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THROUGH A COLORED LOOKING GLASS: A VIEW OF JUDICIAL PARTITION, FAMILY LAND LOSS, AND RULE SETTING

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Table of Contents

"When I use a word," Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean—neither more nor less." "The

* Associate Professor of Law, North Carolina Central University School of Law. This work is the second in a series that explores issues of wealth and property ownership in the African American community. For comments on drafts, I would like to thank Thomas Cotter, Nancy Dowd, Alyson Flournoy, Berta Hernandez, and for her diligent work, I thank my research assistant, Amy Petrick.

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question is," said Alice, "whether you can make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master—that's all."[1]

INTRODUCTION

African Americans in contemporary U.S. society continue to experience economic inequality.[2] Regardless of the indicators one reviews—property ownership,[3] employment,[4] or income[5]—the data confirms the entrenchment of African Americans' disadvantaged status. It is the thesis of this article that the economically subordinated status of African Americans cannot be divorced from the historical processes that have created or contributed to the divide between African Americans and other social groups. Until emancipation, the overwhelming majority of African Americans were enslaved and treated, not as persons, but as property.[6] They had no legal right to own property and, accordingly, could seek no legal redress for the taking or confiscation of property in their possession.[7] The experience of the African American after slavery was similar to the experience of Alice and the "looking glass."[8] The disconnection from reality[9] and expectations based upon that experience are similar to what many ex-slaves experienced once freed and trying to move toward citizenship and independence.[10]

After the slaves were freed, many thought that autonomy and full citizenship could only be secured with the acquisition of property.[11] Many

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1. LEWIS CARROLL, THROUGH THE LOOKING GLASS & WHAT ALICE FOUND THERE 238 (1946). Sometimes the law works very much like Alice's "looking glass"—making things which are real appear fiction and things that are fiction appear real.

2. *See generally* MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH A NEW PERSPECTIVE ON RACIAL INEQUALITY (1995) (analyzing currently existing economic disparities between black Americans and white Americans).

3. *See id.* at 109, tbl. 5.4.

4. *See id.* at 119, tbl. 5.7; *see also* JOE R. FEAGIN, LIVING WITH RACISM, THE BLACK MIDDLE-CLASS EXPERIENCE 136-37 (1994) (noting that blacks commonly experience discrimination in getting jobs and receiving equal wages).

5. *See* OLIVER & SHAPIRO, *supra* note 2, at 102, fig. 5.2.

6. *See* DONALD G. NIEMAN, PROMISES TO KEEP 24 (1991).

7. *See id.*

8. *See* CARROLL, *supra* note 1, at 149.

9. *See id.* at 155. Sitting in a very real room, Alice looked in the mirror and thought that the reflection was actually another room. The "looking glass room" in many ways resembled her sitting room, but when she entered the "looking glass room," the experience was completely different from her real life experience. Her experiences had not prepared her for the rules that applied in her new space. *See id.*

10. *See id.* at 155-56.

11. *See* ERIC FONER, RECONSTRUCTION 104 (1988); HOWARD ZINN, A PEOPLES HISTORY OF

ex-slaves believed that the government would ensure some minimal access to property.[12] Although there was some support for the distribution of land to ex-slaves, ultimately the government's policy and intent failed to provide the needed support for the ex-slaves.[13] The reality fell far short of the ex-slaves' expectations.[14] Opportunities and protection that appeared to apply to all citizens, and that for the white majority were real, proved illusory for the ex-slave.[15]

During Reconstruction and the years that followed, opportunities for property acquisition were severely limited, but a small number of freedmen were successful.[16] Despite incredible odds, freedmen continued their efforts to obtain property.[17] By the end of the Nineteenth Century, legislation and war enactment orders that initially provided former slaves limited access to property were either overturned, repealed, or allowed to lapse out of existence.[18] New restrictions arose that were reinforced by a complex web of racist doctrine, local legislation, and property covenants.[19]

THE UNITED STATES 192-93 (1995). Once free, ex-slaves adopted a version of the republican vision of citizenship—property ownership guaranteed independence in judgment and action. *See* FONER, *supra*, at 103-04. Property ownership would provide a means for economic independence, the opportunity for civic and political involvement, and an elevation in social standing. Especially in the South, a primarily agricultural-based economy, land was an essential asset for the ex-slave. *Id.*

12. *See* FONER, *supra* note 11, at 104-05. Special Field Order No. 15, tax foreclosure sales, and the 1866 Southern Homestead Act all demonstrated the brief promise of property distribution open to African Americans during Reconstruction. *See* Phyliss Craig-Taylor, *To Be Free: Liberty, Property and Race*, 14 HARV. BLACKLETTER L.J. 55-64 (1998). Echoing the Lockean theme of rewarding labor with ownership, immediately after the Civil War, an African American wrote:

> [I]f strict law of right and justice is to be observed, the country around me is the entailed inheritance of the Americans of African descent, purchased by the invaluable labor of our ancestors, through a life of tears and groans, under the lash and yoke of tyranny . . . . The way we can best take care of ourselves is to have land . . . .

See ZINN, *supra* note 11, at 192.

13. *See* LOREN SCHWENINGER, BLACK PROPERTY OWNERS IN THE SOUTH 1790-1915, at 144 (1990).

14. *See* WILLIE LEE ROSE, REHEARSAL FOR RECONSTRUCTION 408 (1964). As one African American remarked of the Reconstruction period: "There is no redress for us from a government which promised to respect all under its flag. It is a mystery to me." *Id.*

15. *See id.*

16. *See* SCHWENINGER, *supra* note 13, at 68-69.

17. There is extensive history on African American attempts to obtain and retain property and wealth. *See* CHARLES ABRAMS, FORBIDDEN NEIGHBORS 23-28 (1955); ROBERT C. KENZER, ENTERPRISING SOUTHERNERS 9-18 (1997); SCHWENINGER, *supra* note 13, at 68-69; WALTER B. WEARE, BLACK BUSINESS IN THE NEW SOUTH 3-8, 13-14 (1993).

18. *See* ZINN, *supra* note 11, at 199-203; *see also* FONER, *supra* note 11, at 70-71, 153-64 (noting the broken promises of Reconstruction plans to provide slaves with land and education, such as Sherman's retraction of Special Field Order No. 15, which provided for the now-famous allotment of 40 acres and a mule to emancipated slaves); ROSE, *supra* note 14, 378-408 (noting that legislative schemes to compensate slaves were abandoned once hostilities cooled between northern and southern whites).

19. *See* A. LEON HIGGENBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND

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Such restrictions limited opportunities for African American land ownership and undermined the confidence of African Americans that the legal system would protect or buttress an attempt at property ownership.[20] One generation out of slavery, African Americans had few opportunities to obtain property and use it as a basis for wealth accumulation.[21] This established a wealth of disparity that would continue into the next century, which when combined with distrust of the legal system, laid the ground work for the "looking glass" experience to continue.[22]

In this Article, I explore the struggle of ex-slaves and their Twenty-First century descendants to achieve the promise of property in a democratic society and the role of law as a reflection of and tool of racial hierarchy. I focus on the role played by the judicial partition process in creating a system that inextricably led to stripping African Americans of their property. In recent years, courts and legislatures have scrutinized and expressed increasing hostility toward exercises of regulatory power that effect takings. This Article gives a similar scrutiny to the partition process and argues that it should be modified to alleviate the unfair burden it places on poor property owners and to assure that property owners are afforded just compensation when their property is involuntarily taken to achieve a public purpose.[23]

In the majority of states, property that passes from generation to generation through intestate succession[24] results in a tenancy in common if there is more than one qualifying heir.[25] The cotenants share an interest in the property as qualifying heirs under the relevant state intestacy statute.[26] Much of the real property held by African Americans passes to future generations through intestate succession. If there is more than one heir, the

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PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 108-26 (1996).

20. *See* Craig-Taylor, *supra* note 12, at 55-64 (providing an in-depth discussion of the developing structure of discrimination which impeded African Americans' land ownership).

21. *See* ABRAMS, *supra* note 17, at 23-28; KENZER, *supra* note 17, at 9-18; WEARE, *supra* note 17, at 3-8. *See generally* SCHWENINGER, *supra* note 13 (discussing the struggle for property ownership among blacks before, during, and after the Reconstruction period).

22. *See generally* OLIVER & SHAPIRO, *supra* note 2.

23. This Article analogizes the combined effect of developing judicial and legislative rules for partition of co-owned property to the effects of judicially ordered condemnation.

24. Intestate succession may be seen as desirable because it keeps property in the family and provides a connection to home, where the family began its journey toward citizenship and freedom. This represents a legacy of hard work and a symbol of an equalizing force for a politically impotent and economically dependent people. It is a type of social leverage. *See, e.g.*, Evelyn Alicia Lewis, *Struggling with Quicksand: The Ins and Outs of Co-tenant Possession Value Liability and a Call for Default Rule Reform*, 1994 WIS. L. REV. 331, 335.

25. For a complete discussion of the mechanics of intestacy, *see infra* Part I.B.

26. *See* Regis W. Campfield, *Estate Planning for Joint Tenancies*, 4 DUKE L.J. 669, 672-73 (1974).

property is held jointly by the heirs as tenants in common. With the death of each cotenant, increasing numbers of descendants may step in to take that interest by representation.[27] The owners become more and more numerous as this process continues through each generation. Problems develop when the co-owners fail to reach a consensus for use of the property. Any interest holder may then force a sale.[28] The heart of the problem is the inadequate protection given to property owners in the context of partition proceedings. Land held by families for generations may be ordered against the wishes of the majority of the cotenants to the highest bidder in a judicial partition sale.[29] Accepting the highest bid as determinative of value also creates a bias in favor of the wealthier party. The wealth bias and failure to recognize the equal value of other noneconomic valuation frameworks thwart attempts by African Americans to retain property. Further, the price paid in these proceedings could arguably fail to satisfy the just compensation standard, if employed in an inverse condemnation conext.

This Article analyzes the role played by the law of partition and its diminished substantive and procedural protection for landowners as applied to tenancies in common in the typical story of land loss. Part I traces the development of the tenancy in common and explores the nature of the partition action, in light of property theory, highlighting the tension between protection of one cotenant's desire to alienate and another cotenant's desire not to alienate, both property rights of great importance. I then examine the implementation of partition through state statutes and question the manner in which courts applying these statutes resolve this tension. Part II explores the courts' near-universal application of an economic valuation formula to resolve partition cases which, in effect, delegitimizes any other criteria or value framework for deciding these cases.[30] Even if one accepts the exclusive focus on economic value as adequate, deficiencies in the procedure employed in partition proceedings artificially depress the economic value assigned to the subject property,

27. *See* U.P.C. § 2-106(b) (1990). Under the Uniform Probate Code, if a decedent's estate passes intestate "by representation," the estate is divided into as many equal shares as there are (1) surviving descendants in the generation nearest to the decedent and (2) deceased descendants in the same generation who left surviving descendants, if any. *Id.* Consequently, it is possible to imagine a large number of shares passing to descendants of both the decedent and pre-deceased heirs; this possibility vastly complicates the ownership of property passed through intestacy.

28. *See* 4 THOMPSON ON REAL PROPERTY § 32.08(b), at 88-89 (David A. Thomas ed., 1994).

29. *See id.*

30. By refusing to recognize as viable or quantifiable such noneconomic values as the "home place" or an ownership of property as essential to full citizenship and independence, the courts choose seemingly "objective" methods of resolving disputes regarding the use of the property.

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thus depriving landowners of the fair market value of their land.

The involuntary nature of partition proceedings, while developed to address sometimes intransigent problems created by cotenancies, arguably is an excessive intrusion into the rights of lower income landowners. Relatively recent legislative acts operate in a manner similar to governmental takings by inverse condemnation but without providing as assurance that just compensation will be paid. The courts have misinterpreted the intent of the judicial partition statutes, which was to protect property rights unless extraordinary injury would occur. This goal is sacrificed in order to facilitate convenience and efficiency.[31] Thus, the outcome is to deny the property owner the degree of protection typically associated with ownership of property in fee. This creates the experience of the "looking glass" for those who lose their property.

This Article concludes by suggesting several ways courts and legislators can respond to ensure that both noneconomic interests are afforded an equal footing in judicial partition cases and that the procedures employed serve the purpose intended and achieve a full and fair result in the judicial partition sale. I recommend that courts and legislators establish a legal doctrine with different exit rules for property held in common.[32]

I. THE TENANCY IN COMMON AS A FORM OF REAL PROPERTY OWNERSHIP

"Property is the right of each and every citizen to enjoy and dispose of the portion of property guaranteed to him by law . . . . The right of property is limited, as are all others, by the obligation to respect the property of others."[33]

A. History and Development of Tenancy in Common

No history of individual rights in the United States would be complete without a thorough analysis of the means by which property is acquired,

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31. *See supra* note 30; *see also infra* note 96 and accompanying text (discussing exceptions to the right to partition).

32. Although this Article focuses on the African American family, the new exit rules I propose would apply to all property owners, not just African Americans. Therefore, my proposal hopes to help afford *all* families greater protection in this setting. This Article focuses on African American families to demonstrate how devastating this situation can become for one group of people. Certainly, other groups suffer as a result of this regime. For a comprehensive discussion of the importance of racially and culturally inclusive perspectives, see Juan F. Perea, *The Black/White Binary Paradigm of Race: the "Normal Science" of American Racial Thought*, 85 CAL. L. REV. 5 (1997).

33. Robespierre, *Proposed Declaration of Rights, 24 April 1793*, *in* A DOCUMENTARY SURVEY OF THE FRENCH REVOLUTION 431 (John Stewart Hall ed., 1951).

divided, and transferred. The founders, in their efforts to create a more perfect union than their British predecessors, recognized the importance of and need for a more equitable distribution of property.[34] Thomas Jefferson recognized universal distribution of lands as the cornerstone of a democratic citizenry.[35] To encourage land distribution, new laws were adopted to facilitate distribution and alienation of property.[36] However, the founders' adherence to the ideal of universal ownership, while facilitating alienation, created unforeseen dilemmas.[37]

One dilemma was the transition in concurrent interests from a presumption of joint tenancies to one of tenancies in common.[38] This shift

34. *See* 1 THE PAPERS OF THOMAS JEFFERSON 362 (Julian P. Boyd ed., 1950); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 201-08 (Max Farrard rev. ed., 1937).

35. For a more thorough examination of Jefferson's notions of property and republicanism, see Stanley N. Katz, *Thomas Jefferson and the Right to Property in Revolutionary America*, 19 J.L. & ECONOMICS 467 (1976).

36. *See* PATRICIA NELSON LIMERICK, THE LEGACY OF CONQUEST 60-61 (1987); *see generally* PAUL W. GATES, A HISTORY OF PUBLIC LAND LAW DEVELOPMENT (1968) (discussing the way American public land law developed to allow private use and ownership of unsettled lands); EVERETT DICK, THE LURE OF LAND (1970) (discussing how immigrants' desire to become land owners shaped public land law).

37. The desire for ease of alienation should not be confused with a desire for equality in property ownership rights. For further discussion of the tensions and contradictions in the concept of property in the republican vision, see Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. REV. 273 (1991). John Locke hinted at a theory of universal ownership of property flowing from one's labor. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 134 (1698). Locke envisioned that "[t]hough the Earth and all inferior creatures be common to all men, yet every man has a property in his own person; this nobody has any right to but himself." *Id.* But what then of real property? While all property started in the common ownership of humanity, its distribution into estates facilitated people's growth from the natural state. The Lockeian theory of property, adopted by Jefferson, focused on humanity's integration of labor into the land. *See* Katz, *supra* note 35, at 474. But this system, without limits, allowed the wasteful stockpiling of land that both Locke and Jefferson disfavored. *See id.* at 475. To counterbalance this threat, Locke urged that land not used effectively or productively could be repossessed by a more industrious replacement, thereby ensuring that the utility of the land would be maximized. *See id.* While Locke effectively conditioned land ownership on the continual input of labor, he failed to address the problem of joint ownership—where both parties have added labor and are vying for ownership. *See* LOCKE, *supra*, at 134.

38. Tenancy in common is a form of concurrent ownership of property in which two or more persons own and possess an undivided interest in the whole property. *See* REEVES ON REAL PROPERTY § 702, at 993-95 (1909); THOMPSON, *supra* note 28, § 32.08, at 88-89. *See also* WILLIAM CRUISE, THE LAWS OF ENGLAND RESPECTING REAL PROPERTY 498 (1808); A. C. FREEMAN, COTENANCY AND PARTITION 150-56 (1886) (discussing the development of tenancies). Different tenancies are best distinguished from each other by which unities they require. The unities required to effectively create a joint tenancy interest are: title, time, and possession. *See* 2 AMERICAN LAW OF PROPERTY § 6.1 (A. James Casner ed., 1952); John W. Fisher, II, *Creditors of a Joint Tenant: Is There a Lien After Death*, 99 W. VA. L. REV. 637, 640 (1997). The defining characteristic of the joint tenancy is the theory of survivorship. *See* 7 RICHARD R. POWELL & PATRICK J. ROHAN, POWELL ON REAL PROPERTY ¶ 618 (1968). Survivorship prevents interests in a joint tenancy from being diluted through division to heirs in inheritance. *See id.* If the joint tenancy is not destroyed before the death of an interest holder, then the deceased holder's interest is absorbed by the surviving joint tenants. *See id.* The last surviving owner gains title to the entire property in fee simple. *See id.* Land held in a tenancy in common differs

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effected a major change in the transmission of property interests. The joint tenancy tends to consolidate the number of ownership interests by vesting title in the surviving joint tenant(s) at the death of a joint interest holder.[39] By contrast, at the death of a tenant of an estate in common, the interest passes by will to a devisee or through intestate succession to the interest holder's heirs.[40] In addition, in its earliest conception, the tenancy in common could only be terminated by agreement between the parties.[41] Partition between tenants in common could only be voluntary.[42] But later, individual co-owners were granted the right to demand partition.[43] This facilitated alienation but also ultimately stripped some co-owners of their property.[44] A brief history of the transition in concurrent ownership of property best demonstrates this effect.[45] However, regardless of the time framework, the shift effected a major change in the transmission of property interests.

It is uncertain when the courts began to move away from joint tenancies toward tenancies in common. As recently as the early Nineteenth Century, joint tenancies were still the standard.[46] By the end of the Nineteenth Century, however, courts had adopted the presumption that transfers of property to multiple owners created tenancies in common.[47] Courts utilized the tenancy in common to alleviate the harsh and inconvenient effects of survivorship.[48] Shifting the presumption to favor

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from a joint tenancy in that a tenancy in common requires only the unity of possession and lacks the principle of survivorship. *See id*. The tenancy in common is a flexible doctrine that can be applied to real, personal, mixed, corporeal, and incorporeal property. *See id*. It can be created by grant, gift, devise, bequeath, or operation of law. *See id*. An inadequate attempt to form a joint tenancy or tenancy in the entirety may also create tenancies in common. *See id*. The law presumes that owners of real property who die intestate with more than one heir create a tenancy in common between the heirs. *See id*.

39. Of course even a joint tenancy can be partially or in some cases, completely severed without the approval of all owners, by the act of a single joint tenant alienating his or her interest. *See* Fisher, supra note 38, at 641; AMERICAN LAW OF PROPERTY, *supra* note 38, § 6.2.

40. *See* RALPH BOYER, HERBERT HOVENKAMP, & SHELDON F. KURTZ, THE LAW OF PROPERTY 122 (4th ed. 1991).

41. *See* 4 THOMPSON, *supra* note 28, § 32.08(a)-(b), at 88-89.

42. *See* POWELL & ROHAN, *supra* note 38, § 609.

43. *See id*.

44. At early common law, property given to two or more people without any restrictive, exclusive, or limiting language was presumed to create a joint tenancy. *See id.* § 602; *see also* CRUISE, *supra* note 38, at 498.

45. *See* POWELL & ROHAN, *supra* note 38, § 609.

46. *See* CRUISE, *supra* note 38, at 550.

47. *See generally*, FREEMAN, *supra* note 38, at 150-156 (discussing the historical origins of tenancy in common).

48. *See generally* RALEIGH COLSTON MINOR & JOHN WURTS, THE LAW OF REAL PROPERTY 589 (1910). Joint tenants lack the ability to pass inherited property to surviving heirs. *See id.* Consequently, where inherited property presumably devolves in the form of a joint tenancy, title to the property

the creation of a tenancy in common encouraged the alienation of property, thereby facilitating the offering of more property in the marketplace for exchange, which, in turn, increased the opportunity for more buyers to obtain property.

The notion that freedom of disposition is inextricable from rights of possession is well supported.[49] This supports the argument that a tenant in common's rights of transfer should not be impeded.[50] The law disfavors any condition that is deemed to render property inalienable—a concept that includes any restrictions on the right to transfer property, even in the context of a partition action.[51] Scholars have criticized restraints on alienation[52] because they diminish efficiency and free choice. Examples of common restraints on alienation are environmental use restrictions and zoning restrictions for historical preservation.[53] Notwithstanding the inalienability rhetoric, however, restraints on alienation are fairly common place.[54] Locke asserted that one ought "as much as he can, to preserve the rest of mankind, and may not, unless it is to do justice to an offender, take away or impair the life, or what tends to the preservation of life: the liberty, health, limb, or goods of another."[55] Balancing the notion of free alienation against Locke's belief that property rights are absolute for owners who invest in the land, thus, may create a tension. Both the rights of possession and alienability are viewed as incidents of ownership. In the context of a tenancy in common, in some situations, multiple owners cannot maximize their individual property rights without infringing on the rights of their cotenants. Each tenant in common has the right to full possession of the property.[56] Consistent with that right, each possesses the right to choose the highest and best use of the property. This is necessarily

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eventually vests with the last surviving heir, effectively excluding second generation descendants of the predeceased heirs. This dynamic works an injustice where testators devise property to multiple heirs in an effort to equally distribute the property among surviving descendants.

49. *See* RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 74 (1985) (stating that any restraint upon the power of an owner to alienate his own property should be regarded as impermissible).

50. Tenants in common face few restrictions on the transfer of their interest. *See* POWELL & ROHAN, *supra* note 38, § 608. After the sale of a share of an estate in common is concluded, the new interest holder obtains an undivided interest in the property with legal rights equal to the other owners, which includes the right of partition. *See id.* § 607(3). The new cotenant can petition to have the property partitioned either in kind or by sale. *See id.*

51. *See generally* Susan Rose-Ackerman, *Inalienability and The Theory of Property Rights*, 85 COLUM. L. REV. 931 (1985) (discussing the concept of inalienability).

52. *See id.* at 931.

53. *See id.* at 937.

54. *See id*.

55. LOCKE, *supra* note 37, at 124.

56. *See* POWELL & ROHAN, *supra* note 38, § 603.

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qualified by the same right in the other cotenant. Thus, inevitably, a conflict arises if one cotenant believes disposal of the property is best, and the other cotenant believes maintaining possession of the property in its present state is best.[57]

Historically, property scholars have debated the definition and relation of property and possession.[58] Hume defined possession as "not only when we immediately touch . . . [anything] but also when we are so situated with respect to it, as to have in our power to use it; and may move, alter or destroy it, according to our present pleasure or advantage."[59] Hume also links mankind to property not through nature, but through the law of justice.[60] However, the laws of justice and unlimited possession clash when applied to the concept of tenancy in common. Can justice be served when the rights of one owner can be trampled by the rights of a second owner? Blackstone opens his second commentary with this following statement on the nature of property:

> There is nothing which so generally strikes the imagination and enrages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.[61]

He repeats this theme of near-limitless property rights throughout his work, yet subjects it to the restraint "save only the laws of the land."[62] These two ideals are incompatible when applied to the ownership of property in a tenancy in common. This incompatibility seems to repeat itself throughout the historical treatment of property: property rights are natural and absolute, yet subject to the prevailing laws of man.[63] Under the

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57. If the dispute is not resolved, a partition action may ensue. *See* 4 THOMPSON, *supra* note 28, § 38.03, at 450. If the remedy granted is a judicial sale, the exercise of the right to seek partition by the one cotenant effectively cuts off the other tenant's right of continued possession unless the tenant seeking to maintain possession of the property has access to sufficient resources to buy the entire estate. Proceeds from the sale are distributed and are expected to replace the lost property. *See id.* at 450-54.

58. *See* EPSTEIN, *supra* note 49, at 58-59 (discussing this liberal classical conception of property as the exclusive right of possession, use, and disposition).

59. DAVID HUME, A TREATISE OF HUMAN NATURE 506 (L.A. Selby-Bigge ed., 1946).

60. *See id.*

61. *See* SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND BOOK II, chpt. 1, at 207 (Sharswood ed., 1889).

62. *Id.; see also* Robert P. Burns, *Blackstone's Theory of the Absolute Rights of Property*, 54 U. CIN L. REV. 67 (1985) (noting the extravagance in Blackstone's famous absolutist assertion).

63. For a discussion of the modern conception of property as an aggregate of rights, see BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 29-31 (1977).

prevailing laws of man, property is highly regulated.[64]

The legal system faces a dilemma when the rights of one tenant in common to maintain possession of property must be reconciled with the unlimited rights of a co-owner to force sale of the same property. In practice, where one co-owner has limited resources or otherwise lacks the interest to acquire the other co-owner's share, the rights of continued possession are forfeited.[65] The legal system, by its choice of rules, determines which co-owner will be favored and ultimately prevail. In the terminology popularized by Calebresi and Melamed, the legal system, by the rules adopted, will elect either a property rule or a liability rule to protect the rights of the owners not wishing to sell.[66] Although Calebresi

64. *See, e.g.*, Honorable John M. Walker, Jr., *Common Law Rules and Land-Use Regulations: Lucas and Future Takings Jurisprudence*, 3 SETON HALL CONST. L.J. 3 (1993) (discussing the States' right to use the police power to regulate land considered a nuisance). Property regulation is prevalent in many areas. The nuisance area best highlights how land may be regulated and at the same time create conflicting land use issues between land owners. Thus, the goal of the legislation regulating property is to prevent private use which would be injurious to citizens generally. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922). *See also* R.H. Coase, *The Problem of Social Cost*, 3 J.L. ECON. 1 (1960). In *The Problem of Social Cost*, Coase discussed the reciprocal nature of conflicting land use. If A's land use interferes with B's land use, then A is harming B. *See id*. at 2. But if B then has the right to stop A, B is harming A. *See id*. Should A or B have the right to harm the other's property right? *See id.* Applying an efficiency test seems to be the most logical approach. Under this approach, the legal regime can act to avoid the greater harm. But, how does one determine the greater or lesser harm between private individuals? Both the land use and nuisance areas are good examples. Under takings law, the regulation may be applied without any provision for compensation if the "state does not appropriate [the land] or make any use of it." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 417 (1922). *See also* Village of Euclid v. Amber Realty Co., 272 U.S. 365 (1926) (upholding the general constitutionality of local zoning regulations that resulted in a 75% diminution in the market value of Amber Realty's sixty-eight acres of vacant land). *Euclid* established the principle that zoning regulation does not deny due process per se or result in a taking; the court will allow regulation in cases of public need or compelling state interest. *See id.*

65. The analogy of eminent domain and inverse condemnation would dictate that forfeiture be permitted only upon the payment of just compensation. *See* Walker, *supra* note 64. As Part II argues, the value paid for the forfeited right is inadequate.

66. In *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, Calebresi and Melamed set out at length the useful distinctions between property and liability rules' roles in a legal system. 85 HARV. L. REV. 1089, 1091, 1105-27 (1972). Calebresi and Melamed start from the premise that the first issue all legal systems must confront is determining the cognizable entitlements of its citizens. *See id*. at 1091. In confronting the problem of "entitlement," the legal system decides which of the conflicting parties will be entitled to prevail in a dispute, generally by establishing two types of rules: property rules and liability rules. *See id*. at 1091. In defining the two categories of rules, they posit a scenario in which interference with a property owner's use of land is threatened by a second party's activity. *See id*. at 1115-19. Either a property rule or a liability rule can be imposed to protect the property owners' initial entitlement to use his property without interference. *See id.* Property rules bestow on property owners powerful protection of their rights. *See id.* at 1092-93 & n.7. Under property rules, property owners possess complete discretion to determine whether to sell their property. *See id*. In other words, an owner determines the selling price of his property rights and can not be forced to sell at any price. On the other hand, under the application of liability rules, although an owner also enjoys an initial entitlement to property, potential buyers are allowed to destroy his

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and Melamed developed their analysis in the context of tort and criminal law,[67] I believe the property rule and liability rule framework is instructive when applied to the facts in a partition case. As I will argue in Part II.C below, applying a property rule would allow the property owner to determine the price, if any, at which he would agree to a sale, and under a liability rule, the sale could be forced on the unwilling co-owner and the value would be objectively determined.

B. Creation of Tenancy in Common Through Intestate Succession

Under intestate succession, when an individual dies without drafting a will, his property is distributed to his family as a matter of law.[68] Thus, the purpose of intestate succession laws is to provide a distribution scheme—a will substitute—for those decedents who die without drafting a will.[69] The lack of estate planning, combined with a fear of the legal system, causes the majority of real property owned by African Americans to pass through intestate succession.[70] Thus, ownership as what I will term "heir property," where land is held by numerous family members as tenants in common, is the most wide-spread form of property ownership in the African American community.[71]

As a result of intestate succession, if there is more than one qualifying taker under the intestate statute, then more than one family member will own an interest in a single piece of property. By statute, the family members are tenants in common.[72] Although the cotenants own an

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entitlement to undisturbed enjoyment by paying an *objectively* determined price to compensate for harm that interferes with his rights. *See id.* (emphasis added). In other words, liability rules permit interference with property rights in return for the payment of damages. Thus, liability rules allow potential buyers to forgo the hassle of negotiating to acquire property rights at a price below that which the property owner would demand.

67. *See* Calebresi & Melamed, *supra* note 66, at 1090-127 (discussing that property and liability rules are relevant to every legal area but focused on torts and criminal sanctions involving theft and violations of bodily integrity as examples).

68. *See* Jennifer K. Robbennolt & Monica Kirkpatrick Johnson, *Legal Planning for Unmarried Committed Partners: Empirical Lessons for a Preventive and Therapeutic Approach*, 41 ARIZ. L. REV. 417, 420 (1999).

69. *See* Sorrels v. McNally, 105 So. 106, 112 (Fla. 1925).

70. *See* CAROL STACK, CALL TO HOME 43-44 (1996).

71. *See id.*

72. *See* REEVES, *supra* note 38, § 671, at 953-55; 4 THOMPSON, *supra* note 28, § 32.06(b)(2), at 70-79. Ownership of one piece of property can become complex as a result of intestate succession. A fairly typical pattern under state succession laws mandates that a decedent's property go to the decedent's surviving spouse and children. *See, e.g.*, FLA. STAT. § 732.102 (1998). However, if there is no surviving spouse or children, then the property devolves to the decedent's parents. *See, e.g.*, FLA. STAT. ch. 732.103 (1998). If there are no surviving parents, then the decedent's property passes to the decedent's siblings. *See id.* In the next generation, if the inheritor also dies intestate, the potential for

undivided interest in the property, if they own the interest in fee, each cotenant can freely alienate, grant, and devise their interest in the commonly owned property.[73] However, no cotenant can convey a greater interest than he owns.[74] Accordingly, although a family member may sell her interest in the property, that family member, acting alone, cannot effect a transfer of the entire property.[75]

C. Homogenous and Heterogenous Tenancy in Common Interests

The underlying scenarios that trigger partition actions reflect a range of possible owner interests. Ownership of property in a tenancy in common involving individuals with kinship relations to each other may take on many configurations.[76] Three possible configurations demonstrate the range of possibilities.[77] First, a *homogeneous tenancy in common*, is one where all co-owners unanimously agree on the same use or disposition of the property. They, in effect, act as a single-homogenous owner. Family members holding an interest as tenants in common or any set of individuals with common interests may constitute a homogeneous unit. The owners may be absentee and/or owner/occupiers of the property. The property ownership is stable.

The second, a *reconcilable heterogeneous interest* includes a co-owner or several subsets of co-owners who have different interests and valuation contexts for evaluating the use and/or disposition of the property, but they have reached a series of negotiated agreements that are *completely* satisfactory to all co-owners as to use and disposition of the property. Again, the owners may be absentee and/or owner/occupiers. The ownership status is stable, as with a homogeneous interest.

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fragmentation is repeated. The owner's or co-owners' interests in the property are similarly divided into even smaller interests in accordance with the statutory distribution scheme.

73. *See In re* Estate of Cleaves, 509 So. 2d 1256, 1258-59 (Fla. Dist. Ct. App. 1987). It is important to note, however, that not all estates may pass by devise or intestacy; a term of years, a life estate, tenancies in the entirety, and joint tenancies may not pass on by will or through intestacy. *See* Roger A. Cunningham et al., THE LAW OF PROPERTY 78, 206-07 (2d ed. 1993).

74. *See* Kern v. Weber, 155 So. 2d 619, 620 (Fla. Dist. Ct. App. 1963).

75. *See generally id.* (refusing to quiet title to entire parcel for a third party who purchased the interest of a family member who held the property as tenant in common with other family members). Of course, the judicial partition process effectively grants each tenant the opportunity to force all cotenants to sell unless they can afford to purchase the entire parcel. *See infra* Part II.B.

76. In this Article, the term "kinship" is limited to those persons who are entitled to distribution under an intestate statute or those persons who succeed by descent and right of relationship to an estate in land upon the death of an ancestor.

77. More numerical distinctions could be drawn to create additional configurations. However, the three presented illustrate the distinctions relevant to this discussion.

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The third interest, an *irreconcilable heterogeneous interest*, involves at least one subset of co-owners who wish to sell their interest in the property. Even though they desire a sale of their interest in the property, they fail to negotiate and sell to their co-owners. This situation is dynamic rather than stable. Due to the right of alienation, an irreconcilable heterogeneous interest devolves. Once a sale to a new co-owner occurs, the irreconcilable heterogeneous interest may involve an outsider with no family ties to the other co-owners. One possible scenario is that the "alien" co-owner then demands that the entire property be placed for sale against the desires of other co-owners, thereby "rupturing" the ownership of the property. The interest is irreconcilable. The irreconcilable interest must be resolved by a judicial partition.[78] Accordingly, in a case involving a number of related co-owners and a heterogeneous "alien" co-owner, which party will acquire sole title to the property if a sale is ordered by the partitioning court usually is determined by a bidding war among the heterogeneous interest holder and the other property owners.[79] The irreconcilable heterogeneous interest holder may have purchased the individual interest of a cotenant with the specific intention of buying the entire parcel through partition. Even without the consent of the other homogeneous interest holders, the purchase may become inevitable once judicial partition is instituted.[80]

Theoretically, any of these three different interest formations could convert into one of the others. Indeed, given the infinite variability in family members' potential degree of attachment to and/or interest in the

78. It is possible that this same scenario could develop with a familial co-owner. However, experts in the area of land loss have indicated that this scenario more frequently involves an outside or alien co-owner. Interview with Henry Sanders, Partner, Chestnut, Sanders, Sanders & Pettway, in Selma, Ala. (June 10, 1999); Interview with Ralph Paige, Director, The Land Loss Institute, in Atlanta, Ga. (July 16, 1999).

79. Even though every interest holder may attempt to purchase the property, the person with more financial resources and access to credit will pay a higher price to purchase the property; thus, they can out-bid the other interest holders and acquire the entire parcel. At the very least, the co-owner wishing to keep the property must have access to monetary resources equal to the market value of the entire parcel in order to compete. Consequently, under this quasi-liability regime, a price which meets or exceeds the predetermined current market value may be paid to the land owners if they have sufficient resources to bid the price up to this level. If they lack such resources, the likelihood that fair market value will be paid diminishes substantially. *See* Interview with Henry Sanders, *supra* note 78. In either event, the property is lost to the heterogeneous interest holder, without an avenue for redemption or retrieval. *See* Part II.C. for a full discussion and definition of a quasi-liability rule.

80. *See* POWELL & ROHAN, *supra* note 38, § 612. Although there is a statutory presumption for an in-kind division of the property, in reality, proving injury through impracticability or infeasibility is easy to establish, thus enabling sale of the property. *See id*. Homogeneous interest holders, who have limited resources, usually will not be able to produce sufficient cash or access the necessary financial resources to competitively participate in the bidding process.

property, and the typical multiplication of co-owners as the property is passed to the next generation, it is unlikely that a large number of family co-ownership situations starting out as a homogeneous interest can sustain that status over time. Particularly with the increasing fragmentation that may result from intestate succession, it is much more likely that a homogeneous interest will disaggregate into a heterogenous interest with potential for "rupturing."[81] It is this "rupturing" of family co-ownership of property which results in a judicial partition that I wish to explore in more detail.

II. PARTITION

"Necessity begat property: and in order to insure that property, recourse was had to civil society."[82]

A. Common Law Origins of Partition

While modern law supports the principle that property rights in ownership should be protected, this principle is not absolute. Partition law, for example, provides a "back door" to outsiders who wish to strip disagreeing cotenants of their property.[83] Until the middle of this century, at common law a tenancy in common was insulated from the threat of judicial partition[84] because only voluntary agreement among all owners or adverse possession could consolidate the property into sole ownership.[85]

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81. Utilizing an alternative dispute resolution process, the tenants in common may reach an amicable agreement for use or possession which does not involve physically dividing or selling the property. *See* FREEMAN, *supra* note 38, § 395, at 505. However, the possibility for amicable resolution of disagreements over the property may be diminished if one tenant has different or heterogenous expectations for the property. *See id.* § 420, at 540. The heterogeneous interest holder has an equal right to use and possession of the property or to petition the court for a division of the property. *See id.* § 422, at 546.

82. BLACKSTONE, *supra* note 61, at 8.

83. A partition action is a means by which cotenants sever their interests in concurrently owned property. *See* Miller v. Griffin, 128 So. 416, 419 (Fla. 1930). The primary objective of partition is to physically divide the co-owned property among co-owners in fair and equal shares. *See id.* One goal is to discard the problems arising from the common ownership of the property. *See* Garcia-Tunon v. Garcia-Tunon, 472 So. 2d 1378, 1379 (Fla. Dist. Ct. App. 1985); Diedricks v. Reinhardt, 466 So. 2d 375, 378 (Fla. Dist. Ct. App. 1985). Thus, when cotenants cannot privately agree to sever their cotenancy, a cotenant can file for a partition by way of judicial proceeding. *See* THOMPSON, *supra* note 28, § 32.08(b), at 88-89. Generally, a cotenant has a right to partition unless this right is lost by waiver, contract, or estoppel. *See* Caruso v. Plank, 574 So. 2d 1230, 1230 (Fla. Dist. Ct. App. 1991); Condrey v. Condrey, 92 So. 2d 423, 426 (Fla. 1957).

84. *See* HERBERT THORNDIKE TIFFANY, THE MODERN LAW OF REAL PROPERTY § 307, at 315 (1940).

85. *See id.* § 307, at 315, § 300, at 302.

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The courts were largely unwilling to sever the estate through partition.[86]

In the United States, partition was established by statute in each of the individual states.[87] Unlike the partition in kind which existed under early common law, the forced judicial partition sale was an American innovation.[88] Under the modern approach, there is also nearly an absolute right to judicial partition.[89] The right of cotenants to partition does not yield to considerations of hardship, inconvenience, or motivation of the petitioner.[90] Generally, due to the difficulties associated with common possession, partition is considered a positive step.[91] Dividing the property may promote industry and enterprise and prevent the land from sitting barren in the hands of unhappy cotenants.[92] Fairness is only relevant as the equity between tenants, not to the intrinsic fairness of the partition itself.[93] Each cotenant has the right to receive a share of proceeds from the partition sale which represents the percentage of his or her ownership interest.[94] This regime fails to consider potential unfairness or hardship

86. *See generally* FREEMAN, *supra* note 38, § 421, at 542. Because joint tenants and tenants in common were created by agreement, their only remedy was to reach an agreement to partition. *See id.* Neither could compel a partition. *See id.* The one exception was a coparceny. *See* 2 AMERICAN LAW OF PROPERTY § 6.7 (A. James Casner et al. eds., 1952). The courts would adjudicate the partition of a coparceny because it was the product of an inheritance, not a voluntary act. *See id.* Coparceny existed with the systems of primogeniture under which the eldest son was the heir. *See id.* If a decedant only had daughters, the daughters took as coparcenors. *See id*. This early form of partition, as it existed in 1271 A.D. (at the end of the reign of Henry III), was accomplished through a writ of partition. It took three centuries for this right to be extended to all estates of tenants in common and joint tenancies.

The first statutes which extended the right of partition to tenants in common and joint tenants only pertained to concurrent estates created through inheritance. *See* REEVES, *supra* note 38, § 702. The legislature extended this right to voluntary tenants in common and joint tenants. *See id.* These statutes extended the rights of partition, but enforcement was tediuos and largely ineffectual. *See id.* It took Parliament a century and half to remedy this deficiency by statute. *See* AMERICAN LAW OF PROPERTY § 6.7 (1952). These statutes were later reinforced to transition from the early system of writs or partition into the jurisdiction of the chancery courts. *See id*. This transition was completed through the abolition of the writ. *See id*.

87. *See* AMERICAN LAW OF PROPERTY § 428, at 558.

88. *See id*. § 433, at 570, § 537, at 713, 718. The courts of England were unwilling to force sale of partitioned property. *See id*. § 433, at 570. If an inequitable split could not be avoided, the courts would order an owelty—a payment of money to make the portion received of equal value. *See id.* § 507, at 676-77. In America, a judicial sale was initially authorized when division-in-kind would seriously prejudice the value or interests of the owners. *See id*. § 433, at 571. The prejudice necessary to force a sale had to affect all of the owners, not just the owner requesting sale. *See id.* § 537, at 713. The onus to prove damage and prejudice was always on the party requesting a partition sale. *See id.*

89. *See* 4 THOMPSON, *supra* note 28, § 38.03(a), at 450-54.

90. *See id*.

91. *See id*. at 446.

92. *See id*.

93. *See id*. § 38.03(a), at 450-54.

94. *See id*. § 38.05(C), at 472. In certain cases, no equal partition of the common property can be made. *See, e.g.*, Hegewald v. Neal, 582 P.2d 529 (Wash. Ct. App. 1978) (finding in-kind partition impracticable because of the unique nature of the land). This impracticability may be caused by the

worked by the judicial partition sale—the transformation of a real property interest into personal property—the loss of land.[95] Intrinsic fairness of the partition should also be essential in the resolution of these cases,[96] as very few exceptions exist to the right to partition.[97]

All tenants in common can file an action for compulsory partition.[98] At early common law and now by statute,[99] there is a presumption in favor of severance of co-owned property by physical or in-kind division of the property.[100] The common law traditionally favored partition in-kind of real property held by more than one owner in a tenancy in common or joint tenancy when one or more of the owners seeks to sever the common ownership.[101] Partition in-kind is favored because an actual division preserves the succession of real property through familial lines and bars compulsion to sell real property against the will of the owners.[102]

B. Statutory Partition and Its Judicial Implementation

Most of the fifty states have enacted statutes which appear to reflect this longstanding principle by providing a presumption of severance of common ownership in real property by partition in-kind unless the proponent of a sale can demonstrate that an actual division would cause injury to some or all of the owners.[103] However, in practice, as shown

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irregular shape of the parcel or the large number of co-owners with interest in the property. *See id.* If the partition is voluntary, the court would generally order an owelty to be paid to equalize the division. *See* Reitmeier v. Kalinoski, 631 F. Supp. 565, 576 (S.D.N.J. 1986). However, the court may choose to order a sale of the property and then distribute the proceeds to the owners. *See, e.g., Hegewald*, 582 P.2d at 529.

95. One need not accept the notion that land is unique to recognize that forced sale of real property is a significant incursion into individual rights. Although constitutionally permitted to achieve a valid public purpose, the taking of property must be accomplished by payment of just compensation and satisfy due process requirements. *See* U.S. CONST. amend. V.

96. *See, e.g.*, Brown v. Lutheran Church, 23 Pa. 495, 500 (1854) (noting that land occupied by funeral plots can be neither sold nor divided without unfairly affecting the rights of those buried therein, and those individual rights may prevent the partition).

97. *See* POWELL & ROHAN, *supra* note 38, § 611.

98. *See id.*

99. Although partition proceedings are governed by statute, actions in partition are in chancery, and thus are actions in equity. *See, e.g.*, FLA. STAT. ch. 64.011 (1998) (stating that actions for partition are actions in chancery); FLA. STAT. ch. 65.031 (1998) (providing for an action in chancery to quiet title of lands). Thus, if a trial court concludes that equity would not result if a partition were ordered, the court, in its discretion, may deny the petition. *See* Condrey v. Condrey, 92 So. 2d 423, 427 (Fla. 1957).

100. *See* POWELL & ROHAN, *supra* note 38, § 612. This Article focuses on how courts routinely award partition through forced sale.

101. *See id.*

102. *See id.*

103. In Florida, for example, compulsory partition is governed by statute. Florida Statute chapter

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below, this burden has proven so easy to meet that partition sales are the rule rather than the exception. Typically, the partition statutes ambiguously define the element of injury using rubric such as "prejudice,"[104] "inconvenience,"[105] "practicality,"[106] "justice,"[107] "equity,"[108] and "interest."[109] Legislatures reason that ambiguous

64.051 provides that a court must order in-kind partition if it appears that the cotenants are entitled to it. A court will order a partition sale only where it is necessary to protect the rights of interested parties. *See* FLA. STAT. ch. 64.011 (1999) (stating that all actions for partition are actions in chancery).

104. *See* ALASKA STAT. § 09.45.290 (Michie 1962) (requiring great prejudice to the owners); ARK. CODE ANN. § 18-60-420 (Michie 1987) (requiring great prejudice to the owners); COLO. REV. STAT. § 38-28-107 (1990) (requiring "manifest prejudice to the rights of the interested parties"); FLA. STAT. ch. 64.071 (1997) (requiring prejudice); HAW. REV. STAT. § 668-1 (1988) (requiring great prejudice to the owners); IDAHO CODE § 6-512 (Michie 1988) (requiring great prejudice to the owners); 735 ILL. COMP. STAT. 5/17-102 (2000) (providing that the court may order a sale if partition cannot be made without manifest prejudice to the owners); MICH. COMP. LAWS § 600.3332 (1987) (requiring great prejudice to the owners); MINN. STAT. § 558.01 (1988) (requiring great prejudice to the owners); MO. REV. STAT. § 528.340 (1953) (requiring great prejudice to the owners); MONT. CODE ANN. § 70-29-202 (1997) (requiring great prejudice to the owners); NEB. REV. STAT. § 25-2181 (1998))requiring great prejudice to the owners); NEV. REV. STAT. § 39.010 (1985) (requiring great prejudice to the owners); N.J. STAT. ANN. § 2A:56-2 (West 1987) (requiring great prejudice to the owners); N.M. STAT. ANN. § 42-5-7 (Michie 1978) (requiring manifest injury to the parties); N.Y. REAL PROP. ACTS LAW § 915 (McKinney 1979) (requiring great prejudice to the owners); N.D. CENT. CODE § 32-16-12 (1943) (requiring great prejudice to the owners); OR. REV. STAT. § 105.245 (1998) (requiring great prejudice to the owners); PA. R. CIV. P. 1563 (1987) (requiring prejudice or spoiling to the property); S.D. CODIFIED LAWS § 21-45-28 (Michie 1968) (requiring great prejudice to the owners); UTAH CODE ANN. § 78-39-12 (1953) (requiring great prejudice); WASH. REV. CODE § 7.52.080 (1992) (requiring great prejudice); WIS. STAT. § 842.11 (1994) (requiring prejudice).

105. *See* LA. CODE CIV. PROC. ANN. art. 4606 (West 1998) (providing that the court may order a sale if the property is indivisible by nature or cannot be conveniently divided); MASS. GEN. LAWS ch. 241, § 31 (1988) (providing that the court may order a sale if the property cannot be divided advantageously); N.H. REV. STAT. ANN. § 547-C:25 (1998) (requiring great prejudice or inconvenience to the owners); VT. STAT. ANN. tit. 12, § 5174 (1997) (requiring great inconvenience to the parties); VA. CODE ANN. § 8.01-83 (Michie 1977) (providing that the court may order a sale if partition cannot be conveniently made and the interests of the parties will be promoted); W. VA. CODE § 37-4-3 (1966) (providing that the court may order a sale if partition cannot be conveniently made and if the interests of one or more of the owners will be promoted).

106. *See* KAN. STAT. ANN. § 60-1003 (1964) (requiring manifest injury to the owners or that the sale is impracticable).

107. *See* ALA. CODE § 35-6-57 (1975) (providing that the court may order a sale if the court finds a just and equal division cannot be made or a sale would better promote the interests of the parties).

108. *See* 1980 CAL. STAT. 872.820 (stating a court may order a sale if the court determines a sale is more equitable than a division); TEX. R. CIV. P. 770 (1955) (providing that the court may order a sale if a fair and equitable division of the property cannot be made).

109. *See* CONN. GEN. STAT. § 52-500 (1991) (providing that the court may order a sale if the court finds a sale would better promote the interests of the parties); DEL. CODE ANN. tit. 25, § 724 (1975) (providing that a court may order a sale if the court finds partition would be detrimental to the interests of the parties); MISS. CODE ANN. § 11-21-11 (1972) (providing that the court may order a sale if the court finds a sale will better promote the interests of the parties). *See also* ARIZ. REV. STAT. § 12-1218 (1994) (defining injury as a depreciation in the value of the property); GA. CODE ANN. § 44-6-166.1 (1991) (defining injury as a depreciation in the value of the property); IND. CODE § 32-4-5-4 (1982) (requiring damage to the owners); MD. CODE ANN. REAL PROPERTY § 14-107 (1996) (requiring loss or injury to the interested parties); N.C. GEN. STAT. § 46-22 (1984) (providing that "substantial injury"

definitions of injury offer courts much needed flexibility in dealing with the complexities of modern property transactions.[110]

Because of the substantial similarity of the statutes, one can distill the essence of what must be proven by a cotenant seeking compulsory partition sale. The interest holder must assert that: (1) he has a right to partition as a matter of general right, and (2) a physical partition would be infeasible.[111] The petitioner may use a number of arguments to establish the second prong of infeasibility. One frequent argument is the difficulty in dividing the property due to its unique topographical features.[112] Courts have held that where the topographical features would render the division substantially unequal in value a partition sale is appropriate.[113] Petitioners have also successfully argued that it is infeasible for the court to physically partition the land since several of the divided parcels would be land-locked and devoid of accessible rights-of-way or not of equal value

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can be shown if the fair market value of each share would be materially less in an in-kind partition than the value of each share in a partition by sale); OHIO REV. CODE ANN. § 5307.09 (West 1997) (requiring manifest injury to the value of the property); OKLA. STAT. tit. 12, § 1509 (1988) (requiring manifest injury to the owners); R.I. GEN. LAWS § 34-15-16 (1956) (permiting the court to order a sale); S.C. CODE. ANN. § 15-61-50 (Law. Co-op. 1976) (providing that the court may order a sale if partition cannot be fairly or impartially made without injury to any of the parties); TENN. CODE ANN. § 29-27-201 (1955) (providing that the court may order a sale if the property is so situated that partition cannot be made or if the property is of such description that it would be manifestly advantageous for the parties to sell); *but see* IOWA R. CIV. P. 270 (providing that the proponent of partition in-kind carries the burden of showing that partition in-kind is equitable and practicable).

110. *See, e.g., Reports Recommendations & Studies*, 13 CAL. LAW REVISION COMM. 413-14 (1975-1976) (noting the importance of offering courts flexible remedies to deal with modern property transactions).

111. As has been noted above, partition is generally available; thus satisfying the first prong requires only a showing of valid co-ownership interest and disagreement.

112. *See* Williams v. McIntyre, 632 So. 2d 446, 448-49 (Ala. 1993) (noting that the topography of the land to be partitioned varied widely); Black v. Stimpson, 602 So. 2d 368, 369 (Ala. 1992) (citing as reason not to partition that portions of the land were susceptible to flooding).

113. *See, e.g.*, Hegewald v. Neal, 582 P.2d 529, 532 (Wash. Ct. App. 1998) (holding that unique topography rendered in-kind division impracticable).

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or desirability.[114] Other courts have used a similar rationale in ordering sale where land containing unique resources, such as hot springs and other water sources, hunting and fishing grounds, or other special attributes, would make actual division complex.[115] However, the property's unique qualities are often the precise reason why parties are resisting sale.[116] One of the most commonly cited reasons for ordering a partition by sale is the existence of too many interests in the commonly held property.[117] Courts find partition in-kind impracticable if it requires a division of property into so many pieces that the property's economic value is diminished.[118] While this rationale seems to preserve the rights of interest holders by protecting property values, court policy to order a sale whenever too many interests exist places the power to force a sale into the hands of any one heterogeneous interest holder.

Another reason commonly used by the courts to order sale is the existence of a dwelling on the subject property.[119] At first blush, the existence of a dwelling on the property seems to be a compelling reason to order sale. In some cases, strict application of the common law right to

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114. For illustrative purposes, consider the following diagram of a single parcel of property subject to division among twenty-five co-owners:

1	2	3	4	5
6	7	8	9	10
11	12	13	14	15
16	17	18	19	20
21	22	23	24	25

At the very least, parcels 7, 8, 9, 12, 13, 14, 17, 18, and 19 are land locked and probably would not have access to their parcels by a right-of-way. Thus, a physical partition among all twenty-five owners would probably be infeasible. The land-locked parcels would have right to an easement by necessity for ingress and egress; however, the location of some parcels on public right-of-way allows the petitioner to assert that the parcels have distinctly different attributes. The differences in attributes then makes the in-kind division impracticable.

115. *See* Cunningham v. Frymire, 325 P.2d 555, 558 (Cal. Dist. Ct. App. 1958); Hegewald v. Neal 582 P.2d 529, 530 (Wash. Ct. App. 1998).

116. *See* Brown v. Boger, 139 S.E.2d 577, 580 (N.C. 1965). Defendants stated that they did not wish to sell their land as it was "down next to Morrow Mountain and they aren't making any more land down there." *Id.* Partrick v. Preiser, 341 N.Y.S.2d 806, 809 (N.Y. Sup. Ct. 1972) (recognizing that, because "all land is unique" and not a "fungible commodity", partition by sale should be based on "some circumstance other than the uniqueness of the land to be divided").

117. *See* Ragland v. Walker, 411 So. 2d 106, 107 (Ala. 1982); Jefcoat v. Powell, 108 So. 2d 868, 871 (Miss. 1959); Johnston v. Duncan, 180 S.E.2d 348, 350 (Ga. 1971); Duke v. Hill, 314 S.E.2d 586, 587 (N.C. Ct. App. 1984).

118. *See Ragland*, 411 So. 2d at 107; *Johnston*, 180 S.E.2d at 350; *Jefcoat*, 108 So. 2d at 871; *Duke*, 314 S.E.2d at 587.

119. *See* Baker v. Baker, 250 S.E.2d 436, 437 (Ga. 1978); Huston v. Swanstrom, 13 P.2d 17, 18 (Wash. 1932); *Cf.* Wilcox v. Willard Shopping Center Associates, 544 A.2d 1207, 1209 (Conn. 1988).

partition in-kind would require the court to divide the house into pieces, forcing cotenants to jointly retain and use the property permanently. Courts typically cite the importance of preserving the alienability of property as a principle reason for selling property with a dwelling rather than ordering actual division.[120] However, the existence of a home or dwelling on the subject property often makes a forced sale disastrous for the party opposing sale.[121] Not only is the opponent of sale effectively divested of their ownership interest in their property, but the opponent of sale may be rendered homeless by the sale where the opponent cannot raise sufficient funds to purchase the property outright at the partition sale.[122] The compelling arguments against dispossessing cotenants who reside in commonly held property have persuaded some courts to find that a judicially ordered sale is inequitable. These courts often cite the grave injustice caused by forcing the sale of an interest holder's home as a justification for ordering partition in-kind.[123]

Courts have not used the general "injury" language of the statutes to offer equitable relief to heirs resisting forced sale from outside parties. Instead, courts have interpreted the element of injury as allowing sale whenever the sale's proponent can prove that partition in-kind of real property would result in pecuniary loss to some or all of the owners.[124] Consequently, although state legislatures ostensibly enacted these statutes in order to preserve family inheritance and to bar forced sales of real property,[125] the pecuniary loss standard adopted by all of the states has

120. *See, e.g.*, Whatley v. Whatley, 484 S.E.2d 420, 421-22 (N.C. Ct. App. 1997) (recognizing the strong public policy in North Carolina favoring free alienation and marketability of real property and concluding that partition by sale comported with North Carolina policy where actual partition would divide title of land and buildings); Ferguson v. McLoughlin, 584 N.Y.S.2d 816, 817 (N.Y. Sup. Ct. 1992) (holding that partition in-kind would be impossible because it would render the single building inalienable and destroy the marketability).

121. *See* Delfino v. Vealencis, 436 A.2d 27, 29 (Conn. 1988); Overstreet v. Overstreet, 692 So. 2d 88, 90 (Miss. 1997) (ordering partition in this case would require sale of house that husband built by hand during period of marital separation).

122. *See* Delfino v. Vealencis, 436 A.2d 27, 29 (Conn. 1988); Overstreet v. Overstreet, 692 So. 2d 88, 91 (Miss 1997); *see also* Bomer v. Campbell, 318 S.E.2d 841, 842 (N.C. Ct. App. 1984) (recognizing that it is a "matter of common knowledge that few people in this state are capable of depositing" the requisite amount of money required as a cash bond at a partition sale); Duke v. Hill, 314 S.E.2d 586, 587 (N.C. Ct. App. 1984) (noting the difficulty parties have in raising sufficient funds to bid on property at a partition sale).

123. *See, e.g.*, *Overstreet*, 692 So. 2d at 90.

124. *See* Butte Creek Island Ranch v. Crim, 186 Cal. Rptr. 252, 256 (Cal. Ct. App. 1982) (stating that the test for injury is economic); *Partrick*, 341 N.Y.S.2d at 808 (stating that the test for determining injury is whether the aggregate of the divided parts is substantially less than the whole value of the property if owned by one person); Williamson Inv. Co. v. Williamson, 96 Wash. 529, 536 (1917) (holding that the "great prejudice" element of injury is satisfied by a showing of pecuniary loss).

125. *See Butte Creek Island Ranch*, 186 Cal. Rptr. at 255.

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reduced the presumption of partition in-kind to a procedural barrier, easily overcome by a mere showing of the loss of any pecuniary value.

Once a court finds that compulsory partition by way of judicial sale is necessary, it orders the entire[126] property sold at market price, applying a quasi-liability rule.[127] Unless the cotenants have access to resources equal to the total economic value of the entire co-owned parcel, they may lose their interest in a partition sale. The desire of other interest holders in the tenancy in common to retain their property is relegated to a secondary position. The court's primary focus is whether there would be injury to a cotenant seeking partition, if partition was denied. Injury is, more often than not, defined as economic loss.[128]

A review of case law illustrates the tendency of courts to consider only monetary interests when deciding a petition for sale, even when opponents of a sale offer a creative solution that fairly compensates the party seeking sale.[129] Adherence to the economic loss standard has led courts throughout the nation to render seemingly inconsistent and inequitable results in the name of preserving the market value of the commonly held property.[130]

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126. Note that if a court only ordered a judicial sale of the petitioning party's interest in the property, the person seeking the partition would not be able to acquire the entire property. However, because courts only recognize the economic value in land, courts order a judicial sale of the *entire* property because the physically equal land may be worth more in the aggregate than it is in divided shares. *See, e.g.*, *Williamson*, 96 Wash. at 529 (using an economic standard for determining injury).

127. Again, courts only recognize an economic value in land. Thus courts order the land sold at market value instead of "heirloom" value because, in essence, heirloom value is priceless. *See infra* Part II.C.3. The failure to allow a veto on the part of the opponents of the sale denies them property rule protection. *See infra* Part II.C.1.

128. *See* Stone v. Benton, 371 S.E.2d 864, 864 (Ga. 1988); Baker v Baker, 250 S.E.2d 436, 437 (Ga. 1978); Hames v Shaver, 191 S.E.2d 861, 863 (Ga. 1972); Lankford v. Milhollin, 37 S.E.2d 197, 200 (Ga. 1946); Anderson v. Anderson, 108 S.E. 907, 908 (Ga. Ct. App. 1921); Gordon v. Mcelroy, 42 S.E. 68, 68 (Ga. 1902); Duke v Hill, 314 S.E.2d 586, 588 (N.C. Ct. App. 1984).

129. For example, in *Ragland v. Walker*, the Alabama Supreme Court refused to reverse a decision ordering sale of commonly held land, despite the request of family heirs that the Court set aside a portion of the land for those who wanted to continue common ownership. 411 So. 2d 106, 108 (Ala. 1982). The Court reasoned that a division of the property into smaller tracts prior to sale would affect the overall sale value of the individual interests. *See id.* Thus, rather than attempting to preserve ownership while still compensating those interest holders petitioning for sale, the Court employed a strictly economic analysis in deciding to affirm the order for sale. *See id.* Similarly, in *Black v. Stimpson*, the Court refused to partition in-kind rather than order sale, despite the request of several common interest owners to set aside a portion of the land for those who wanted to continue common ownership. 602 So. 2d 368, 369 (Ala. 1992). The *Black* decision is particularly startling because two of the interest holders actually lived on the subject property, so that sale would effectively render the two interest holders homeless. *See id.* at 370. Furthermore, while the interest holders requesting partition in-kind were all heirs of the original land owner, the primary interest holder petitioning for sale was a third party who had purchased the interest of one of the heirs. *See id. Cf.* Cain v. Christie, 937 P.2d 119, 123-24 (Okl. Ct. App. 1997) (allowing a number of interest holders to retain common ownership of one parcel, while selling another parcel of land to compensate interest holders requesting sale).

130. *Partin v. Dalton Property Associates* exemplifies the strict construction courts employ to

Despite the inconsistencies and potential unfairness produced by the pecuniary loss standard, the standard has become so common that some states have expressly incorporated it into the relevant statute.[131] While most states have retreated from the presumption favoring partition in-kind through judicial or statutory application of the pecuniary loss standard, at least one state, Iowa, has expressly abandoned the presumption favoring partition in-kind altogether.[132] Even prior to this change in the statute, Iowa seemed to apply a pecuniary loss standard.[133]

Real property, the asset Jefferson, Adams, Madison, and other founders considered the cornerstone of republicanism, can be stripped from productive owners by a cotenant.[134] After the court orders a sale, a bias in favor of wealthier cotenants is clear if the highest offering price is going to

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determine whether partition by sale is necessary. 436 S.E.2d 903 (N.C. Ct. App. 1997). The trial court determined that the nature of the land and the number of interests in the subject property made partition in-kind impractical and necessitated sale. *Id.* at 904. The appellate court reversed and remanded the trial court to monetize the injury if partition resulted in "a cotenant who receives a portion of the land, which has a greater value than his proportionate share of the property's total value." *Id.* at 906. The *Partin* analysis suggests that under the amended North Carolina statute, economic factors are dispositive of the propriety of a partition by sale to the exclusion of other equitable factors.

131. *See* ARIZ. REV. STAT. § 12-1218 (1994); 1985 GA. CODE ANN. § 44-6-166.1 (1991); N.C. GEN STAT. § 46-22 (1984). The North Carolina statute provides that the court shall order a sale if it finds by a preponderance of the evidence that a partition in-kind cannot be made without substantial injury to one or more of the parties. *See* N.C. GEN STAT. § 46-22(a) (1984). The statute also provides that "substantial injury" can be shown if the fair market value of each share would be materially less in an in-kind partition than in partition by sale. *Id.* § 46-22(b).

132. *See* IOWA R. CIV. P. 270. The Iowa statute states that a proponent of an actual, physical division of real property must show that partition in-kind is equitable and practicable to the parties. The burden is placed on the proponent of an actual, physical division rather than the party seeking sale of the property. In *Spies*, one co-owner of a 100 acre farm sought partition by sale. *See* Spies v. Prybil, 160 N.W.2d 505, 506 (Iowa 1968). The Court held that a second co-owner who sought partition in-kind did not prove that partition in-kind was equitable or practicable. *Id.* at 509. The Court noted the Iowa legislature's intentional and unequivocal favoring of partition by sale—the presumption of Rule 270—although contrary to longstanding common law principles in other states. *Id.* at 508. Since the proponent of partition in-kind did not offer evidence on the financial value of the improvements, which included a house, machine shed, and corn crib, and did not propose a method of division that would provide pecuniary equality for each of the party's interests, the statutory burden was not satisfied. *Id.*

133. *See* Murphy v. Bates, 276 N.W. 29, 30 (Iowa 1937) (holding that property should be sold when a division would depreciate its aggregate value). *See also* Nehls v. Walker, 244 N.W. 850, 851 (Iowa 1932) (holding partition in-kind is impracticable when a division results in a sacrifice of property value); Snyder v. Synder, 233 N.W. 498, 499 (Iowa 1930) (holding partion-in-kind is impracticable if a division would cause a considerable depreciation in value of smaller tracts); Porter v. Wingert, 190 N.W. 330, 331 (Iowa 1922) (upholding an order for sale where the party resisting sale made several offers to divide property on the grounds that the parcel was encumbered with mortgages that made in-kind partition difficult); Brown v. Cooper, 67 N.W. 378, 380,81 (Iowa 1896) (setting aside an order to partition in-kind on the grounds that partitioning a commonly held water supply would require the parties to incur considerable costs).

134. *See supra* note 35.

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determine who obtains title to the property. Madison warned of:

> . . . the unreasonable advantage [wealth bias] gives to the sagacious, the enterprising, and the moneyed few over the industrious and uninformed mass of the people. Every new regulation concerning commerce or revenue, or in any matter affecting the value of the different species of property, presents a new harvest to those who watch the change, and can trace its consequences; a harvest, reared not by themselves, but by the toils and cares of the great body of their fellow citizens.[135]

In today's society, it is the uninformed masses that Madison described who suffer from the wealth bias inherent in the partition by sale of tenancy in common property. While some take advantage of estate planning, the poor and minorities all too frequently leave their property to pass through intestate succession because they lack a full understanding of the laws and the consequences.[136]

C. A Critique of the Case Law

1. Towards Property Rule Protection for Co-Owners

By consistently ruling for the compulsory sale of the entire property, the courts in effect have created a regime in which a nonconsensual taking of property by the highest bidder is permitted. This nonconsensual taking of property is accompanied with what, supposedly, represents an appropriate payment in fair and objective "damages" to the other "former" co-owners. In actuality, the courts have, in the name of efficiency, effected a redistribution of property away from co-owners who do not wish to lose their property to advance pecuniary interest.[137]

In resolving the entitlement issues surrounding cotenancy, the courts have tended to apply a strong liability-like or what I will call a "quasi-liability rule" to resolve conflicting rights.[138] The application of a quasi-

135. THE FEDERALIST NO. 62, at 472 (James Madison) (1869).

136. *See* CAROLE SHAMMAS ET AL., INHERITANCE IN AMERICA FROM COLONIAL TIMES TO THE PRESENT 17 (1987) (noting that wealthy decedents are much more likely to have a will than those without wealth).

137. This argument does not require that we discount the usefulness of economic valuation, only that we recognize its limitations—namely, its exclusion of other socially important values that are not reducible to dollars. *See infra* Part II.C.3; *see also infra* note 197. Further, the argument rests on evidence that legislatures intended courts to consider a broader definition of injury.

138. *See* Calebresi & Malamed, *supra* note 66. Calabresi and Melamed set out in length the useful distinctions between property and liability rules' roles in a legal system. *See id.* at 1105-27. In defining

liability rule appears tied to a desire to achieve economic efficiency and consistency. Although both economic efficiency and consistency are legitimate goals, other very important implications arise from applying a quasi-liability rule over a property-like rule in partition cases.[139] Considering the historical significance and connection of property ownership to citizenship in this country, the destruction by court-ordered sale of a property owner's future expectation of ownership based on economic efficiency raises many concerns.

A property rule would protect an owner's right to possession of property,[140] discourage nonconsensual takings,[141] and encourage negotiations in order to effect a transfer of property.[142] Legal economists argue that application of a property rule is sometimes undesirable because the cost of determining the value of the initial entitlement through negotiation may be so high that the transaction would probably not occur.[143] Accordingly, legal economists generally advocate the applicability of liability rules.[144] Although the use of liability rules may be best applied in certain areas of the law (for example, eminent domain and torts), the use of liability rules to determine entitlement in the partition sale context raises more difficult questions.[145]

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the two categories of rules, they posit a scenario in which interferences with a property owner's use of the land is threatened by a second party's activity. *See id.* at 1115-19. Either a property rule or a liability rule can be imposed to protect the property owner's entitlement to use of his property without interference. Property rules bestow on property owners powerful protection of their rights. Under property rules, property owners possess complete discretion to determine whether or not to sell their property. In other words an owner determines the selling price of his property rights and will not be forced to sell at any price.

139. Epstein makes a passing reference to this question, but incorrectly assumes that courts apply the property-like rule. *See* Richard A. Epstein, *A Clear View of the Cathedral: The Dominance of Property Rules*, 106 YALE L.J. 2091, 2107 (1997).

140. *See* Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713, 716 (1996).

141. *See supra* text accompanying note 65.

142. While encouraging negotiation, the rule ultimately places the power to "hold out" and reject all offers in the property owner's hands. *See, e.g.*, Marla Jo Fisher, *Disney Holdout Farmer Dies*, THE ORANGE COUNTY REGISTER, Sept. 29, 1998, *available at* 1998 WL 2651363. This Article demonstrates the protection of the property rule in action. Hiroshi Fujishige, a strawberry farmer, will forever be famous for rejecting offers from the Walt Disney Company and resort developers that would have made him an instant millionaire. *Id.* The protection of the property rule allowed Fujishige to preserve his traditional way of life on his fifty-six acre farm.

143. *See* Calabresi & Melamed, *supra* note 66.

144. *See id.*

145. Richard Epstein critiques Calebresi and Melamed's discussion of the property and liability rule application in his path-breaking article, *A Clear View of the Cathedral: The Dominance of Property Rules:*

> It is one thing to articulate a distinction; it is another to determine how it should be used. Although their work was path breaking in many ways, Calebresi and Melamed nonetheless

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For example, commentators have suggested that liability rules in eminent domain actions are necessary for the very existence of government.[146] The sovereign's superior right trumps the rights of an individual landowner.[147] The use of a liability rule to resolve tort claims for past harm is arguably also necessary. If the harm to or interference with property rights has occurred, there is no window of opportunity for negotiation to prevent the conflict and allow the parties to reach an amicable resolution. The property right has already been invaded; the only question is whether to provide compensation for past harm. The question of whether to grant an injunction to prevent future harm is distinct.

In contrast, the application of a liability rule is not necessary, and is indeed, undesirable, as between private parties when a non-owner offers to purchase a property interest from an owner in a classic real estate transfer. As a general matter, real estate ownership is governed by property rules. In part, this reflects the fact that real estate is valued differently from individual to individual.[148] Moreover, cultural groups value property differently.[149] Since land is unique and valued differently by individuals, as between private parties, the only equitable way to compensate a

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failed to address systematically the challenge of deciding whether legal protection via a property or a liability rule should be conferred to holders of particular sorts of assets, or why.

Epstein, *supra* note 139, at 2092.

146. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 63-66 (1977); *see generally* James W. Ely, Jr., *"That due satisfaction may be made": The Fifth Amendment and the Origins of the Compensation Principle*, 36 AM. J. LEGAL HIST. 1 (1992); 1 PHILLIP NICHOLS, THE LAW OF EMINENT DOMAIN § 1.1-1.3 (3d ed. 1992).

147. This same consideration does not apply in the partition context, where the rights of two individuals or groups of individuals are at odds. The sovereign's superior status is based on these following facts: (1) individual ownership is derived from grants from the state and the state had original and absolute ownership; (2) the sovereign is serving a larger public purpose; and (3) forcing the government to negotiate with each property owner would be onerous and expensive for taxpayers.

148. *See* Bell v. Alsip, 435 So. 2d 840, 842 (Fla. Dist. Ct. App. 1983).

149. *See infra* text accompanying notes 221-22. Also note that African Americans are not the only cultural groups that hold land sacred. For example, many Native Americans also view land as sacred. *See* D.R. Lewis, *Native Americans and the Environment: A Survey of Twentieth-Century Issues*, 19 AM. INDIAN Q. 423 (1995). *See also* E. DURKEIM, THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE (1915); STEWART GUTHRIE, FACES IN THE CLOUDS (1993); D.E. Booth, *The Economics and Ethics of Old-Growth Forests*, 14 ENVTL. ETHICS 43, 58-62 (1992); R.L. Hopcroft & J.M. Whitmeyer, *Community, Capitalism, and Rebellion in Chipas*, 39 SOCIOLOGICAL PERSPECTIVE 517 (1996); C.C. Horton & T.R. Peterson, *Rooted in the Soil: How Understanding the Perspective of Landowners Can Enhance to Management of Environmental Disputes*, 81 Q.J. SPEECH 139 (1995); Jeffrey Kline & Martsa J. Mazzotta, *Environmental Philosophy and the Concept of Nonuse Value*, 71 LAND ECON. 244 (1995); R. Asedillo, Sense of the Sacred, The Other Side (on file with author); Norman Hadley, Places of Power (Spiritual Landscapes of the Inuit), Royal Canadian Geographical Society (on file with author); R. Rudner, Sacred Geographies: Indian Country, Time, Land, Tradition, and Law are Joined—or Should Be, Wilderness Society (on file with author); Johnson Trebbe, Native Intelligence (Team-Up Between Environmentalist and American Indians for Environmental Protection), Natural Resources Defense Council (on file with author).

property owner is to pay the exact price for which the owner is willing to part with his land. The choice of the term "property rule" reflects that an estate in property typically cannot be acquired without the seller's consent.

While making a clear set of distinctions between property rules and liability rules, Calabresi and Melamed argue that ultimately it does not matter; the same result will be obtained under either set of rules.[150] Richard Epstein pointed out a significant gap in their analysis.[151] Given a world with transaction costs and real time, Epstein argues that choosing between the two rules will have "major consequences for the overall operation of any legal system."[152] While Calabresi and Melamed present a variety of factors to consider in determining entitlement, (for example, economic efficiency, distributional preferences, and other just considerations),[153] economic efficiency has become increasingly seen by some scholars as a primary justification for supporting the choice between property and liability rules.[154] This seems to have led to a preoccupation with "high theory"— theory producing an often elegant model but one which, in many instances, may be devoid of historical, practical, and legal context.[155]

Property has been regarded as a distinctive right essential to liberty and as placing a limit on governmental authority.[156] Even designating the categories of "property rules" or "liability rules," hints at the persistence of this vision of property and its rhetorical power. The term *property* captures the core of what ownership means inside this vision—that one will have some input in determining the retention or transfer of this interest. In compulsory partition actions, the courts are failing to honor this right to determine. Instead, the courts apply a quasi-liability rule, allowing this core element of property ownership to be entirely removed without consent. No higher public interest has been established in these cases as

150. *See* Calebresi & Melamed, *supra* note 66, at 1105-27.

151. Epstein criticized Calebresi and Melamed for failing to address systematically when and why legal protection should be provided via a property or liability rule. *See* Epstein, *supra* note 139, at 2092. Although Epstein's insight on the limitations of Calebresi and Melamed's analysis is apt, I argue that Epstein's excessive reliance on economic efficiency is unwise and may create a new set of issues. *See id.*

152. *See id.* at 2092.

153. *See* Calebresi & Melamed, *supra* note 66, at 1093-105.

154. *See id.* at 1093-98. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 22-23 (2d ed. 1977) [hereinafter ECONOMIC ANALYSIS].

155. *See* Epstein, *supra* note 139, at 2095 (critiquing the essay of Ian Ayers and J.M. Balkin, *Legal Entitlement as Auctions: Property Rules, Liability Rules and Beyond*, 106 YALE L.J. 703 (1996)).

156. *See* JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 248 (1990).

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compared to the takings area. Here, the courts allow a private actor with a private interest to enjoy quasi-liability rule status. Even though most state statutes still give lip-service to a presumption of division-in-kind, a review of the cases reveals that the presumption is rarely honored and the application of a quasi-liability rule is the prevailing trend.[157]

2. Expanding the Metric: Recognizing Incomemensurability

Not only in deciding whether to force sale of the property, but also in selecting a method of valuation, the courts have focused on economic efficiency. In partition cases, courts have adopted this single metric for determining value based on what on the surface appears to be a reasonable and practical rationale: the valuation process should advance wealth creation and maximization.[158] The rationale which supports this paridigm is that a market/auction process establishes an "objective" determinant of value that can be applied universally by the courts to resolve ruptured interests in an efficient manner and does not require the courts to apply any "subjective" definitions to the process. All interested parties have the opportunity to demonstrate the degree to which they value the property by offering to pay more for the property than other bidders.[159] Under closer scrutiny, however, this process does not provide an objective metric of value but instead, is riddled with subjective assumptions about the "higher order" of economic value—that the highest price offered represents the highest intensity of valuing the property.[160] In short, it assumes the actors'

157. *See, e.g.*, Black v. Stimpson, 602 So. 2d 368, 369 (Ala. 1992) (applying an economic test in spite of efforts by interest holders to craft equitable alternatives). Allowing a partition sale where one individual takes sole title to the property has the potential benefit of minimizing future disputes and honoring the myth of property ownership—"sole and despotic dominion." BLACKSTONE, *supra* note 61. For other discussions of the tendency to consolidate authority over property in a single owner, see generally Gregory Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189 (1985) (discussing property as a bundle of rights).

158. Courts attempt to provide a consistent and efficient method of dealing with partition cases involving ruptured interest in cotenancy property by adopting a single metric of valuation.

159. *See* Fine v. Sharer, 571 P.2d 1252 (Or. 1977). This approach was articulated in *Fine* where the court stated that "the financial interest of the owners is the primary factor to be considered" in partition cases and other alleged value is "necessarily subordinate to the pecuniary interest of the parties." *Id*. at 1254. The *Fine* court's analysis indicates that a party alleging sentimental or other noneconomic value can not expect to have their claim weighed equally with economic claims. Any party alleging sentimental or other value would be forced to protect his interest by making the highest bid at the public sale. *Id*.

160. The courts choose to subordinate other indices of value in the wealth maximizing formula which may only benefit a minority interest holder. *See, e.g.*, *Fine*, 571 P.2d at 1254-55. By adopting this approach, courts are not honoring the original and primary intent of the partition statutes—to sustain family interest in property. The wealth maximization approach also ignores the social, cultural, and political consequences of ordering a forced redistribution of property away from less wealthy

primary motivation is economic advancement.

But this assumption is flawed when some of the actors have other overriding interests which they place ahead of economic advancement. The possible willingness to forego increased pecuniary gains in partition cases argues for considering alternative modes of valuation. I argue that in these cases, valuing property as a mere tool of wealth maximization, is artificial and extremely limited.[161] To the extent that this approach limits our ability to achieve effective and equitable resolutions to resolve partition disputes, we need to subject it to closer scrutiny. Courts, in employing both a pecuniary loss standard to resolve claims and to auction property in a partition by sale, make two significant and I believe, highly contestable assumptions to undergird their decisions: (1) that a single hierarchy of values exists which can be used to determine the disposition of a ruptured heterogeneous interest in real property; and (2) that pecuniary interest or wealth maximization is at the top of this hierarchy. An examination of the subjective underpinnings of the courts' hierarchical valuation framework is needed.

The economic efficiency framework is attractive for many reasons. Some scholars have argued that economic efficiency (wealth maximization) increases the overall wealth of society and therefore, adds to the total social good.[162] Some have even argued that all human goods and relationships can and should be reduced to this single metric of valuation[163] and that a number of social problems would be more "efficiently" resolved by applying maximizing criteria.[164] By adopting, formally or informally, this valuation viewpoint, the court has "drowned out" other, alternative valuation frameworks.[165] Other valuation frameworks reflect very different views on the desirability of ownership,

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members of society to accommodate the pecuniary gain of wealthier parties.

161. The rationale which supports this paradigm is that a market or auction process creates an "objective" valuation of the property which can be applied universally and efficiently by the courts to resolve ruptured interests because courts will not have to apply any "subjective" definitions to the process. *See* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 353-59 (1990) [hereinafter POSNER, PROBLEMS].

162. *See* POSNER, PROBLEMS, *supra* note 161; POSNER, ECONOMIC ANALYSIS, *supra* note 154; RICHARD POSNER, THE ECONOMICS OF JUSTICE 88-115 (1981) [hereinafter POSNER, ECONOMICS]. Posner suggests that, while not perfect, "wealth maximization provides an ethically adequate guide to common law decision making—indeed a superior guide to any other that has been suggested." POSNER, PROBLEMS, *supra* note 161, at 390.

163. For a leading exponent of this approach, see GARY BECKER, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR 5-14 (1976).

164. For an extraordinary application of this approach see Elizabeth M. Landes & Richard Posner, *The Economics of the Baby Shortage*, 7 J. OF LEGAL STUD. 323 (1978).

165. *See generally infra* Part II.C.3.

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maintenance, and alienability of land. Even a cursory examination of some of the other frameworks for valuation reveals a very rich and diverse approach to defining value in more than economic terms.

Gregory Alexander asserts that the alienation or exchange of "property is so important in our American society that many Americans are apt to view 'property' as synonymous with 'commodity.'" [166] "[This] wasn't always so."[167] Individual preferences may be expressed through market alienation of property; however, not all property fits this market exchange model.[168] The value placed on the property by the owner may not be correlative to market criteria. This property has a unique, personal, and nonreoccurring history that forms the basis for establishing a noneconomic value for the property. For example, the house where one was born has historical significance for a family and may escape an economic valuation framework.[169] Or an "heirloom" may be a piece of jewelry passed down through the generations from mothers to daughters and theoretically, has no economic exchange value which will equal the psychological or emotional value attached to the item.[170] Scholars have noted that fidelity to a spouse or loyalty to a friend defies a single metric of valuation.[171] One may value fidelity and loyalty in a manner that precludes an exchange based on money.[172] Others have argued that "friendship is more valuable than any amount of money or in other words, that the value of friendship is incomparably greater."[173] One does not have to agree that the value of

166. Gregory Alexander, *Property as* Propriety, 77 NEB. L. REV. 667, 668 (1998) (discussing the relatively new development of the conception of property as a commodity).

167. *Id.* (discussing the conception of property as a commodity a realtively new development).

168. Notwithstanding challenges to the "free market" model of property, "[it] has a life of its own and continues to dominate legal discourse." Joseph Singer, *The Reliance Interest in Property*, 40 STAN L. REV. 611, 636 (1988) (discussing limits to market theory for property rights and suggesting a reliance theory for property rights, analogous to the reliance theory used in torts and contract law). *See also* Morris Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927).

169. The dissent in *Chuck v. Gomes* eloquently articulates why the pecuniary loss standard is unable to fairly adjudicate needs of a local population. 532 P.2d 657, 660 (Haw. 1975) (Richardson, C.J., dissenting). In *Chuck v. Gomes*, the majority affirmed the trial court's order of sale of real property owned by nine tenants in common despite the Commissioner's report that partition in-kind was feasible. *Id.* The dissent argued that the discretion of the courts to order partition by sale should be narrow considering Hawaiian culture and the importance of retaining the ownership of real property in one's family line. *See id.* at 661. The dissent supported its position by noting the common law favored partition in-kind and by arguing that the individual's right to possess familial lands to perpetuate the homestead is integral to Hawaiian culture.

170. *See* MARGARET JANE RADIN, CONTESTED COMMODITIES 3 (1996).

171. *See* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 958 (1982); Cass Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 801 (1994).

172. *See* Sunstein, *supra* note 171, at 813.

173. Donald H. Regan, *Authority Value: Reflections on Raz's Morality of Freedom*, 62 S. CAL. L. REV. 995, 1058 (1989).

friendship is incomparably greater than money to conclude that friendship, like loyalty or fidelity, defy a commensurability framework.[174] They "cannot be aligned along a single metric without doing violence to our considered judgments about how these goods are best characterized."[175] Radin argues that "[m]ost people possess certain objects they feel are almost part of themselves . . . they are part of the way we constitute ourselves as continuing personal entities."[176] Radin points out that certain goods are intrinsic to one's sense of identity and personhood, and that to assume these goods are exchangeable commodities "does violence to the self."[177]

Much the same as friendship, loyalty, or fidelity, historical or personal attachment to land may be inside of one's "self-construction" or "self-identity."[178] Scholars have recognized the continuing cross-cultural importance of land to one's sense of self.[179] The "homeplace" may be more important to African Americans because of their struggle to achieve land ownership, and because of their need for refuge, solace, and self-determination in a persistently discriminatory social landscape.[180] For many African Americans the homeplace is a place that can be created and controlled as a place of dignity, something so often denied African Americans in society at large.[181] Thus, land is not fungible and defies valuation along one common metric. Land as "sacred"[182] or invaluable is

174. *See* Sunstein, *supra* note 171, at 813.

175. *See id.* at 796.

176. *See* RADIN, *supra* note 170.

177. "Human values are plural and diverse." *See* RADIN, *supra* note 170, at 74-75. Thus, "human goods are not commensurable." *Id.* "Most people possess certain objects they feel are almost a part of themselves . . . . One may gauge the strength or significance of someone's relationship with an object by the kind of pain that would be occasioned by its loss." *Id.* Radin argues that the item is "closely related to one's personhood" when replacement of the object will not relieve the pain of associated with the loss. *See id.* The individual's perceived status in society, which is attached to the property, defies a purely economic valuation. *See id*.

178. *See id.*

179. *See, e.g.*, Joyce Quiring Erickson, *On Being at Home*, 43 CROSSCURRENTS 235, 237 (1997) (citing E. RELPH, PLACE AND PLACELESSNESS 39 (1976)) (noting that "[h]ome is the foundation of our identity as individuals and as members of a community, the dwelling-place of being . . . an irreplaceable centre of significance.")

180. *See* FEAGIN, *supra* note 4, at 224 ("To black families, home represents one of the few anchors available to them in an often hostile white-dominated world. Home is for African Americans the one place that is theirs to control and that can give them refuge from racial maltreatment in the outside world.") *See also* STACK, *supra* note 70 (recounting the stories of many African Americans who return to the rural, poor South to reclaim their histories, to reconnect with families, and to rediscover their identities by confronting their past).

181. *See* FEAGIN, *supra* note 4, at 224-25.

182. Americans have with notable consistency accorded property an almost sacred position in American culture. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 236 (Phillips Bradley ed., Vintage Books 1990) (1840). "In no other country in the world is the love of property more active and

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not a unique or new concept.[183] Land symbolizes and represents a diverse number of things for different people at different times.[184] Historically, there is much support for the position that the value of land is not determined only by its use for economic gain.[185] Outside the boundaries of western society, sustenance and birthright have endured as valuations of land far longer than have property assessments, possession, and market values.[186] The perspectives of indigenous people[187] and environmentalists[188] are examples of alternatives to a purely economic approach to land valuation. Other scholars have noted instances where individuals hold certain noneconomic goals as cherished above all else. In some contexts, this has been explained by the scholars as the desire for esteem, status, group identity, group interest,[189] or group loyalty.[190]

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more anxious than in the United States . . . ." *Id.*

183. *See* Rudner, *supra* note 149; Lewis, *supra* note 149.

184. *See generally* Rudner, *supra* note 149 (arguing the importance of recognizing noneconomic land values found in Indian culture).

185. *See* Alexander, *supra* note 166, at 668. (discussing "property as the material foundation for creating and maintaining the proper social order").

186. *See* Rudner, *supra* note 149.

187. Native Americans have a close relationship with their physical environment and the land itself. Land, for indigenous people, is sacred—something to be cherished and respected. *Id.* Many Native Americans live in close connection with the earth and are cognizant of it rhythms and resources. In many ways, they define themselves in relation to the land and by the sacred places that bind and shape their world. *Id.* Their traditions and religious beliefs are inseparable from the land. *See* Hallendy, *supra* note 149; Trebbe, *supra* note 149. The revered connection that Native Americans have with their land and environment is reflected in their persistence in challenging the destruction of specific geographic sites. Mount Graham in Arizona (which is considered sacred by the San Carlos Apaches), Red Butte (held sacred by the Havasupai), and the Big Horn Medicine Wheel in Wyoming (held sacred by the Blackfeet people) are examples of three sites which have been targeted for capitalist use. *See* Trebbe, *supra* note 149, at 1. Mount Graham was chosen by the University of Arizona as the site of seven telescopes. *See* Rudner, *supra* note 149, at 10. Red Butte is now the site of an uranium development and the Big Horn Medicine Wheel is a prime source of oil and natural gas deposits. *See id.* In *Lyng v. Northwest Indian Cemetery Protective Association*, the Supreme Court failed to recognize the noneconomic value of the land as sacred to the Native Americans for religious purposes. 485 U.S. 439 (1987). Instead, the Court applied an economic test. Several California tribes tried to block construction of a logging road through an old growth forest central to their ceremonial practices. *See id.* at 443. The Court held that the First Amendment does not protect native sacred sites from being destroyed so long as the intent of the party using the land is not to prevent Native Americans from practicing their religion. *See id.* at 450-51.

188. The environmental perspective is consistent with Native American views, although it does not define land as sacred. The environmentalist groups, however, may have different strategies and even different motivations. The primary distinctions between the groups has been based on their philosophies. Two distinct philosophies which operate within the initial movement are anthropocentric and nonanthropocentric philosophies. See Kline & Mazzotta, *supra* note 149, at 71. *See also* D. E. Booth, *supra* note 149, at 59; *See also* ALDO LEOPOLD, A SAND COUNTY ALMANAC (1946) (parenthetical).

189. Improving conditions or maintaining a hierarchy which supports a feeling of superior group status can become the reward and motivation for individual action. For example, in the 1960s, individual African Americans participated in social protest and risked economic loss, incarceration,

The economic valuation process reflects a hierarchy where market activity is implicitly privileged, and psychological and emotional components are undervalued. Partition sales of family owned property have the potential not just to reinforce this hierarchy, but to capitalize on it. The values of co-owners who do not share these assumptions about value are marginalized. Their claims are deemed less worthy due to their failure to communicate their value in financial terms.

Scholars debate whether "law and economics" principles are the appropriate model on which to base legal rules in certain contexts.[191] Much of the debate centers on whether formalistic deduction based on predetermined assumptions, as applied in law and economics to determine human disputes, achieves the highest utility in determining human disputes or is, at least, the most practical solution.[192] Human motivation and "human experience," although undeniably "real," cannot be easily quantified or measured. An approach which focuses on economic efficiency may produce a more quantifiable, but not necessarily more equitable, result. In spite of the favored status asserted by the courts and some scholars, the economic efficiency framework must be viewed with some skepticism.

3. Contested Assumptions

Even if one accepts the notion of a single metric and therefore, rejects the arguments for incommensurability, problems remain with employing a

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and even death to enjoy an improvement in group status. *See generally* TAYLOR BRANCH, PARTING THE WATERS (1988) (tracing the risks and challenges faced by Martin Luther King, Jr. and his supporters during the Civil Rights Movement). Thus, improving the condition, not of the individual, but of the family, the next generation, or the homogeneous unit, may be a sufficient motivation to explain the desire to retain title to land and forego immediate individual economic gain.

190. Consider the possible economic consequences of these words:

> Standing in the presence of this multitude, sobered with the responsibility of the message I delivered to the young men of the South, I declared that the truth above all others to be worn unsullied and sacred in your hearts, to be surrendered to no force, sold for no price, compromised in no necessity, but cherished and defended as the covenant of your prosperity, and the pledge of peace to your children, is that the white race must dominate forever in the South, because it is the white race, and superior to that race by which its supremacy is threatened.

HENRY W. GRADY, THE NEW SOUTH AND OTHER ADDRESSES 55 (1969).

191. *See* POSNER, PROBLEMS, supra note 161; Thomas Cotter, *Legal Pragmatism and the Law and Economics Movement*, 84 GEO. L.J. 2071 (1996) (arguing that the economic theory of pragmatism offers insights useful for constructing legal theory); Herbert Hovenkamp, *Positivism in Law and Economics*, 78 CAL. L. REV. 815 (1990) (discussing whether the economic theory of positivism has an analog in legal theory).

192. *See* RADIN, *supra* note 170, at 16-45.

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market model to assess value.[193] An offer-price criteria is often employed as a proxy to determine an individual's value of the relevant property.[194] For example, the basic premise of employing an offer-price criteria is that the interest holder who values the property more, will offer (in an auction or other market setting) to pay more for the property. Efficient markets for all goods will therefore sort out the interest which values the property the most.[195] A number of scholars have argued that this proxy is subject to a series of limiting parameters which makes it at a minimum indeterminate as a reliable surrogate for revealing the interest holder's intensity of preference.[196] For example, consider the "Widow's Mite Paradox" as an example of the limitation of the offer-price as a measure of intensity in valuation questions.[197]

In the "Widows Mite Paradox"[198] scenario, I assume that Interest A's total wealth is 5000 dollars while Interest B's total wealth is 20,000 dollars. Interest A and Interest B are tenants in common. Interest B ruptures the relationship through partition and the property is ordered sold at auction. Interest A offers 5000 dollars, representing 100% of her wealth, to purchase the property. Interest B is prepared to offer no more than 5001 dollars, representing 25% of her wealth. At auction, Interest B receives the property. But can one deduce that Interest B, by bidding more in dollars, in fact values the property more than Interest A? What I term the "Widows Mite Paradox" clearly indicates that analysis beyond the surface facts (amount of bid in dollars) necessitates an answer of "No." Interest A, by offering 5000 dollars, was willing to pay *all* that she owned in order to keep the property; whereas Interest B, in offering 5001 dollars, was only willing to pay 25% of her wealth to keep the property. Interest A values

193. A number of scholars have agreed that given the number and complexities of valuation frameworks, a simplifying single metric should be used as a proxy for all the other valuations frameworks. *See* BECKER, *supra* note 163, at 8.

194. See Landes and Posner, *supra* note 164, at 327-39, for a concrete application of this argument.

195. *See id*.

196. *See* Herbert Hovenkamp, *Rationality in Law and Economics*, 60 GEO. WASH. L. REV. 293, 325-30 (1992); Herbert Hovenkamp, *Legal Policy and the Endowment Effect*, 20 J. OF LEGAL STUD. 225, 238-43 (1991) [hereinafter Hovenkamp, *Legal Policy*]; Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387, 401-10 (1981).

197. *See* Cotter, *supra* note 191, at 2127. *See also* Hovenkamp, *Legal Policy*, *supra* note 196, at 239.

198. This is based on the Widow's offering story in the New Testament of the Christian Bible. Jesus sat watching the rich put significant amounts into the offering containers. Then a poor widow approached and offered only two copper coins. Jesus said, "Truly I tell you, this poor widow has put in more than all of them; for they contribute out of their abundance, but she out of her poverty put in all the living that she had." *Luke* 21:1-4.

the property more on an alternative method of measuring intensity based on the amount of the bids. The amount of any bid may only reflect that one interest holder has more wealth or access to more resources and not the true value the bidder places in the property. The suggested use of alternative value frameworks may be subjected to similar critiques. This leaves the responsibility of finding a suitable metric with the court. If all value frameworks are subject to some critique, then no metric may be appropriate for universal application.

In partition cases where the property is ordered sold, it may appear that awarding the property to the highest bidder at auction is a neutral, objective, and value-free metric which will produce an economically efficient use of the property. However, as demonstrated above, this approach excludes other, potentially valid frameworks held by some of the co-owners. In this context, where ownership of real property is involuntarily converted into personal property through state power, all value frameworks should be considered equally viable especially if it allows a co-owner to protect their interest in the property.

Property is a scarce resource which is traditionally protected in the law, except in cases involving public need and compelling state interest.[199] Here there is no public need which compels the forced sale of the property. A sale of the property is set out in state partition statutes as an extraordinary remedy.[200] For courts to allow a purely economic valuation to establish the "injury" and to determine who gets the property does violence to the intent and spirit of the law. Historically, partition sales were ordered in extraordinary circumstances when a division could not be clearly established.[201] The circumventing of this intent by an outside interest, supported by the courts, may be legal, but it is not objective or fair to all interests in the property. The devastating impact of this liability regime in judicial partition has a devastating impact on particular segments of society and specifically African Americans.

III. THE AFRICAN AMERICAN CASE: LAND LOSS

These facts suggest that the overall consequences of the phenomenon described in Parts I-III of this Article can be usefully viewed through the lens of race. These facts, taken together, support the proposition that

199. *See* Epstein, *supra* note 49.

200. *See generally supra* Part.II.B and notes 104-09.

201. *See generally supra* Part II.A (discussing the common law origin and purpose of partition sales in the United States).

Washington University Open Scholarship

African Americans as a group have suffered disproportionately from the combined effects of the judicial doctrine favoring forced sales, the exclusive reliance on economic valuation favoring forced sales, and the use of nonmarket auctions to compensate dispossessed co-owners.

The history of African Americans in this country first as property,[202] their struggle to acquire land, and their subsequent land loss is well documented. The real and undesirable impact that this community has suffered makes the search for contributing causes worthwhile. Although judicial partition is only one of a list of causes of land loss, this area is a good example of how many of the causes intersect. Second, African Americans as a group are poorer than whites as a group,[203] and are poorer in terms of real property ownership and wealth.[204] A corollary to this second fact is that in part, as a result of this relative economic status and other negative experiences with the legal system, African Americans tend not to engage in estate planning;[205] thus disproportionately, their real property passes under the laws of intestacy, making it more likely for property to be owned under the co-ownership forms that are subject to partition.[206] Discrimination in opportunities for land acquisition has presented a major and enduring hurdle for African Americans. Factors such as restrictive covenants, steering by realtors, redlining by lending institutions, and discrimination in the approval process for mortgages have contributed to this on going dilemma of land acquisition and retention.[207] Finally, cultural and sociological studies suggest that African Americans value land ownership beyond the market value that the relevant land commands.[208] Thus, African Americans are more likely to be caught in the

202. Thrust into a new land as chattel, African Americans, like the rest of American society, began to express their individuality through the acquisition of property and other forms of wealth. *See* SCHWENINGER, *supra* note 13, at 144-45. However, unlike the rest of society, individual property ownership became a necessity for African Americans instead of a mere desire. *See id*. Individual property ownership became a necessity because "slaves saw liquid capital not only as a means to secure freedom, but also as a means to attach their paternity—and hence, their identity as persons—to something even their masters would have to respect." *See id*. at 11.

203. *See* OLIVER & SHAPIRO, *supra* note 2, at 102 tbl. 5.2.

204. *See id*. at 106 tbl. 5.3.

205. *See* STACK, *supra* note 70, at 44.

206. By engaging in estate planning, individuals may avoid co-ownership and avail themselves of trusts and other planning tools to distribute their property. Even though co-ownership may be chosen in a will or other estate planning device, the phenomenon of fragmentation that occurs over several generations in the absence of any estate planning is far less likely to occur.

207. *See* JOHN YINGER, CLOSED DOORS, OPPORTUNITIES LOST: THE CONTINUING COSTS OF HOUSING DISCRIMINATION 4-5, 44-45, 187-89 (1995).

208. *See, e.g.*, FEAGIN, *supra* note 4, at 224 (noting the cultural importance of land ownership for African Americans). *See also* THORDIS SIMONSEN, YOU MAY PLOW HERE 19-21 (W.W. Norton & Company 1986) (providing a narrative study of Sara Brooks, an African American woman living on a

web of partition law that leads to forced sale. In the judicial proceedings for sale, they receive compensation that not only may fail to reflect the nonmarket value of the property lost but also may fail to accurately reflect fair market value.[209]

For any group, the loss of property historically held by family would be considered a painful break with a valued family asset. African American property ownership is considered by many as all but a sacred phenomenon.[210] Despite numerous obstacles, newly freed African Americans demonstrated and modern African Americans still demonstrate,[211] a great determination to accumulate property.[212] Indeed, "perhaps no Americans can better understand the meaning of owning property than those who had been considered a 'species of property' themselves."[213]

For African Americans, the viewpoint of land as "sacred" is directly tied to a people's movement from slavery to freedom.[214] In judicial partition cases where the retention or divestment of land title is determined, a valuation framework which only employs an economic model does violence to the historical significance land has played in the lives of African Americans.[215] Land for many African Americans may be the most important symbol of achieving some level of equality in American society.[216] In view of this, any process that precipitates land loss must be carefully evaluated, critiqued, and scrutinized. Status and self-esteem are naturally attached to those things which people are able to

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farm in the rural South). Simonsen notes that Sara Brooks' father gained both independence and the respect of neighbors, black and white, through continued land ownership. *See id.*

209. *See, e.g.* Fine v. Sharer, 571 P.2d 1252 (Or. 1977).

210. *See generally* Edward Magdol, *An American Village Movement*, *in* A RIGHT TO LAND, ESSAYS ON THE FREEDMEN'S COMMUNITY 180 (1975).

211. *See generally infra* Part I and accompanying notes (explaining the hardships African Americans experience in attempting to acquire property). *See also* 42 U.S.C. § 1982 (1993) (attempting to eradicate discrimination in property ownership).

212. *See* § 1982.

213. *See* SCHWENINGER, *supra* note 13, at 144.

214. African Americans were torn from Africa, their native land, and taken to the New World to commence their new lives as slaves. *See id.* at 9. Although the early African Americans were descendants from numerous African tribes and thus, shared great cultural differences, they did share one cultural trait. *See id.* at 10. In America, the soon-to-be African Americans experienced a different type of property ownership that was enjoyed in the New World. *See id.* In the New World, the colonists enjoyed individual property ownership. *See id.* However, in Africa, Africans enjoyed communal property ownership.

215. *See* SCHWENINGER, *supra* note 13, at 145.

216. *See* Lester Salamon, *Family Assistance—The Stakes in the Rural South*, THE NEW REPUBLIC, Feb. 20, 1971, vol. 164, at 17.

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acquire; they are symbols of our position in society.[217] Acquisition of the "homeplace" or productive land was the first symbolic step toward true liberty or freedom for many African Americans following Reconstruction.[218] Individual property ownership was viewed as a necessity for adaptation and citizenship.[219] The psychological and emotional significance of retaining a 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.[220]

The goal of property ownership by African Americans has continued to be a contested possibility.[221] Post-Reconstruction, the ownership of productive property conferred independence and stability on African Americans in a culture that sought to maintain and enforce their heretofore status of inferior and dependent quasi-citizens. Not only was the struggle to gain ownership or property difficult but equally problematic was the struggle to preserve their title to the property.[222] The independence of

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217. Cultural transformations were imperative for the first African Americans because "[t]he more their unique culture differed from that of their master the more they were 'immune from the control of whites' and the more they 'gained in personal autonomy and positive self concepts.'" SCHWENINGER, *supra* note 13, at 29. However, as would be expected, the cultures of the new African Americans gradually transformed. One such cultural transformation included their philosophies about property ownership. *See* SOLTOW, *supra* note 202, at 76, 84, 186.

218. *See* Magdol, *supra* note 210, at 175-80.

219. Schweninger notes:

> It was not merely observing Europeans and envying their wealth and comfort, or seeing how their accumulations had made them independent and powerful, or even accepting new definitions for success and self-esteem, although all of these probably influenced to one degree or another the changing attitudes of blacks. In the brutal and exploitative new setting they found that survival depended not so much on communal harmony as on individual ingenuity. Even those who could never relinquish the hope of someday returning to the life they had been forced to abandon realized that perhaps the only way to make their dream a reality was to make adaptations to their new land.

SCHWENINGER, *supra* note 13, at 11.

220. *See* Radin, *supra* note 170, at 958.

221. *See* FONER, *supra* note 11, at 102-10; WILLIE LEE ROSE, REHEARSAL FOR RECONSTRUCTION (1976) (providing a detailed exploration of freedmen and land); SCHWEINGER, *supra* note 13, at 97-141.

222. *See* WEARE, *supra* note 17, at 3-8, 13-14. Given the historic segregation within the rural areas of the South, African American communities developed a complete network or infrastructure of associated relationships to provide mutual aid and opportunity to its members. *See id.* at 6-11. Churches, burial societies, and cooperatives of various kinds created opportunities for African Americans who desired to carve out a higher quality of life. *See id.* at 6-7. These associations also were independent locations where African Americans could talk freely about the individual issues or the intersection of politics, race, and economics. *See id.* They were often hotbeds of intellectual discussion and potential launching points for resistance to segregation and limitations placed on economic advancement. *See id.* at 8. At the center of this network of associations and organizations were the African American property owners. African American landowners and property owners provided significant leadership and stability to the ongoing effort of these associations to aid the African American community. *See id.* at 52-56. *See* also LERONE BENNET, JR., BEFORE THE

landowners and business owners provided ample inducement and basis for the majority power structures at the local and state level to adopt legal and extra-legal methods to undermine the ability of this group to maintain itself and grow.[223]

Attempts by African Americans to protect their property rights in the courts were also problematic.[224] Chances of success for African Americans in legal actions involving contested issues against a white opponent were low.[225] They could not depend on an impartial administration of justice.[226] Opportunities were further limited by community control. Given the closed nature of the relationships in many towns and cities, whites who dared to break with convention by selling property to African Americans or providing financing for the purchase of property could face harsh repercussions which included ostracism inside their own community.[227] As punishment, they could effectively be removed from future business

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MAYFLOWER: A HISTORY OF BLACK AMERICA 214-54 (6th ed. 1987); W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA 601-36 (1935) (discussing the difficulties African Americans faced during Reconstruction when they attempted to obtain possession and title to lands, as well as the right to vote attendant with land tenure).

223. Whites mounted campaigns in an attempt to keep African Americans from achieving any sense of land ownership and possession. *See* WHITELAW REID, AFTER THE WAR: A TOUR OF SOUTHERN STATES 1865-1866, at 564-65 (C. Vann. Woodward ed., Harper Torchbooks 1965) (1866). For example, in 1865 the state of Mississippi prohibited "any freedman, free Negro or mulatto" from renting or leasing any land or tenements except within the limits of where local authorities could control and oversee such rental and lease agreements. *Id.* In other states, whites entered into private agreements prohibiting each other from selling, renting or leasing their property to African Americans. *See id.* Whites also lashed out against African Americans who succeeded in spite of the odds to obtain property in a time that can be described as a reign of terror. In July of 1919 in Chicago, white mobs brutally attacked African American neighborhoods, killing and wounding 537 residents and leaving an estimated 1,000 homeless. *See* MAXINE D. JONES ET. AL., A DOCUMENTED HISTORY OF THE INCIDENT WHICH OCCURED AT ROSEWOOD, FLORIDA IN JANUARY, 1923, at 94 (1993). In July of 1917 in East St. Louis, Illinois, homes were indiscriminately torched as a result of competition for jobs. *See id.* at 89. In November of 1920 in Ocoee, Florida, six African American residents were killed; twenty-five homes, two churches, and a lodge were destroyed. *See id.* at 97. In June of 1921, a section of Tulsa, Oklahoma, where African Americans resided was set aflame, leaving thousands homeless. *See id.* at 98. White mobs destroyed approximately eighteen homes during the Rosewood incident. *See id.* at 421-22. After two weeks of terror, all of the African American residents of the town fled, surrendering all property, including their homes. *See id.* Most of the houses and personal property were burned. *See id.* at 428-29. These homes belonged to John Wesley Bradley, George Bradley, Mary Ann Hall, Laura Jones, James Carrier, Sarah Carrier, Aaron Carrier, Hardee Davis, John Coleman, Virginia Smith, James Hall, Lizzie Screen, Sam Carter, Cornelia Carter, Ransom Edwards, May Ann Hayward, John McCoy, Ed Bradley, Perry Goins, Sam King, and Lexie Gordon. *See id.* According to Moore, these homes were relatively substantial dwellings and well furnished. *See id.*

224. *See* DAVID M. OSHINSKY, WORSE THAN SLAVERY 25-27 (1996); NIEMAN, *supra* note 6, at 114-47 (describing the difficulties African Americans encountered advancing their civil rights and challenging segregation in the courts).

225. *See* LEON F. LITWACK, TROUBLE IN MIND 246-57 (1998).

226. *See id.*

227. *See supra* note 223, at 564-65.

Washington University Open Scholarship

dealings which could impact their own livelihood. As a consequence, only exceptionally independent whites would risk their status in the community to act on behalf of African Americans, even in the courts.[228] A perversion of this phenomenon was the accepted notion that whites could safely act on behalf of "good darkies."[229]

The cumulative impact of this "raced" system is impossible to determine. However, one consequence was avoidance of the legal system. With the risk of losing so high, African Americans with property issues often did not choose going to court as a viable option in many instances.[230] Limited resources and a legitimate distrust of the legal system provided the rationale for many families to allow the intergenerational transfer of property to proceed through intestate succession. Many African Americans "came to perceive the law and its enforcers as an outside alien force."[231] Without recourse to the courts for probate, the passing of their property interests as "heir property" was a safer alternative and would in effect keep the property in the family.[232] This system of transfer created its own set of practical and legal problems.[233]

As property passed down to each generation through intestate succession, the ownership interests tended to multiply and disperse over time. Instead of protecting the property, the multiplication of interests created potential vulnerabilities. Many possibilities for rupturing of the tenancy in common are present. For example, one of the interest holders could sell his interest to a purchaser who does not desire to continue ownership as a tenant in common,[234] or a disagreement over the desired

228. *See id.*

229. NEIL R.MCMILLEN, DARK JOURNEY 118 (1990).

230. LITWACK, *supra* note 225, at 277-78.

231. *Id.* at 277.

232. The term "heir property" is commonly used in the African American community to denote land held by the legal heirs of the deceased under an intestate succession statute. *See* STACK, *supra* note 70, at 44. The heirs hold the property as tenants in common. *See id.* Each heir has an undivided interest. *See id.*

233. *See* Wayne Moore, *Improving the Delivery of Legal Services for the Elderly: A Comprehensive Approach*, 41 EMORY L.J. 805, 813 (1992) (citing an American Association of Retired Persons survey that found African Americans lagged substantially behind whites in utilizing estate planning tools). Specifically, the survey noted that African Americans were less likely to have wills and durable powers of attorney. *Id.*

234. A common scenario appears in many partition cases involving heir property owned by African Americans. A party interested in purchasing property in a rural area researches the ownership record of the specific tract. The desire to obtain this tract may stem from many different sources such as speculation on possible development opportunities, or the consolidation or extension of adjoining land. The research would indicate that the particular property is owned by a number of heirs as tenants in common. The purchaser may contact one or more of the heirs to discuss a possible purchase. If the entire group does not agree, the purchaser may still purchase the interest of any heir willing to sell

use of the property may develop between co-tenants and to resolve the dilemma any of the co-owners may seek a partition. If the court found that an in-kind division is infeasible, the entire tract could be lost to a nonfamily member in a judicial sale.[235] Selling the property to the highest bidder works to the disadvantage of a less wealthier party desiring to retain ownership.[236] Due to this and other factors, the judicial sale of property in partition actions has contributed significantly to property loss in the African American community.[237]

Although African Americans in the Twentieth Century owned more land than their ancestors, the security they enjoyed in their property ownership did not improve drastically. The incidence of overt acts of racial violence may have declined over the years, but the African American struggle to acquire and maintain property still persists.[238] The present day struggle often takes the form of discrimination in lending.[239]

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their individual interest. The purchaser then becomes a tenant in common with the other heirs. As a cotenant, the purchaser may then request a partition of the property and assert that an in-kind division is infeasible. If the court finds that in-kind division is impossible without injury to a cotenant's interest, then a judicial sale of the entire tract is ordered. This injury is, in most cases, defined in economic terms. The sale is noticed within the legal requirements of the partition statute and all interested parties are given the opportunity to bid on the property. The highest bidder is awarded title to the property and the other cotenants are paid in proportion to their representative interest. The relative wealth and access to resources greatly impacts the outcome of these cases. *See* Telephone Interview with Jerry Pennick, Federation of Southern Cooperatives and Director, The Land Loss Fund, Inc. (July 17, 1999); *supra* Part II.C.

235. See *supra* Part II.B for a detailed discussion of the statutory standards for a judicial partition.

236. Whites have substantially higher incomes than African Americans and the wealth gap is significantly larger. This gap works as an impediment to African Americans who seek to retain their property if the highest bidder is awarded the property. *See* OLIVER & SHAPIRO, *supra* note 2, at 203 tbl. A6.3 (providing a detailed analysis of the income and wealth disparities between black and white married households); T.J. Eller & Wallace Fraser, *Asset Ownership of Households*, *in* 1993 U.S. BUREAU OF THE CENSUS CURRENT POPULATION REPORTS pt. 70-74, at 1, 8-10 (1995).

237. It is estimated that over one-half of all land lost by African Americans in the South over the past thirty years may be attributed to judicial sales in partition proceedings. *See* Telephone Interview with Jerry Pennick, *supra* note 234.

238. Congress enacted federal legislation prohibiting such discrimination in the 1960s. *See* 42 U.S.C. § 1982 (1993) ("All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.").

239. The executive branch also issued an executive order in an attempt to squash such discrimination. *See* Exec. Order No. 11,063, 27 Fed. Reg. 11,527 (Nov. 20, 1962). Executive Order No. 11,063 acknowledged that "discriminatory policies and practices based upon race, color, creed, or national origin now operate to deny many Americans the benefits of housing . . . ." *Id.* The Executive Order then explains that such discrimination "result[s] in segregated patterns of housing and necessarily produce[s] other forms of discrimination and segregation which deprive many Americans an equal opportunity to exercise their unalienable rights to life, liberty, and the pursuit of happiness . . . ." *Id.* Accordingly, the executive branch directed all of its departments "to take all action necessary and appropriate to prevent discrimination because of race . . . in the sale, leasing, rental, or other disposition of residential property . . . or in the use of occupancy thereof . . . ." *Id.* Furthermore, the

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Without access to adequate lending sources due to discrimination, African Americans are once again disadvantaged. In judicial partition cases, the outcome is directly impacted by the parties' distribution of wealth, who are attempting to secure funds in order to competitively participate in the bidding process when the property is auctioned at the judicial sale. This factor, combined with the integration of racial discrimination infused into facially "neutral mechanisms," produces a discriminatory dynamic which works against the African American interest holder.[240] The result is predetermined by the lending institutions' utilization of discriminatory practices in their lending decisions, refusing to make loans to African American family members. Study after study documents the persistence of discrimination in lending practices. [241] Next, the tendency of local appraisers to "color" the appraisal of property held by African Americans plays a contributing role in this rupturing process. [242] The threat of intimidation is also a factor. [243] Family members seeking to fight the sale may face threats and intimidation.[244] The disparate number of African American lawyers, judges, appraisers, and bankers also works against a true representation of the best interests of the African American interest holders. Their valuation of property may not be culturally understood or worse—may be understood and then devalued. Thus, even at the dawn of the Twenty-First Century, African Americans are still denied many meaningful opportunities for property ownership.[245] Despite the enormity

executive branch amended this executive order in 1980 and 1994. 24 C.F.R. § 107.10 (2000). The need to amend Executive Order 11,063 as recently as 1994 is proof that discrimination in the disposition of property still persists and still requires a remedy.

240. *See supra* Part II.C.3.

241. *See* Russell Sage Foundation, *Projects of Special Interest: Preliminary Findings from the Multi-City Study of Urban Inequality*, *available at* http://www.russelsage.org/special_interest/point_8_preferences.htm (last visited Nov. 27, 2000); FEAGIN, *supra* note 4, at 249-52 (discussing lending and housing discrimination). The federal government has taken an active role in litigating lending discrimination cases. *See, e.g.*, United States v. Decatur Federal Savings and Loan Ass'n, Atlanta, Consent Decree, No. 1-92-CV-219-CAM (N.D. Ga. Sept. 17, 1992). In *Decatur Federal Savings*, the government brought its first suit against a mortgage lender for an alleged "pattern of practice" of violations of the Fair Housing Act and the Equal Credit Opportunity Act. *See id.* The federal government alleged that Decatur discriminated against black applicants, and also discouraged black applications by excluding minority areas from its service area, opened new branches only in white areas, closed branches in black neighborhoods, employed few blacks, and directed its marketing at white customers and neighborhoods. *Id.* at 429.

242. *See Decatur Federal Savings*, Consent Decree, No. 1-92-CV-219-CAM, at 61.

243. *See, e.g.*, ROBERT W. LAKE, THE NEW SUBURBANITES, 77-105 (1981) (describing white intimadation of blacks in the housing desegregation and integration context); ARNOLD SCHUCHTER, WHITE POWER, BLACK FREEDOM 60-61 (1968) (discussing the threats of violence faced by civil rights workers led by Dr. Martin Luther King, Jr. in Chicago).

244. *See* SCHUCHTER, *supra* note 243, at 60-61.

245. Today the pattern of racial and class inequity still remains within American society.

of the record of progress and determination, some African Americans are mired in the intractable practices and vestiges of a system which grounds in beliefs of inferiority and promotes second-class citizenship.[246] In the eyes of many, one of the most valuable attributes of citizenship—property ownership—is threatened by ongoing discrimination in lending and the forced partition of jointly held property.[247]

In this article, I have argued that the African American family's[248]

Economically, banks still 'redline' communities, denying credit and capital to black consumers and entrepreneurs. *See* David A. Harris, Jr., *Using the Law to Break Discriminatory Barriers to Fair Lending for Home Ownership*, 22 N.C. CENT. L.J. 101, 103-06 (1996). There is no denying the fact that the civil rights movement and subsequent anti-discrimination legislation sought to balance the playing field for African Africans, particularly in employment and property ownership. *See id.* De jure segregation was banned, and now many African Americans enjoy opportunities which were only dreams for their ancestors. With this in mind, it is impossible to deny the progress made inside the African American community. This progress best demonstrates the strong and unwavering determination of a people to participate fully and equally in the life of this nation.

246. *See* Craig-Taylor, *supra* note 12, at 59-64.

247. This problem is highlighted by the recent complaints of thousands of African American farmers alleging discrimination in lending practices by the United States Department of Agriculture. *See* Pigford et al. v. USDA, Consent Decree, No. 97-1978(Plf) (D.C. Cir. Apr. 14, 1999). Fifteen years earlier, a Civil Rights Commission report stated that the Farmers Home Administration "may be involved in the very kind of racial discrimination that it should be seeking to correct." U.S. DEP'T OF AGRICULTURE, CIVIL RIGHTS AT THE UNITED STATES DEPARTMENT OF AGRICULTURE: A REPORT BY THE CIVIL RIGHTS ACTION TEAM (February 1997) [hereinafter CIVIL RIGHTS]. Nothing was done to stop the problem. The lending bias initiated a cycle of failure for African American farmers. The claims are varied but all of the claims have a common thread—disparate treatment based on race. *See Pigford et al.*, Consent Decree, No. 97-1978(Plf). The farmers assert that they were discouraged from applying, their pleas for loans were ignored, and their applications were delayed as white farmers received loans and assistance in a much more timely manner. *See id*. The delays and denials caused the loss of land which had been in the families of these farmers for years. *See id.* Land had to be auctioned and sold while the farms waited for help which did not come. *See id*. A class action lawsuit has been initiated for over 2500 African American farmers from Alabama, Arkansas, California, Florida, Georgia, Illinois, Kansas, Missouri, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas and Virginia, alleging violations of the Equal Credit Opportunity Act and the Civil Rights Act. *See id.* Bolstering the farmers complaints is a 1997 study undertaken by the Department of Agriculture that found African American farmers being denied credit they needed to sustain their farming operations and defrauded by agricultural agents because of the color of their skin. *See* CIVIL RIGHTS, *supra*.

248. I am narrowing the scope of my argument to family-owned properties since opponents will contend that adopting a property rule across the board would not be economically efficient and would impede development. However, where developers exploit *families*, the argument of economic efficiency has no merit as the preservation of the family is a deeply rooted value in this country. *See* Michael H. v. Gerald D., 491 U.S. 110, 123 (1989).

Additionally, the focus on families should not violate the equal protection clause. *See* RONALD D. ROTUNDA & JOHN E. NOWACK, CONSTITUTIONAL LAW ch.14, § 3 (5th ed. 1995); *see also* Lyng v. Castilllo, 477 U.S. 635 (1986) (upholding a rule that offered different welfare benefits based on family status). First, individuals who do not own family-owned prperty do not belong to a protected class. *See* ROTUNDA & NOWACK, *supra*, at 608. Accordingly, a statute remedying the above problem would only need to withstand a rationality review. *See id*. at 601. Because the legislature would attempt to protect property rights, the statute would be rationally related to a legitimate governmental purpose. Second, the above problem arises as a result of intestate succession. Under intestate succession, property is

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entitlement to their family-owned properties should be protected by property rules. Although their interests are initially protected by property rules, somehow their protection is shifted to that of liability rules. To assure protection of the owners' property rights and that owners are provided just compensation when their property is involuntarily taken, state legislatures must eradicate the loopholes by modifying existing law. Specifically, I first propose that compulsory partition statutes be modified to ensure the partition of property rules where the property is family-owned. Second, I propose that the cotenancy statutes are revised or enacted to ensure that all of a developer's cotenants acquire a license in the developed property that forces a developer to share its profits with cotenants.

IV. PROPOSED REMEDIES

The struggle for African American property ownership is only one example of the struggle for property ownership in America; thus, individual rights in family-owned property should be protected by property rules rather than liability rules. Statutes that govern the partition process should adequately value the family interest holder's investment in the subject property and should preserve both the interest holder's status as property holder as well as the economic benefit of the individual property interest. In other words, resourceful parties should be prohibited from forcing individuals to part with their property while offering them only compensation for the deflated market value of the divided interest.

Partition statutes could be modified in several alternative ways in order to offer adequate protection to homogenous interest holders. First, statutes could be modified to require a supermajority vote of the cotenants, before the court would have the discretion to order sale.[249] Second, statutes could be modified to require a redemption period,[250] like that found in mortgage forfeiture cases, where the family interest holders could gather the funds to redeem the property.[251] Another variation of this proposal is a statutory

passed only to family members; this is a problem specific to families. Accordingly, to remedy this problem, it is not necessary to protect any other class.

249. Some states have already incorporated this remedy in similar statutes governing cotenancy of mineral rights. *See, e.g.*, LA. REV. STAT. ANN. 31:164 (West 1987) (requiring consent of all co-owners before mining rights may be exercised).

250. Redemption period refers to a period of time, allowed either by statute or through common law, in which a mortgagor who has defaulted on a mortgage may pay the outstanding balance of the mortgage and recover the mortgaged property from forfeiture. *See* GRANTS S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW § 7.1 (3d ed. 1994).

251. *See id.*

waiting period that would allow the family to raise funds to compensate the outside interest holder for the market value of their interest.[252] Third, the statutes could be revised to ensure that cotenants acquire a license in the developed property that forces the developer to share its profits.[253]

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,[254] created in order to avoid the further headaches that arise from common ownership of property.[255] 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.

A. Modifying Partition Statutes to Require a Supermajority Vote of the Cotenant Class

There are several advantages to modifying partition statutes to provide that, in order for a heterogeneous cotenant to effect a compulsory partition, they must obtain a supermajority vote from their cotenants. Perhaps the most compelling argument favoring a rule that requires the consent of

252. *Cf.* Jolly v. Knopf, 463 So. 2d 150 (Ala. 1985) (declaring unconstitutional the application of a provision that preferred cotenants who were defendants in a partition action over cotenants who brought an action to partition by sale, where both parties desired to purchase the interests of the other party). The proposed statutory scheme would limit the application of a "buy out" provision to cases where the cotenants desiring to retain common ownership received their interests through devise or intestacy and where the cotenant attempting to force sale is an outside "alien" party. This statutory formulation presents stronger policy interests than the case at issue in *Jolly*; the cotenants in my proposal who are able to avail themselves of the buy-back provision, are not "similarly situated" to the cotenants attempting to force a sale. Thus, a rule that allows for a buy-back provision where the plaintiff is an outside party seeking to force sale on family owners is rationally related to the state's legitimate interest in protecting family ownership. *See Jolly*, 463 So. 2d at 154 (Torbert, J., concurring) (discussing the importance of protecting family interests from outsiders and suggesting that language specifying application in the family context would have been constitutionally valid).

253. *See infra* note 271 and accompanying text.

254. *See supra* notes 85, 99 and accompanying text.

255. *See supra* notes 88, 100.

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most of the cotenants, is that such a rule would not disadvantage interest holders with less financial resources in determining whose interests are compelling. As noted throughout this Article, new cotenants who seek to force sale through the use of partition statutes may have access to greater resources and are greatly advantaged in the competitive bid process.[256] By contrast, the family interest holder may receive the property through intestacy precisely because the family has limited means or because the family's wealth is substantially invested in the subject property. Consequently, any rule that allows cotenants to resist only if they are sufficiently able to raise funds to repurchase the entire commonly held property effectively denies the nonfinancial interests of family cotenants.

Current legislative policy favoring arbitration is another persuasive reason for requiring the consent of a cotenant supermajority prior to a judicially ordered sale.[257] As noted before, courts are hesitant to partition where the interests are numerous or the geographical features affecting value are complex.[258] Accordingly, requiring the parties to work together toward a nonjudicial outcome before sale is ordered allows 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.

Finally, a rule that required the consent of a supermajority of cotenants would act as a powerful disincentive for the type of financial speculation discussed in this Article. Courts have consistently noted the longstanding policy favoring preservation of a right to inheritance.[259] The market interests advanced by developer speculation are not sufficient to outweigh the strong social value of preserving inherited interests, particularly in communities where such ownership is directly tied to community identity. Thus, a requirement that cotenants consent to sale would be a useful method to avoid "rupturing" family interests for purely profit motives.

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256. *See supra* Part.II.C.2; *supra* notes 238-47 and accompanying text.

257. *See* Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24 (1983) (holding that § 2 is a "congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."); *see also* Federal Arbitration Act, 9 U.S.C. ch.1, § 4 (1999); Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2993 (1999).

258. *See supra* Part II.B (discussing courts' refusal to value property according to noneconomic interests).

259. *See, e.g.*, *Butte Creeke Island Ranch*, 186 Cal. Rptr. at 360 (citing Richmond v. Dofflemeyer, 105 Cal. App. 3d 745, 747 (Cal. Ct. App. 1980)) (noting that "[p]artition in kind is favored since this does not disturb the existing form of inheritance or compel a person to sell his property against his will").

B. Modifying Partition Statutes to Allow for a Redemption Period

The equity of redemption is a universally recognized remedy in mortgage law that allows a mortgagee to "redeem" the property within a specified time after the mortgage is forfeited.[260] The redemption remedy may also provide a practical solution for cotenants seeking to avoid a sale in the judicial partition context. As in the mortgage situation, a partition redemption statute could provide that cotenants who received their interest from a family member (either through devise or intestacy) could redeem the property by paying the fair market value of the property within a specified amount of time after sale.[261]

The equity redemption solution is attractive for several reasons. First, the equity redemption solution allows the court to engage in the same economic valuation that the courts have come to rely upon in partition cases.[262] Allowing the courts to continue an economic valuation of the property would make it unnecessary for courts to consider the nonfinancial interests of the cotenants. This is useful, since courts find it difficult to value the contenant's noneconomic interests in continued family ownership, continued status as a landowner, sentimental attachment to a particular tract of land, and other nonquantifiable interests.[263] Once the court decides that partition in-kind is impractical, the court may set an economic value on the land, identify the requisite redemption period, and effectively dispose of the case. Thus, judicial efficiency is satisfied by this solution.

Another important factor favoring a redemption period is the avoidance of a competitive bid. Because family members need only redeem the property by paying the fair market value as identified by the court, the land would not be given to the party with the most resources, typically the outside interest holder.[264] As well, the outside holder's interest in the

260. *See* NELSON & WHITMAN, *supra* note 250, § 7.1.

261. The time period for mortgage redemption rights usually varies from six months to three years. *See id*. Redemption rights in a partition context should be equally generous due to the difficulty family interest owners may have in securing funds to pay the purchase price of the subject property.

262. *See supra* Part II.C.3.

263. *See supra* Part II.C.; *supra* note 169.

264. Critics may suggest that allowing the family cotenants to redeem the land for the fair market value will lower the amount of money the property will yield at a competitive bid sale; the buyer will not want to bid higher than the fair market value for fear that the property could be redeemed for less than the bid price. However, in the foreclosure context, the concern usually is not that the bidding purchaser will have paid more than the amount of the mortgage, but rather that the purchaser will have purchased the land for less than the mortgage judgment. *See* NELSON & WHITMAN, *supra* note 250, § 8.4. There is no reason to think that the partition competitive bid process would yield a different result. Consequently, by fixing the redemption amount to the fair market value determined at the time

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property is protected because the property price is set by the fair market value of the entire property. This method of valuing the interest of the party forcing sale ensures that the party's interest is fully compensated. Full compensation is one of the most commonly cited reasons for requiring a sale when an interest holder moves for partition.[265] Therefore, redeeming the land at a fair market value gives the party moving for sale the same compensation that the other interest holders would get in a judicial partition by sale without divesting unwilling parties of their ownership interest.

An alternative way of modifying partition statutes to allow for a buy-back period would be to require a waiting period prior to the judicially ordered sale, during which the cotenants resisting sale would have the right to pay the fair market value of the interest held by those parties requesting sale.[266] This formulation is similar to the redemption period model, except that the "buy back" would occur prior to sale and would require the cotenants seeking to retain ownership to raise only the value of the interest held by the party forcing sale. The primary virtue of this rule is that it would fairly balance the power of the various parties, allowing those with the most significant interest in the property a proportionate right to buy the property. When the parties seeking sale hold a significant interest, the burden of "buying back" the property is more financially onerous. By the same token, when the parties seeking sale hold only a small interest, the financial burden of retaining ownership would be small. While these solutions still burden cotenants seeking to retain ownership by requiring them to raise funds to retain their ownership rights, equitable redemption or a buy-back period would more fairly weigh the competing interests by avoiding the inequities of the competitive bid process.

C. Promulgating Cotenancy Statutes Granting Cotenants a License to the Developed Property

If our legal system must accept the contention that liability rules are preferable over property rules, then equity requires a developer, who is

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of sale, the court is fairly compensating the outside purchaser for the land, while discouraging bargain bids at a judicially compelled sale.

265. *See, e.g.*, Cunningham v. Frumire, 325 P.2d 555 (Cal. Dist. Ct. App. 1958); Duke v. Hill, 314 S.E.2d 586 (N.C. Ct. App. 1984); Whatley v. Whatley, 484 S.E.2d 420 (N.C. Ct. App. 1997). In each of these cases, Petitioners requested a sale and alleged that a division in-kind would materially impair their rights such that the value of their share would be materially less.

266. *Cf. supra* note 252 (discussing similar Alabama statute held unconstitutional by the Alabama Supreme Court).

guilty of forcing individuals to depart with their family-owned property, share its profits with its cotentants.[267]

Since developers use the equitable remedy of compulsory partition to make substantial profits at the expense of their cotenants, equity requires, at the very least, that the developers share their profits. One way to ensure an equitable division of a developer's profits is to vest, as a matter of law, a "license" in the property in the developer's cotenants.[268]

Generally, a license in real property is a personal privilege conferred to an individual that allows an individual to do one or more acts on the land of another without possessing an interest in the land.[269] However, the concept of a license could be statutorily extended by including the following language: *a personal privilege granted to an individual to receive compensation generated by real property.*[270] Vesting cotenants with a license when their family's land is compulsorily partitioned would ensure that developers share their profits because, at the moment of partition, the cotenants would begin to enjoy a recognizable right to a partition of the developer's profits. Accordingly, the cotenants could record their licenses in the county's property records and thus ensure payment on their licenses before the developer sells the partitioned property to another party.[271]

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267. This remedy should be awarded in addition to the "market value" for the property in the partition proceedings.

268. This proposal is similar to the "au droit" or moral rights doctrine found in the protection of creative art. *See, e.g.*, CAL. CIV. CODE § 987 (West 1998). Generally, the moral rights doctrine protects the personality of an artist embodied in a creative work. *See* Berne Convention for the Protection of Literary and Artistic Works (July 24, 1971), *reprinted in* 4M. NIMMER, NIMMER ON COPYRIGHT, app. 27-5-6 (1985). Since a creative work is an expression of the personality of the artist, it remains linked to the artist for a lifetime and thus should be protected. *See* Sophia Davis, *State Moral Rights and the Federal Copyright System*, 4 CARDOZO ARTS & ENT. L.J. 233, 234 (1985). There are two basic rights that underlie the moral rights doctrine. *See* Raymond Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465, 478-83 (1968). The first is the right of paternity or attribution, which enables artists to vindicate a claim of authorship in their work. *Id.* at 478-80. The second is the right of integrity, which allows artists to object to the distortion, mutilation, or other alteration of the work that would cause prejudice to the author's honor or reputation. *Id.* at 480-83. Thus, artists enjoy a right to bring a cause of action against someone who denies them the right to claim authorship of their work or who distorts their artwork in some way. *See* 8 THOMPSON ON REAL PROPERTY § 64.02(b), at 7 (David A. Thomas ed., 1994).

269. *See* 8 THOMPSON, *supra* note 268.

270. The license should equate about five to ten percent of the sale price of the developed property instead of a percentage of the developer's profits. If the value of the license is contingent upon the developer's profit, then developers could easily engage in fraud by manipulating their costs and expenses to reduce their profits and thus, decrease the value of their cotenants licenses. Instead, the value of the licenses should be contingent upon the *total value* from which the property is sold.

271. One may wonder why the courts would grant the cotenants a license instead of entitling them to general damages from the developers. If cotenants were given the right to general damages from the particular developer who filed the compulsory partition action, then there would be too much room for

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V. CONCLUSION

In this Article, I have argued that the African American family's ongoing attempt to retain their family-owned properties should be protected by property rules. I propose that the legislatures eradicate the loopholes by modifying existing law. Specifically, the compulsory partition statutes should be modified to ensure the application of property rule protection where property is family-owned. The new heterogenous interest may be purchased by the family members to prevent the judicial sale of the entire tract of land. Second, if family members are unable to buyout the heterogeneous interest and the property is sold under the judicial sale, the family of homogeneous interest holders would then acquire a license in the development rights of the property that forces the successful heterogeneous interest buyer to share future profits with the family.

These remedies would recognize that the meaning and significance of property is part of the institutional structure of society and of ongoing social construction. Property is part of the vast system of social relations, cultural relations, and material context. Peoples' attitudes toward specific property interests and arrangements profoundly influence the formation of their social identities and take on social meaning. For many African Americans, property ownership and the retention of heir property are intrinsically connected to concepts of liberty and freedom. Liberty and freedom represent a psychological and internal security. For ex-slaves, a crucial aspect of freedom was economic freedom. This economic freedom was thought secure if one owned property. Property thus took on a significant meaning in the African American community. And even when one is absent from the property and not receiving any direct or present economic advantage from the ownership interest, the psychological impact of the ownership is undeniably significant. Property then exists and interacts with other nonproperty forms of decision making, policy, and control. In this larger context, the severe limitations of an anaylsis that posits a pure profit-driven or economic valuation are demonstrated. Any analysis which is so limited ignores the highly variegated conception of property as becoming part of one's own identity, something which should not be sacrificed and then sold on the market to the highest bidder.

Multi-ownership of property by relatives is common to many African

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developers to defraud their cotenants of their equitable compensation. For example, developers could form practically insolvent subsidiaries to acquire the property, "sell" the property to their parent corporations, and then file bankruptcy when their cotenants attempt to collect.

American families. This Article identifies two distinct classes of owners—those which I term homogeneous interest owners and heterogeneous interest owners. This Article examines how homogenous expectations may be defeated when heterogeneous expectations are introduced into the framework of common ownership. It theorizes the process through which these interests are frequently partitioned and ultimately transform the family members from real property owners to non-owners. This process involves a phenomenon I call "rupturing" of heterogeneous interests which frequently is the catalyst for judicial partition proceedings. Partition proceedings then provide the opportunity for sale of the property, and based on a monetary valuation, the property is awarded to the highest bidder. I question a purely economic valuation of property in monetary terms. If property is widely agreed to be important for many different reasons, valuation should require many different scales of value. Because its value is multifaceted, it is difficult to capture in monetary terms. In the context of judicial partition, value of property is central and the determination of value has a great impact on the cotenant's continued status as a property owner.

In practice, common ownership is more predominant inside family units where the owners have similar life experiences and hence, similar expectations for the property. The optimal possibility for meaningful and satisfactory resolutions of disputes regarding future use, possession, and management of the resource (to avoid loss) resides within the family unit. The introduction of outside heterogeneous expectations disturbs this balance. Often, the result may appear to be an efficient bargain, which allows the property to go to the individual(s) who value it the most. However, utilizing evaluation systems with biases that measure value only in terms of the highest purchase price denies other important variables (for example, differences in cultural experience, psychological value, and emotional attachment) which may be essential to the way a family unit defines itself or sees its history, and is biased in favor of property holders with greater wealth.[272]

The introduction of a heterogeneous economic interest into the ownership of productive property thus, has the potential to "drown out" other noneconomic interests and facilitate the sale of the property. Such a sale may be determined to be an "economically efficient" use of the property, and may, in fact be wealth maximizing, but it may also destroy other cultural socio-political interests and undermine civil society and

272. *See supra* note 149.

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democratic participation. By refusing to grant noneconomic interests equal or, in many instances, any standing, the courts have intentionally decided that such noneconomic interests have no quantifiable value that might justify and facilitate equitable distribution of the property; therefore, the courts have discounted the individual "eccentric" interest of the owner. These individual "eccentric" interests play a substantial role in the socio-political power relationship between African Americans and whites within specific geographical regions. This consistent interpretation of the partition statutes by the courts facilitates a continued weakening of the socio-political independence and power of African Americans within the communities of which they are a part. Thus, not valuing noneconomic interest as equal to economic interest and allowing further divestment of property, contributes to the ongoing disparity in wealth accumulation, and to the suppression of political rights and the enjoyment of common values within the homogeneous interest group that "loses" the court case.