued forcefully that the Court's decision renders all private property "vulnerable to being taken and transferred to another private owner, so long as it might be upgraded."¹⁶⁵ Justice O'Connor urged that an "external judicial check" is necessary to ensure that legislatures exercise their eminent domain power appropriately¹⁶⁶ and that *Berman* and *Midkiff* exercised this judicial check correctly because the takings in those cases were necessary to forestall the harms of the existing property uses when the cases were brought.¹⁶⁷ The majority opinion, according to the dissent, "wash[es] out" the distinction between private and public use by lifting an "incidental public benefit" to the level of "public use" imagined by the Founding Fathers.¹⁶⁸

Although the *Kelo* decision seems like a victory for developers rather than homeowners, the decision strengthens the case for heirs' property title-holders.

¹⁶⁰ *Id.* at 2666.

¹⁶¹ *Id.* at 2666 n.16.

¹⁶² *Id.* at 2670 (Kennedy, J., concurring).

¹⁶³ *Id.* at 2669.

¹⁶⁴ *Id.* at 2670.

¹⁶⁵ *Id.* at 2671 (O'Connor, J., dissenting).

¹⁶⁶ *Id.* at 2673.

¹⁶⁷ *Id.* at 2674–75.

¹⁶⁸ *Id.* at 2671–72.

Because the Court has determined that legislatures deserve “broad latitude”¹⁶⁹ when taking action to create or preserve public use, any protective measures taken to ensure that heirs’ property is not forced into partition sale would withstand judicial scrutiny.

4. Implications of Judicial Deference

Because the judiciary is now so deferential to the state’s stated purpose in Takings Clause cases, the Public Use Clause no longer protects minorities from majoritarian abuse as the Founders intended.¹⁷⁰

Rather, the decline of public use doctrine has allowed majorities who have captured power to take the land of politically disfavored minorities. By deferring to legislative declarations of public use, the judiciary has opened the door to the type of arbitrary government that the Framers sought to prevent. Majorities with the power to condemn property have happily stepped in, using their power to take the land of the politically impotent to benefit the politically influential.¹⁷¹

The Public Use Clause was intended to prohibit the majority from usurping resources or redistributing opportunities from one group to another merely because they possess the “raw political power to obtain what they want.”¹⁷² This struggle between the rights of the majority and minority has been characterized as such: “Whereas majoritarian interference with protected rights constitutes a tyranny by the majority, denial of the majority’s power to rule in spheres not specifically protected constitutes a tyranny by the minority.”¹⁷³ The Public Use Clause illustrates this dilemma. For example, without the Public Use Clause, a minority landowner could attempt to thwart a public project by refusing to sell or by holding onto his land unless offered a vastly higher price than others who sold before him.¹⁷⁴ But for the government’s eminent domain power, the result of this quandary would permit individual landowners to thwart the will of the majority and effectively veto proposed public projects.¹⁷⁵ “Eminent domain prevents the exercise of minority

¹⁶⁹ *Id.* at 2664 (plurality opinion).

¹⁷⁰ Werner, *supra* note 119, at 346.

¹⁷¹ *Id.* (footnotes omitted).

¹⁷² Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1689 (1984).

¹⁷³ Werner, *supra* note 119, at 347 (quoting David L. Faigman, *Madisonian Balancing: A Theory of Constitutional Adjudication*, 88 N.W. U. L. REV. 641, 644 (1994)).

¹⁷⁴ *Id.* at 347–48.

¹⁷⁵ *Id.* at 348.

vetoed by allowing legislative majorities to employ the coercive machinery of the state to force the transfer of land from the dissenting minority to the public."¹⁷⁶

The state's eminent domain power has grown too large, however, and its ability to justify the exercise of that power through the Public Use Clause has gone virtually unchecked by the Court.¹⁷⁷ Madison's fear of government officials' propensity for despotism when power is accumulated by majority factions has been realized.¹⁷⁸ The expectation that they will receive just compensation and the "lack of access to the political system"¹⁷⁹ influence minorities to accept the condemnation action.¹⁸⁰ They may be further discouraged from pursuing action when they realize that "those seeking condemnations are special interest groups and repeat-players with legislative clout."¹⁸¹

Courts can ensure that municipalities do not favor rich over poor. Some courts are beginning to recognize the need to ensure fair treatment and provide restitution for past discrimination. Many courts now require municipalities "to accommodate their share of the region's poor by building housing, subsidizing rents and requiring builders to sell units at designated prices."¹⁸² In *Southern Burlington County NAACP v. Township of Mount Laurel*,¹⁸³ the New Jersey Supreme Court covered new territory by invalidating portions of a zoning ordinance that excluded low and moderate income housing from the municipality.¹⁸⁴ The judgment went on to strike down the trial court's ruling that the town undertake "a plan of affirmative public action designed 'to enable and encourage the satisfaction of the indicated needs' for township-related low and moderate income housing."¹⁸⁵ The court noted, however, that the municipality should undertake appropriate action and implied that it would be willing to order further judicial action if the city did not comply.¹⁸⁶ In subsequent litigation, the New Jersey court explained its ruling, stating: "The basis for the constitutional obligation is simple: the State controls the use of land, *all* of the land. In exercising that control it cannot favor rich over poor."¹⁸⁷

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 350.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 354.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² Dennis J. Coyle, *Takings Jurisprudence and the Political Cultures of American Politics*, 42 CATH. U. L. REV. 817, 838 (1993).

¹⁸³ 336 A.2d 713 (N.J. 1975).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 734 (quoting 290 A.2d 465 (N.J. Super. Ct. Law Div. 1972)).

¹⁸⁶ *Id.*

¹⁸⁷ *S. Burlington Co. NAACP v. Twp. of Mount Laurel*, 456 A.2d 390, 415 (N.J. 1983).

Thus far, no other state courts have followed New Jersey's lead. Politicians have questioned the court's holding in *Mount Laurel* as engaging in unauthorized policymaking.¹⁸⁸

A study of the aftermath of the 1983 *Mount Laurel II* decision concluded: "Perhaps the worst burden overhanging the *Mount Laurel* process is the manner of its birth. . . . With the judicial involvement came intense controversy, . . . which has discouraged politicians everywhere and judges outside of New Jersey from embracing the approach."¹⁸⁹

5. Takings and Economic Growth

In takings analysis, it is often assumed that increased employment and an increased tax base will benefit the public.¹⁹⁰ However, municipalities often cannot provide services to meet the increasing demand.¹⁹¹ The need for new housing, schools, and other necessities can outstrip a city's economic resources. In terms of taking heirs' property for economic growth, the externalities of development include the loss of cultural identity and heritage.¹⁹² The effects of these losses can be devastating to a community.

Too frequently, courts fail to consider these human costs.¹⁹³ The current tenants who are relocated can afford housing only comparable to or less desirable than what they had before the displacement.¹⁹⁴ Further, the destruction of the community can be even more devastating for a member of that community than the loss of his own home:

Particularly among the poor, "the existence of a matrix of mutually shared values and mutually shared concerns and support are necessary conditions, not just to psychic wellbeing, but to physical survival itself." While the prosperous can obtain what they need to survive, the impoverished often look to "a

¹⁸⁸ Coyle, *supra* note 183, at 838.

¹⁸⁹ *Id.* at 838–39 (quoting Martha Lamar et al., *Mount Laurel at Work: Affordable Housing in New Jersey, 1983–1988*, 41 RUTGERS L. REV. 1197, 1277 (1989)).

¹⁹⁰ *Id.*

¹⁹¹ Nancy K. Kubasek, *Time to Return to a Higher Standard of Scrutiny in Defining Public Use*, 27 RUTGERS L. REC. 3, 14 (2003).

¹⁹² *Id.*

¹⁹³ Keasha Broussard, Note, *Social Consequences of Eminent Domain: Urban Revitalization Against the Backdrop of the Takings Clause*, 24 LAW & PSYCHOL. REV. 99, 110 (2000).

¹⁹⁴ *Id.*

web of mutual support consisting of nonmonetary exchange of goods and services with each individual contributing to the others whatever meager abundance and special talents he might have." By scattering the members of these communities, displacement causes the dissolution of the bonds that they have formed.¹⁹⁵

Land ownership among African Americans is particularly important. Studies have shown that land ownership in African American communities promotes community well-being in the form of "increased civic participation, psychological well-being, and an enhanced sense of community," and children who stay in school longer.¹⁹⁶ "This focus on land as a base for community infrastructure extrapolates from the classical liberal view that landownership is uniquely important to the protection of individual liberty interests."¹⁹⁷

Families often build communal relationships tied to the land. Just as Johnny Rivers shared the land with his sisters, children, grandchildren, and great-grandchildren,¹⁹⁸ many African American landowners have set up family communes where family members of all generations rely on one another.¹⁹⁹ Although the benefits of these connections are not economically tangible, they provide important cultural, and societal benefits that are destroyed when ties are broken and the families are forced to move.²⁰⁰ Further, for African Americans whose ties to the land go back to slavery, owning land where their ancestors were once held in bondage can be nearly sacred. As Phyllis Craig-Taylor explained:

Acquisition of the "homeplace" or productive land was the first symbolic step toward true liberty or freedom for many African Americans following Reconstruction. Individual property ownership was viewed as a necessity for adaptation and citizenship. The psychological and emotional significance of retaining a

¹⁹⁵ *Id.* at 111 (footnotes omitted) (quoting Denis J. Brion, *The Meaning of the City: Urban Redevelopment and the Loss of the Community*, 25 IND. L. REV. 685, 702 (1991)).

¹⁹⁶ Mitchell, *supra* note 22, at 539 (footnotes omitted).

¹⁹⁷ *Id.*

¹⁹⁸ Bartelme, *Heirs Property Tangle*, *supra* note 1.

¹⁹⁹ Mitchell, *supra* note 22, at 539. In a study that compared equally poor, landowning and landless elderly black people in the Piedmont region of North Carolina, researchers determined "that a greater percentage of the children of sharecroppers moved far away from their parents (often to northern cities) than did the children of landowners. *Id.* at 540 (footnotes omitted). The elderly sharecroppers were more often left to fend for themselves." The study also found that two-thirds of landowners lived on family compounds composed of several generations who "established 'reciprocal exchange relationships.'" *Id.*

²⁰⁰ In the Rivers case, the family lived in seven trailers spread across the property. After the eviction, the families were relocated to different areas, all in different neighborhoods. Bartelme, *Families Evicted*, *supra* note 3.

particular property is immeasurable in financial terms and may “[do] violence” to the individuals whose cultural and historical ties bind them so closely to the property.²⁰¹

Thus, while preserving heirs’ property may not yield the most profitable use of land, the benefits to the community are incalculable.

IV. PROPOSED REFORMS

Takings jurisprudence has evolved from an initial wariness of the Public Purpose Clause to an embrace of it as a legitimate exercise of the state’s power. Because the courts grant such deference to state condemnation proceedings, it is likely that reform to protect heirs’ property would also be upheld as a legitimate exercise of the state’s eminent domain power. These reforms could take several different forms, but all of the proposed reforms would withstand rational scrutiny.

The first reform is to shift the burden onto the plaintiff in partition sales to prove that in-kind partition is impossible. Most state statutes and common law favor partition in kind. More often, however, courts now order a partition sale because the physical division of land is impractical among so many cotenants. State legislatures, for the most part, have not changed the partition statutes to reflect a newfound preference for partition sales. As discussed in Part IIB, most state statutes require a partition sale only when physical division is “impossible.”²⁰² Nonetheless, courts routinely construe “impossible” to mean “improbable” or “impractical.”²⁰³ “This trend contradicts the language, purpose, and spirit of the statute In the absence of compelling reasons, which have never been advanced by . . . courts, express statutory language prohibits the court’s use of partitioning sales unless the parties clearly prove the impossibility of division in kind.”²⁰⁴

Several factors account for the judiciary’s preference for partition sales.

[T]he judicial system implicitly disfavors the co-ownership of land. Furthermore, when faced with the practical difficulties of and the efforts involved with partitioning generally, courts find it easier to conduct a sale, rather than a partition by division in kind. Finally, . . . because partitioning sale actions involve considerably less effort while generating greater legal fees than actions in which property is divided in kind, lower income cotenants desiring to protect their

²⁰¹ Phyllis Craig-Taylor, *Through a Colored Looking Glass: A View of Judicial Partition, Family Land Loss, and Rule Setting*, 78 WASH. U. L.Q. 737, 774 (2000) (footnotes omitted).

²⁰² See *supra* notes 72–73 and accompanying text.

²⁰³ Casagrande, *supra* note 27, at 774–75 (footnotes omitted).

²⁰⁴ *Id.*

interests frequently are unable to procure adequate legal representation.²⁰⁵

Phylliss Craig-Taylor proposed three reforms that involve actual statutory revision. The first of these reforms is to require a supermajority vote of the cotenants in order for a court to order a partition sale.²⁰⁶ A second proposed reform is a modification to existing statutes to include a redemption period, "where the family interest holders could gather the funds to redeem the property."²⁰⁷ Craig-Taylor's third idea is "to ensure that cotenants acquire a license in the developed property that forces the developer to share its profits."²⁰⁸ The supermajority vote would protect the interests of disadvantaged titleholders from developers with deep pockets.²⁰⁹ Further, it would encourage the family to work together, possibly through arbitration, and would allow "the court to avoid the complicated technical analysis required to divide land by partition in-kind, while still preserving the common law presumption favoring actual partition."²¹⁰ Most importantly, a supermajority vote would be a "powerful disincentive" for the type of financial speculation that played out in the Rivers case.²¹¹ Craig-Taylor observes: "Courts have consistently noted the longstanding policy favoring preservation of a right to inheritance. The market interests advanced by developer speculation are not sufficient to outweigh the strong social value of preserving inherited interests,

²⁰⁵ *Id.* at 783.

²⁰⁶ Craig-Taylor, *supra* note 201, at 780.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 781. Craig-Taylor notes:

In considering these alternative methods of honoring the family interest holder's investment in commonly held property, one must be mindful that compulsory partition is an action in equity, created in order to avoid the further headaches that arise from common ownership of property. However, the case of the outside interest holder does not present the same considerations as the case where cotenants have experienced a change of circumstance and are no longer practically able to enjoy common ownership. The developer who purchases a fractional interest in commonly held property obviously never intended to enjoy common ownership with the family. To the contrary, the developer had every intention, when it acquired the interest, to destroy the cotenancy in order to force a sale and purchase of the land. Thus, any right to equitable relief should be limited where the outside interest holder "attempts to discard the headaches that accompany the common ownership" that was voluntarily assumed for speculative purposes.

Id. (footnotes omitted).

²⁰⁹ *Id.* at 781-82.

²¹⁰ *Id.* at 782.

²¹¹ *Id.*

particularly in communities where such ownership is directly tied to community identity."²¹²

Craig-Taylor does not address the interests of developers or titleholders who would prefer a partition sale over partition in kind. A supermajority vote would restrict the right of these owners to sell and represents governmental intrusion into private land use. Under these proposed statutory revisions, the cotenant who wished to sell against the supermajority vote of the other cotenants might bring a cause of action against the government for a regulatory taking. As discussed earlier in this Note, however, the need to preserve African American heirs' property, particularly that which has been passed intestate since Reconstruction, is a valid public need, and would likely withstand rational scrutiny.

CONCLUSION

The struggle of African American farmers has been ignored for far too long. The *Pigford* class action has failed to spur the USDA to revise its policies, and the loan applications of the remaining African American farmers are still in the hands of white farmers, elected by other local farmers, who are not accountable to anyone. Tens of thousands of farmers have been discriminated against by the federal government in trying to obtain farm loans, unknown numbers of families are struggling to preserve a dying heritage, and millions of acres have already been lost.

Even those families who fight developers in court are forced to sell their land at auction where they receive much less than they would on the open market. The system is vastly unfair, and courts exacerbate the unfairness by continuing to order partition sales even when physical division of the land is possible. Enforcing the statutes as written might stem the flood of land loss; however, rewriting the statutes to save this cultural heritage would offer more protection.

Such revisions will face takings challenges, but with the legislature in favor of land preservation, those challenges could not withstand rational scrutiny. For many African Americans, property ownership is a symbol of freedom and provides psychological security. Thus far, the government has made no significant effort to halt this land loss. To redress the effects of discrimination on African American farmers, the government must make special efforts to protect minority-owned land.

²¹² *Id.* at 782 (footnote omitted).