PROPERTY LAW AND THE INTESTACY ENTITLEMENT

Desiree C. Hensley[*]

INTRODUCTION

Homeownership is the largest single source of individual wealth accumulation in the United States.[1] Beyond the home, real estate in general is the single highest-value asset in the United States.[2] More broadly, the global value of all types of real estate in 2016 was $217 trillion dollars, $100 trillion more than the value of stocks, securitized debt, and shares combined.[3] This is not just a modern phenomenon. Real estate speculation—acquisition of land to be sold at a profit—has been a significant engine of the American economy since before the founding of the country.[4]

[*] Associate Professor and Director of the Low-Income Housing Clinic at the University of Mississippi School of Law. My husband and colleague, Tucker Carrington, and my student, Kathleen Workman, contributed to this Article through their thoughtful comments and extensive edits. A huge thanks to you both! Thank you also to my clients who are the reason we seek solutions.

[1] *See* Odeta Kushi, *Homeownership Remains Strongly Linked to Wealth-Building*, FIRST AMERICAN (Nov. 5, 2005), https://blog.firstam.com/economics/homeownership-remains-strongly-linked-to-wealth-building [https://perma.cc/YM4G-PN2W]; Thomas M. Shapiro, *Race, Homeownership and Wealth*, 20 WASH. U. J. L. & POL'Y 53, 65 (2006); *see also* Jenny Schuetz, *Rethinking Homeownership Incentives to Improve Household Financial Security and Shrink the Racial Wealth Gap*, BROOKINGS (Dec. 9, 2020), https://www.brookings.edu/research/rethinking-homeownership-incentives-to-improve-household-financial-security-and-shrink-the-racial-wealth-gap/ [https://perma.cc/NT7B-C5YL]; Julie D. Lawton, *Limited Equity Cooperatives: The Non-Economic Value of Homeownership*, 43 WASH. U. J. L. & POL'Y 187, 194–95 (2014). Homeowners are wealthier than renters. *See* JOINT CTR. FOR HOUS. STUD. OF HARVARD UNIV., THE STATE OF THE NATION'S HOUS. 2021, at 17 (2021) [hereinafter NATION'S HOUSING] ("[T]he median wealth for homeowners [in 2019] was approximately $254,900—more than 40 times the $6,270 median for renters.").

[2] *See* RICHARD VAGUE, AN ILLUSTRATED BUSINESS HISTORY OF THE UNITED STATES, at vii (2021).

[3] *See What Price the World?*, SAVILLS 4–5 (Jan. 28, 2016), https://pdf.euro.savills.co.uk/global-research/around-the-world-in-dollars-and-cents-2016.pdf [https://perma.cc/XLC5-8328]; Hum. Rts Council, Rep. of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in This Context, U.N. Doc. A/HRC/34/51, at 3 (Jan. 18, 2017).

[4] *See* Edward L. Glaeser, *A Nation of Gamblers: Real Estate Speculation and American History*, AM. ECON. REV., May 2013, at 2, 8.

As a general matter, Property law[5] in the United States is good at encouraging and facilitating its frothy real estate market. Property law and its supporting institutions support this frothiness by creating certainty in land ownership so that those who purchase real estate have a relatively sophisticated understanding of the risk associated with their investment. Property law also facilitates the free circulation of land by strictly policing reasonable restraints on its alienability and use through the application of common law doctrines like the Rule Against Perpetuities (RAP).[6]

There is one category of real estate, however, for which Property law does no policing—heirs property—real estate that was transferred by operation of law from a prior owner who died intestate to some unknown heir or heirs at law but never formally titled in them.[7] Owned by someone, but existing outside of Property law and its institutions, heirs property has no reliable record of ownership over many generations of heirs.[8] The uncertainty of its ownership is so extreme that it is sometimes impossible to figure out who has the legal right to use or sell or encumber it.[9] As a result, heirs property may become so mired in generations of uncertain title that it becomes inalienable and unmarketable and cannot be the basis upon which

[5] For the purposes of this Article, lowercase "property" is the noun that refers to things. Uppercase "Property" refers to the body of law that governs the relationship between people and things or between persons as relates to things.

[6] *See* Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1179–80 (1999) (discussing the relationship between RAP and unreasonable restraints on alienation); *see also* JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES § 119 (4th ed. 1942) ("The typing up of property, the taking it out of commerce, can be accomplished either, first, by restraining alienation of interests in it, or secondly, by postponing to a remote period the arising of future interests. To guard effectually against this evil, as the law considered it, both these methods had to be provided against. The law provided against the first by the doctrine that all interests should be alienable; it provided against the second by the doctrine that all interests must arise within certain limits,-- that is, by the Rule against Perpetuities.").

[7] *See* Janice F. Dyer & Conner Bailey, *A Place to Call Home: Cultural Understandings of Heir Property Among Rural African Americans*, 73 RURAL SOCIO., 317, 318–19 (2008); *see also* B. James Deaton, *Land "in Heirs": Building a Hypothesis Concerning Tenancy in Common and the Persistence of Poverty in Central Appalachia*, 11 J. OF APPALACHIAN STUD. 83, 91 (2005). The author and her students currently litigate heirs property cases in Mississippi as part of her clinical practice of law at the University of Mississippi School of Law and has directly experienced the difficulty and heartache these problems cause her clients.

[8] *See* Heather K. Way, *Informal Homeownership in the United States and the Law*, 29 ST. LOUIS U. PUB. L. REV. 113, 116–17, 151–52 (2010).

[9] *See* B. James Deaton, *Intestate Succession and Heir Property: Implications for Future Research on the Persistence of Poverty in Central Applachi*a, 41 J. ECON. ISSUES 927, 930 (2007) (describing the way in which complex fractionalization of tenant in common property ownership happens over generations, citing a Kentucky case in which twenty heirs held undivided interests in one acre of land. Their interests ranged from 78.84 percent to 0.1923 percent).

wealth is accumulated by those who own it.[10] Yet this diminished form of ownership nevertheless holds a entitled position in the legal system because Property law does nothing to limit its creation in the first instance or to curtail it once it is created. In short, Property law fails to provide heirs property with the certainty of title required for its free circulation in the market and fails to ensure its alienability as a general matter. Without being alienable by its owners, heirs property is effectively valueless as either a source of capital or as a means to accrue wealth.[11]

To make matters worse, the diminished value of heirs property plagues groups who are frequently the least able to afford it: African American land owners in the southern U.S., owners of tribal lands, and low-income Appalachian land owners.[12] In 1980, the Emergency Land Fund estimated, for example, that almost four million acres of land in five southern states was heirs property.[13] Given the well-documented wealth gap that exists between minorities and whites in the United States,[14] rooting out the heirs property problem that so disproportionately affects minority communities should be a legal priority. Yet even the traditional tools at the disposal of Property law—–the curtailment of conveyances in which grantors unduly restrict the alienability and use of particular property in perpetuity––what Michael Heller has called Private Property Boundary Rules—–are not used to ameliorate it.[15]

In fact, heirs property is not usually treated in the literature as a problem within the law itself. Instead, heirs property is blamed on

[10] *See* Carla Spivack, *Broken Links: A Critique of Formal Equity in Inheritance Law*, 2019 WIS. L. REV. 191, 194–95; Howard Demsetz, *Toward a Theory of Property Right*s, 57 AM. ECON. REV. 347, 355 (1967) (arguing that it is rational for owners to expect to acquire wealth through property acquisition).

[11] *See* Deaton, supra note 7 at 84–85 ("The resulting interdependencies between tenants influence the economic character of property and can be reasonably expected to constrain the capacity of these assets to act as capital."); *cf.* Rishi Batra, *Improving the Uniform Partition of Heirs Property Act*, 24 GEO. MASON L. REV. 743, 745–47 (2017) (explaining that since merchantable title is not available, heirs property owners lack access to certain resources and government programs).

[12] *See* CASSANDRA JOHNSON GAITHER, U.S. DEP'T OF AGRIC. FOREST SERV., S RSCH. STATION, "HAVE NOT OUR WEARY FEET COME TO THE PLACE FOR WHICH OUR FATHERS SIGHED?" 1–3, 22 (2016).

[13] *See id.* at 4, tbl.1.

[14] *See* CAROLINA K. REID, TERNER CENTER FOR HOUSING INNOVATION, U.C. BERKELEY, CRISIS, RESPONSE, AND RECOVERY: THE FEDERAL GOVERNMENT AND THE BLACK/WHITE HOMEOWNERSHIP GAP 2 (2021), https://ternercenter.berkeley.edu/wp-content/uploads/2021/03/Crisis-Response-Recovery-March-2021-Final.pdf [https://perma.cc/S3HT-VHRC]; Shapiro, *supra* note 1, at 62.

[15] *See* Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L. J., 1163, 1179–82 (1999).

land owners who fail to undertake responsible estate planning and die without a will.[16] This treatment has it exactly backwards. States determine by statute who owns the property of persons who die intestate, not the dead owners.[17] It is state law that forces upon heirs tenancy in common co-ownership and fractionalization,[18] that gives equal rights to remote, non-deserving heirs,[19] and that does not adequately prioritize the contributions of committed and invested heirs. These results flow from state law and states are free to change the law in order to eliminate, reduce, or simplify the heirs property problems in their jurisdictions. Likewise, by not using traditional Property law doctrines to protect the alienability of heirs property, Property law facilitates perpetual fragmentation and uncertainty of title.

The goal of this Article is to recast the heirs property problem as one of uncertainty directly caused by Property law's negligence. Property law already has tools at its disposal to manage harmful uncertainty of ownership—namely the Rule Against Perpetuities and the Rule Against Restraints on Alienation. Those Rules are consistently applied to express transfers of ownership of property, but neither has been systematically applied by courts to heirs property created by operation of law. The Article also demonstrates that the states can, through creative legislation, remediate their heirs property problem. The Article suggests several ways to eliminate heirs property and reduce the fragmentation that results from it. There may be other, better, ideas to end the creation and perpetuation of heirs property.

Part I of this Article describes the background of the heirs property problem: the important role Property law plays in the real estate market, the rise of heirs property in the United States, and the tenancy in common as the default form of ownership as the primary factor in its creation. Part II describes the uncertainty surrounding heirs property and its entitled existence outside of Property law and its institutions. Part III describes the authority of the states to amend intestate succession statutes and to apply them retroactively

[16] *See, e.g.*, UNIF. PARTITION OF HEIRS PROP. ACT prefatory note (UNIF. L. COMM'N 2010) ("This phenomenon is explained in large part by the fact that many low to middle-income property owners transfer their real property by intestate succession instead of by will, which is consistent with studies that have documented low will-making rates among Americans of more modest economic means."); Dyer & Bailey, *supra* note 7, at 318–19; Batra, *supra* note 11, at 745.

[17] *See* 4 THOMPSON ON REAL PROPERTY, THIRD THOMAS EDITION § 32.06(b)(2) (LexisNexis 2017) (1924).

[18] *See* Batra, *supra* note 11, at 744.

[19] *See, e.g.*, *id.* at 743.

as well as prospectively to eliminate heirs property or to significantly simplify the resolution of the heirs property problem where it already exists.

I. BACKGROUND

A. Property and Certainty

Laypersons typically—and instinctively—define *property* as a thing that a person owns, or may own, as in, "that car is my property; not your property." If asked, a layperson might respond in turn that the purpose of the Property law must then be to determine who is the rightful, lawful owner of things. In many ways, this understanding is correct. *Pierson v. Post*,[20] the seminal American Property Law case, teaches as much. *Pierson* asks at what specific point will the law confirm that a thing belongs to a particular person and protect that person's rights in that thing?[21] In *Pierson v. Post*, as many will no doubt recall, that thing is a fox.[22] Does the law deem a person to own a thing because the person has worked hard to obtain it? Will a person own a thing if they have improved or enhanced it?[23] Or does a person own it only if they have control over it and thereby exclude the rest of the world from it?[24]

But Property law does much more than designate who owns what and why. In defining a person's relationship to a thing, Property law also provides the boundaries that separate its rightful owner from others who claim to own or to have other rights in that thing.[25] Take the saying that "possession is nine tenths of the law," for example. This saying considers how being in physical possession of a thing gives a possessor property rights. This is because Property law recognizes that the person who currently possesses a thing has the most rights to it in that moment. According to Property law, even if a person has possession of a thing because he stole it, his rights in it

[20] *See* Pierson v. Post, 3 Cai. 175 (N.Y. Sup. Ct. 1805).
[21] *See id.* at 177.
[22] *See id.*
[23] *See* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT, §§ 37–39 (C.B. McPherson ed., Hackett Publ'g Co. 1980) (1690) (arguing that mankind does not inherently own land. Rather the use and cultivation of land increases the value of land to all men, so those who labor, cultivate, and use land have a "peculiar right" to the land over all others who would allow the land to "waste." Ownership is, therefore, a legal concept to promote the laborious use of land to benefit society).
[24] *See* Heller, *supra* note 15, at 1167.
[25] *See id.* at 1166; TOM BETHELL, THE NOBLEST TRIUMPH: PROPERTY AND PROSPERITY THROUGH THE AGES 19–20 (1998).

are still superior to everyone else's in the world except for the person he stole it from.[26] Even if you know your neighbor stole the car sitting in their driveway, you don't have a right to go and steal it from them. Robin Hood, it turns out, may have been on the side of right, but he was on the wrong side of Property law. Property Law tells us, then, how and when we can assert that we own a thing and, if we are correct, Property law ensures that the rest of the world will respect that.[27] Property law does these two things really well almost all of the time.

Because it creates certainty regarding the relationship between persons—owners, possessors, or others—and things that buyers need to purchase with confidence,[28] Property law is the foundation of the modern economy. How is it the foundation? A seller can point to Property law to show that their right in a thing is recognized and will be defended against all other claims. This protection, and the ability to exercise it, add value for the seller and buyer alike. For the buyer, in particular, it provides the security that the buyer needs to offer money for something. Property law assures the buyer that they will have the same protected rights in the thing as the seller. Market exchanges in jurisdictions that have well-developed and reliable Property law, like the United States, are predictable: an investor knows that she can spend money to buy a thing and then, just as easily, sell it at a future time. This certainty inspires confidence that supports economic decision making and investment, which in turn encourages the growth and transfer of wealth.[29]

Wealth accumulation through land speculation has played an outsized role in the American story from the earliest days of the colonial period.[30] This early and robust market in land forced

[26] *See* Armory v. Delamirie, 1 St. 505 (1722). *Armory* is the quintessential "possession is nine tenths of the law" case in which a chimney sweep, who is in possession of a valuable jewel, has superior title relative to the entire world except the actual owner. *See id.*

[27] *See* HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 218–21 (2000); BETHELL, *supra* note 25, at 20.

[28] *See* DE SOTO, *supra* note 27, at 218; Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1711–12 (2012). *See generally* Michael Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 624 (1998).

[29] *See* DE SOTO, *supra* note 27, at 219. *See generally* Heller, *supra* note 28, at 688 (examining the underuse of formerly state-owned property in socialist and formerly communist countries, concluding that the effects of ongoing fragmented ownership and poorly bundled legal rights may result in the newly privatized property ever making the transition to usable private property); BETHELL, *supra* note 25, at 25.

[30] *See* RICHARD VAGUE, AN ILLUSTRATED BUSINESS HISTORY OF THE UNITED STATES, at vii (2021) ("From the outset, ambitious Americans well understood that buying land and waiting for the population to increase was a path to riches, and we can perhaps date the beginning of truly American business to 1748, with the Ohio Company of Virginia, many of whose

Property law to develop with an emphasis upon finding certainty in land titles to support real estate transactions.[31] In fact, it was the United States government's own need to sell off vast quantities of land west of the Ohio river to help fund the newly formed federal government that spurred the creation of a unified system of land measurement—the Public Land Survey System—which itself allowed for precise legal descriptions of land across the entire continent, even in the remotest areas.[32]

Today as well, the main way most Americans grow wealth is by accruing equity in their homes.[33] In fact, a key predictor of whether a person in the United States will accumulate wealth at all during their lives is whether that person owns a home.[34] As their equity grows, Americans who own a home can use it to access capital through purchase money loans, refinancing, and lines of credit.[35] Each of these types of transactions is possible because lenders are willing to secure loans with real property.[36] Indeed, conventional

shareholders and administrators—Virginia's elite, including George Washington—were born on American soil."). *See generally* ANDRO LINKLATER, MEASURING AMERICA: HOW AN UNTAMED WILDERNESS SHAPED THE UNITED STATES AND FULFILLED THE PROMISE OF DEMOCRACY 29–44 (2002) (describing land speculation during the colonial period).

[31] *See* DE SOTO, *supra* note 27, at 219–21 (arguing that it is the West's property system that provides the knowledge and rules necessary to engage in transactions that result in the accumulation of capital); LINKLATER, *supra* note 30, at 141–42.

[32] *See About the Public Land Survey System*, MINERAL & LANDS RECORDS SYSTEM (Nov. 15, 2020), https://mlrs.blm.gov/s/article/PLSS-Information; LINKLATER, *supra* note 30, at 141–42. Almost immediately after the U.S. Army defeated the Western Confederacy of Indian nations at the Battle of Fallen Timbers in 1794 and the subsequent ratification of multiple treaties in 1795, which opened up land west of the Ohio for settlement, Congress passed the law authorizing settlement. *See id.* The first step was for the government to survey the land for sale according to an invariable procedure using six square mile townships, divided into thirty-six one-mile sections and oriented on a north-south and east-west lines. *See id.*

[33] *See generally* NATION'S HOUSING, *supra* note 1, at 17 fig.16 (wealth disparities between renters and homeowners); *id.* at ch. 6 (barriers to homeownership and ways to expand it, and therefore wealth, in the United States); REID, *supra* note 14, at 17; FEDERAL RESERVE, CHANGES IN U.S. FAMILY FINANCES FROM 2016 TO 2019: EVIDENCE FROM THE SURVEY OF CONSUMER FINANCES 23, https://www.federalreserve.gov/publications/files/scf20.pdf [https://perma.cc/VDZ6-88JL].

[34] THOMAS SHAPIRO ET AL., THE ROOTS OF THE WIDENING RACIAL WEALTH GAP: EXPLAINING THE BLACK-WHITE ECONOMIC DIVIDE 2, fig. 2 ("Among households with positive wealth growth during the 25-year study period, as shown in Figure 2, the number of years of homeownership accounts for 27 percent of the difference in relative wealth growth between white and African-American families, the largest portion of the growing wealth gap.").

[35] *See generally* Vladimir Klyuev & Paul Mills, *Is Housing Wealth an "ATM"? The Relationship Between Household Wealth, Home Equity Withdrawal, and Saving Rates*, 54 IMF STAFF PAPERS 539, 539–45 (2007) (describing how Americans finance their lives by continually engaging in home equity withdrawals or "HEWS").

[36] RESTATEMENT (THIRD) OF PROPERTY: MORTGAGES § 1.1 (AM. L. INST. 1997) ("A mortgage is a conveyance or retention of an interest in real property as security for performance of an obligation. A mortgage is enforceable whether or not any person is personally liable for that performance.").

wisdom holds that much of the wealth generated in modern market economies like the United States is due to the ability of Property law to allow for the efficient collateralization of land.[37]

It should come as no surprise, then, that a multifaceted Property law system has developed in the United States to make collateralization of land more straightforward. This system includes courts, state legislatures, local land recordation systems, the Public Land Survey System,[38] surveyors, lawyers, the title insurance industry, the real estate industry, the mortgage industry, and local tax collection systems, among others.[39] Courts and legislatures create and adjudicate the law; each state maintains its own public recordation and indexing system; surveyors, using the Public Land Survey System and the public recordation and indexing system, accurately measure specific pieces of land so that they can be clearly and quickly identified over time; local tax collectors use these same records to assess and collect real property taxes; lawyers prepare the legal documents that pass title of land from one owner to the next; title insurance guarantees lenders and buyers that a buyer's ownership and the bank's loan are as secure as possible from competing claims of ownership; and the real estate industry moves within and among these systems to facilitate the efficient transfer of ownership.[40] Taken together, these public and private institutions create an environment that makes it possible in the United States to acquire a right in land that is virtually certain to be recognized and protected by Property law. Not only does the system have a high degree of certainty, but it is also relatively simple, secure, and fast.[41]

The situation is starkly different for real estate that is owned as heirs property—land that people tend to use or to possess without a clear interest that Property law will recognize. In his seminal book, *The Mystery of Capital*, Hernando de Soto blamed the difficulty in obtaining legal rights in land for the lack of economic growth

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[37] *See* Sebastian Galiani & Ernesto Schargrodsky, *Land Property Rights and Resource Allocation*, 54 J. L. & ECON. S329, S330 (2011).

[38] The Public Land Survey System ("PLLS") was designed by Thomas Jefferson to enable the young and ever-expanding United States to map, and to keep accurate records of land titles based upon those maps, of every parcel of land in the United States. *See About the Public Land Survey System*, *supra* note 32; *see also* LINKLATER, *supra* note 30, at 141–42.

[39] *See* Dale A. Whitman, *Optimizing Land Title Assurance Systems*, 42 GEO. WASH. L. REV. 40, 41–42, 47 (1973–1974).

[40] *See id.*; Joseph T. Janczyk, *An Economic Analysis of the Land Title Systems for Transferring Real Property*, 6 J. LEGAL STUD. 213, 214 (1977).

[41] *See* Whitman, *supra* note 39, at 43–45 (estimating that it only takes three to four hours to search and abstract the records for an average single-family home); *see also* DE SOTO, *supra* note 27, at 61–63 (describing the Western property system as a network that continually tracks all property records); Smith, *supra* note 28, at 1693–94.

generally seen in many low-income countries.[42] According to de Soto, the problem that poor countries face is not that their citizens lack ambition or the capacity for hard work and entrepreneurism.[43] In fact, de Soto argues that in poor countries there is a surfeit of resourceful individuals who work hard and create innovative jobs for themselves in order to eke out a living.[44] If the relative wealth differential between wealthy nations and poor nations cannot be explained by the work ethic or culture of the people themselves, de Soto then asks, what explains it?[45] De Soto's answer: Property law.[46] Early on in their development, today's wealthy nations conceptualized and institutionalized Property law and created its supporting institutions to provide the certainty needed for an efficient market in land.[47] Without it, people are forced to use and improve property when their legal rights in it are uncertain and are permanently handicapped by their inability to make an effective, marketable legal claim to it.[48] Similarly, in the case of heirs property in the United States, the law of Property provides no certain answers regarding the relationship between people and land or the relationship between persons as they relate to this land.[49] Under these circumstances, several individuals or entities—or both—may assert legal rights to the same property, thereby over or under-utilizing it, and in doing so may effectively stymy consistent, healthy economic growth over time and the transmission of wealth by heirs property owners.[50]

While Property law overwhelmingly works to support legal rights in land in the United States—in fact must work, to provide certainty

[42] *See* DE SOTO, *supra* note 27, at 18–28.
[43] *See id.* at 4–5.
[44] *See id.*
[45] *See id.* at 46–47.
[46] *See id.* at 47–48.
[47] *See id.* at 46–48.
[48] *See id.* at 18–21.
[49] *See generally id.* at 64; Heller, *supra* note 28, at 631 ("[P]rivate property emerges less successfully in resources that begin transition with the most divided ownership. In such resources, poorly performing anticommons property is most likely to appear and persist. In contrast, private property emerges more successfully in resources that begin transition with a single owner holding a near-standard bundle of market legal rights.").
[50] *See* Heller, *supra* note 28, at 623–24 (arguing that if too many people assert a right to use the same property this could also lead to the development of an anticommons resulting in underuse and a lack of investment and growth because no single owner has an effective ability to use the property); DE SOTO, *supra* note 27, at 63 ("Property, then, is not mere paper but a mediating device that captures and stores most of the stuff required to make a market economy run."). *See generally* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1243–48 (1968) (arguing that if too many people assert a right to use the same property, then it may lead to the depletion of the resource for everyone).

to support and sustain the market—it utterly fails when it comes to heirs property.[51] Property law has no efficient mechanism to effectively determine ownership of heirs property, the rights of persons as relates to heirs property, or the certainty necessary for heirs property to circulate in the U.S. market.[52]

B. The Rise of Heirs Property

Primogeniture was the main form of the intestate succession in the American colonies.[53] Under the rules of primogeniture, when an owner of property died without a will, all of his property passed to the owner's oldest surviving son or closest surviving male relative by operation of law.[54] Primogeniture was a holdover from probate law and land use patterns in medieval England where it was considered necessary to ensure that an owner's land real would stay physically intact for many years after death.[55] Prior to the 16th century, the English Crown owned all of the property in England.[56] Farmers leased smaller, non-contiguous, arable strips of land while the Crown reserved larger contiguous areas for common pasture.[57] Farmers, however, struggled with the inefficiency of farming multiple smaller parcels of land spread out over a large area.[58] In the 16th century, King Henry the VIII began selling royal holdings in fee simple for the

[51] *See* DE SOTO, *supra* note 27, at 63; Sarah E. Waldeck, *Rethinking the Intersection of Inheritance and the Law of Tenancy in Common*, 87 NOTRE DAME L. REV. 737, 741 (2011).

[52] *See* Waldeck, *supra* note 51, at 741 ("Indeed, property law lacks a satisfactory default doctrine for situations in which identity property is inherited by more than one individual.").

[53] *See* CAROLE SHAMMAS ET AL., INHERITANCE IN AMERICA: FROM COLONIAL TIMES TO THE PRESENT 32 (1987).

[54] *See id.* at 24. Personal property, on the other hand, was divided among the surviving spouse and the decedent's children, both male and female, by operation of law. *See id.* at 26. There was contemporaneous use of multigeniture in the colonies—a division of real property among children and a spouse, but it was not as widespread a practice as primogeniture. Multigeniture intestate succession provided that the eldest son would receive a double share of the owner's land and personal property, or that the eldest son would receive all the land and the other male and female children would get equal shares of the personal property. In multigeniture American colonies, eldest sons were expected to purchase their siblings' shares of land so as to maintain a sufficiently large agricultural holding that ensured ongoing viability. *See* SHAMMAS ET AL., *supra* note 53, at 42. In the event that the eldest son was unable to make such a purchase, his double share was meant to provide a sufficient enough land holding for this purpose. *See id.*; George L. Haskins, *The Beginnings of Partible Inheritance in the American Colonies*, 51 YALE L. J. 1280, 1295 (1942) (regarding the double share of the eldest son).

[55] LAWRENCE M. FRIEDMAN, DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW 20 (2009).

[56] *See* LINKLATER, *supra* note 30, at 8; TOM BETHELL, THE NOBLEST TRIUMPH: PROPERTY AND PROSPERITY THROUGH THE AGES 77 (1998).

[57] *See id.*

[58] *See id.*

first time.[59] First-time buyers wanted to avoid small and scattered holdings and sought to consolidate their purchases into large, contiguous holdings for ease of management.[60] After making this effort, they of course desired to prevent their contiguous holdings from fragmenting again into separately owned, smaller parcels at their deaths when their estates would be distributed among their heirs. Primogeniture met this desire by guaranteeing that sole ownership and physical cohesion would remain unified when the landowner died.[61]

Primogeniture and multigeniture would have been useful devices in Colonial America for the same reason they had been in in England: the decedent could be sure that the family agricultural estate was protected by the continued consolidation of the land, which would otherwise be jeopardized by the problems of fractionalization if it were divided into smaller shares among all of a decedent's heirs.[62] The fee tail[63] was also a common testamentary device in Colonial America because it gave testators the power to create land control landed dynasties after death.[64]

Quite quickly, however, American colonies began abandoning primogeniture in favor of partible inheritance.[65] In southern colonies, owners were likely to have an abundance of land to divide among heirs, but few items of personal property or cash to leave a surviving spouse and other children, which made primogeniture less desirable.[66] With more land to spread among heirs, American landowners grew to prefer to divide ownership of land into equal shares, especially in circumstances where younger children would inherit little if their share was limited only to personal property.[67] States began to abolish primogeniture as a form of intestate

[59] *See id.* at 8, 11.
[60] *See id.* at 11–12.
[61] *See* Heller, *supra* note 15, at 1171.
[62] *See id.*
[63] *See* SHAMMAS ET AL., *supra* note 53, at 35 ("Less comprehensive than the strict family settlement and only applicable to land, some colonies attempted to make it an effective dynastic tool by putting obstacles in the way of those who wished to reverse the actions of an ancestor."); Holly Brewer, *Entailing Aristocracy in Colonial Virginia: 'Ancient Feudal Restraints' and Revolutionary Reform*, 54 WM. & MARY Q. 307, 307 (1997).
[64] *See* Brewer, *supra* note 63, at 307, 313. Some colonies even enacted laws to protect the entail of real property. For example, Virginia enacted a law in 1705 that made it impossible for heirs to break an entail. *See* SHAMMAS ET AL., *supra* note 53, at 35.
[65] *See* Haskins, *supra* note 54, at 1295.
[66] *See* SHAMMAS ET AL., *supra* note 53, at 7; *see also* LAWRENCE M. FRIEDMAN, DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW 20–22 (2009).
[67] *See* SHAMMAS ET AL., *supra* note 53, at 33–34.

succession after the Revolution,[68] and it was not in effect in any state by 1790.[69]

Primogeniture was abolished in favor of partible inheritance.[70] Partible inheritance can be described as the division of the ownership of a deceased's property equally among their children, subject to a share for a surviving spouse.[71] Partible inheritance, as a default rule, protected the homestead for the use of the surviving spouse and for any minor children by dividing up not the land itself, but the ownership of it.[72] It also secured an inheritance for all of the decedent's children and had the added benefit (to the decedent at least) of tying heirs to the land, and to each other, for many years after their death.[73] Default partible intestate succession rules tended to title real property among all of a decedent's heirs in shares as determined by a familiar formula— one-third to the surviving spouse and equal portions of the remainder divided among the children,[74] a distribution formula that was flexible and could be modified by a court based upon the circumstances.[75] As a result of this new intestate succession philosophy—that ownership of property would be divided among all children and the surviving spouse—heirs property first came into being.[76] Of course, the rise of co-ownership by operation of law also gave rise to the power of courts to divide the co-ownership by partition.[77]

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[68] *See* Richard B. Morris, *Primogeniture and Entailed Estates in America*, 27 COLUM. L. REV. 24, 25 (1927); SHAMMAS ET AL., *supra* note 53, at 64 tbl.3.1.

[69] *See* SHAMMAS ET AL., *supra* note 53, at 64–65 tbl.3.1.

[70] *See* Haskins, *supra* note 54, at 1295.

[71] *See id.* at 1280.

[72] *See id.* at 1296.

[73] *See id.*; *see also* SHAMMAS ET AL., *supra* note 53, at 62.

[74] *See* SHAMMAS ET AL., *supra* note 53, at 32–33 tbl.1.1.

[75] *See* Haskins, *supra* note 54, at 1292, 1296.

[76] *See id.* at 1281.

[77] *See* SHAMMAS ET AL., *supra* note 53, at 66–67; *see also* A. C. FREEMAN, COTENANCY AND PARTITION: A TREATISE ON THE LAW OF CO-OWNERSHIP AS IT EXISTS INDEPENDENT OF PARTNERSHIP RELATIONS BETWEEN THE CO-OWNERS § 428 (1874). Under English law, joint tenancy and tenancy in common could only be created by deliberate agreement of the co-owners, not by default. *See* Phyliss Craig-Taylor, *Through a Colored Looking Glass: A View of Judicial Partition, Family Land Loss, and Rule Setting*, 78 WASH. U. L. REV. 737, 752 n.86 (2000). For this reason, co-owners who chose co-ownership were stuck with the consequences of that choice and could not force partition upon the others. *See id.* at 751, 752 n.86. Only co-parcener ownership could be partitioned involuntarily. *See id.* at 752 n.86. Coparceny is the form of ownership that resulted when primogeniture failed because there was no qualified male heir. *See id.* Under those circumstances, ownership of the estate would be shared by the decedent's daughters as coparceners. *See id.*

C. Tenancy in Common Co-Ownership by Operation of Law

The rights and duties among co-owners of property (whether they co-own property through intestate succession or otherwise) are dictated by which form of co-ownership they have: tenancy in common, joint tenancy with the right of survivorship, or tenancy by the entirety.[78] The three forms overlap in multiple ways. For example, all provide co-owners with an equal right to use the co-owned property[79] and impose a duty to contribute to the cost of maintaining it in proportion to their share.[80] The forms, however, are different in a few very important ways. Tenants in common—the predominant form of co-ownership created by default under modern state intestate succession statutes[81]—may own a share of the property in any fractional amount,[82] whereas joint tenants and tenants by the entireties must have identical shares.[83] For example, the share a surviving spouse receives might be half of the intestate's property, while the intestate's children evenly split the other half between them. If these first generation co-owners also die intestate, their original fractional share is automatically divided yet again among their heirs into additional unequal, smaller shares by operation of law.[84] The result is that property owned by tenants in common can—and often does—become extremely fractionalized over time, with some owners possessing large shares and others possessing much smaller, frequently insignificant or valueless shares.[85] In spite of what may be significant differences in ownership share, all tenants in common have an equal right to enjoy possession and use of the whole.[86] For example, if the surviving spouse owns a

[78] *See* United States v. Craft, 535 U.S. 274, 279–81 (2002) (explaining these three types of co-ownership).

[79] *See* 20 AM. JUR. 2D *Cotenancy and Joint Ownership* §§ 2 (database updated Feb. 2022).

[80] *See id.* § 62.

[81] THOMPSON ON REAL PROPERTY, *supra* note 17, § 32.06(a) ("When two or more persons of equal degree of kinship inherit property together they take title under modern intestacy statutes as tenants in common.").

[82] *See* 20 AM. JUR. 2D *Cotenancy and Joint Ownership* § 31.

[83] *See id.* § 5.

[84] *See* Dyer & Bailey, *supra* note 7, at 317, 327–28; Deaton, *supra* note 7, at 91–92; Craig-Taylor, *supra* note 77, at 776–77; *see also* Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505, 563 (2001) (discussing the application of rigid inheritance laws as source of physical and legal fragmentation).

[85] *See* sources cited *supra* note 84.

[86] JOSEPH WILLIAM SINGER ET AL., PROPERTY LAW: RULES, POLICIES AND PRACTICES § 2.1, at 662 (6th ed. 2014). In all forms of co-ownership in the United States, every tenant in common owns the value of some undivided share of the property, but has the right to possess the whole. 20 AM. JUR. 2D *Cotenancy and Joint Ownership* § 2.

fifty percent share of the property and his grand-nephew owns a one-tenth share, they each have a one hundred percent interest using and possessing the entire property.[87]

Joint tenants and tenants by the entireties, in contrast, either own equal shares of the property or, in the case of tenants by the entirety, each spouse (or the marriage itself) owns one hundred percent of the whole.[88] The ownership of joint tenants or tenants by the entireties automatically pass to the surviving joint tenant(s) or tenant by the entirety by operation of law if and when a co-owner dies.[89] Joint tenancy and tenancy by the entireties thus work to consolidate ownership in fewer people rather than automatically fragmenting property into additional smaller shares.[90]

Initially, joint tenancies were the presumed form of co-ownership created by intestate succession in the United States.[91] This presumption was abandoned during the twentieth century due, in part, to the rigidity of the joint tenancy at the time, which did not allow joint tenants to alienate their interest during life without the agreement of the other co-owners.[92] That has since changed, and today joint tenancies are freely alienable *inter vivos*.[93]

To improve alienability of co-owned land, state legislators passed laws either abandoning this presumption or specifically making tenancy in common the presumed form of co-ownership for transfers of property to multiple owners.[94] The result is that if a will or deed does not say which type of co-ownership the grantor or testator desired, then the law presumes that the grantor or testator created a tenancy in common.[95] Why this change of presumption? In addition

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[87] *See id.*

[88] 41 AM. JUR. 2D *Husband and Wife* § 19 (2021).

[89] 20 AM. JUR. 2D *Cotenancy and Joint Ownership* §§ 4, 7 (2021).

[90] *See* Candace Reid, *Partitions in Kind: A Preference Without Favor*, 7 CARDOZO L. REV. 855, 862, 863 n.48 (1986).

[91] *See* 2 WILLIAM BLACKSTONE, COMMENTARIES 180 ("Now, if an estate be given to a plurality of persons, without adding any restrictive, exclusive, or explanatory words, as if an estate be granted to A and B and their heirs, this makes them immediately joint-tenants in fee of the lands."); 4 THOMPSON ON REAL PROPERTY, *supra* note 17, § 32.06 (b)(1).

[92] *See* Reid, *supra* note 90, at 853 n.47–48; Anne L. Spitzer, *Joint Tenancy with Right of Survivorship: A Legacy from Thirteenth Century England*, 16 TEX. TECH. L. REV. 629, 636, 671 (1985).

[93] John V. Orth, *The Perils of Joint Tenancies*, 44 REAL PROP., TR. & EST. L. J. 427, 434 (2009).

[94] *See, e.g.*, Aquino v. United Prop. & Cas. Co., 143 N.E.3d 379, 383 n. 1 (2020) (quoting Cross v. Cross, 85 N.E.2d 325, 327 (1949)). *See generally* 20 AM. JUR. 2D, *supra* note 79, at § 35 ("Tenancy in common is the presumptive or favored form of concurrent ownership of property."). A few states presume that a transfer to a married couple creates a tenancy by the entirety. *See, e.g.*, ALASKA STAT. § 34.15.110 (2021).

[95] *See* 4 THOMPSON ON REAL PROPERTY, *supra* note 17, at § 32.09 ("With its freedom of alienation and devise, its inheritable shares, and its right to partition, the estate of tenancy in

to tenancy in common interests being freely alienable and partible, a tenancy in common has benefits over the other forms, including being very adaptable to more disparate circumstances of ownership.[96] For example, any number of real or corporate persons may choose to pool resources for larger investments and then share title in any fractional amount as tenants in common.[97] These sometimes varied, undivided, fractional shares of ownership may correspond to a partners' or investors' respective investments and reflect the parties' expectations regarding ongoing contribution to costs and receipt of profits.[98] In contrast, joint tenancy and tenancy by the entirety have traditionally rigidly required co-owners to have a unity of interests—including identical and coequal shares.[99] Furthermore, a tenancy by the entirety is exclusively reserved for use by two owners who are married to each other and who want to effectively title the property in the marriage itself, rather than in their own persons.[100]

Tenancy in common is the only form of concurrent ownership that is both freely alienable during life and freely descendible at death. There is no right to survivorship in a tenancy in common as there is in a joint tenancy, nor is alienation by a spouse prohibited as a tenancy by the entirety.[101] A tenant in common has total autonomy to convey to anyone during life or to pass on title to whomever she chooses at death,[102] whereas at the joint tenant's death, her share will belong to the other surviving joint tenants by operation of law.[103]

common seems ideally suited to the modern ethos of individualism. Tenants in common remain together only so long as each and every one wants to, and no longer. What had been for Blackstone a residual estate, recognized when all else failed, has become the modern paradigm of concurrent ownership. Rather than viewing it as some kind of defective joint tenancy, modern observers tend to see the tenancy in common as the norm from which other forms of concurrent ownership (if any) deviate to one degree or another."); *see also* Waldeck, *supra* note 51, at 754 (describing the right of partition as reflecting liberal values, especially when co-ownership is not by choice).

96 *See* 4 THOMPSON ON REAL PROPERTY, *supra* note 17, § 32.09.

97 *See generally* Craig-Taylor, *supra* note 77, at 742–45, n.38 (describing the tenancy in common as flexible, but sharing the practical problems with joint tenancy and tenancy by the entireties). Absent agreement between them, tenants in common have a right to physically possess the entire property no matter how small their fractional interest. *See id.* at n.38; Waldeck, *supra* note 51, at 741–42. They also have common duties of support and maintenance of the property. *See* Waldeck, *supra* note 51, at 741–42. For this reason, they may end up in serious disagreements about who is entitled physical possession and whether each is doing their fair share. *See id.* at 749.

98 SINGER ET AL., *supra* note 86, at 668–69.

99 *See* SINGER ET AL., *supra* note 86, at 663–64; Oval A. Phipps, *Tenancy by Entireties*, 25 TEMPLE L. Q., 24, 35 (1951).

100 *See* SINGER ET AL., *supra* note 86, at 666; Phipps, *supra* note 99, at 35 n.33.

101 *See* SINGER ET AL., *supra* note 86, at 663, 666.

102 *See id.* at 663.

103 *See id.*

Likewise, a co-owner of a property held as tenants by the entireties may not dispose of her share either during her life (without the agreement of her spouse) or at her death, when her title passes automatically to her surviving spouse by operation of law.[104] The inability of owners of property held as joint tenants with rights of survivorship and as tenants by the entireties to decide who owns their share of the property at their death makes these forms of co-ownership less useful for a certain subset of co-owners.

The adaptability of tenancy in common is most fully enjoyed by co-owners who use this form of ownership deliberately in order to achieve a common investment or other goal.[105] Co-owners who choose this ownership structure are likely to have agreements which facilitate joint decision making, shared responsibility and use, and terms for the future disposition of the property so as to avoid conflicts.[106] In the context of heirs property, however, tenancy in common is imposed on the co-owners by operation of law.[107] Tenants in common who are thrown together through intestate succession may be strangers to each other, have no desire to own property together, and may not have the have the knowledge or resources to figure out how to agree to do so productively. As a result, communication and coordination problems arise that undermine the benefits otherwise attributable to this form of ownership.[108] Management conflicts may so diminish the value of the property that ownership becomes costlier to heirs at law than their fractional share of the property is worth.[109] At least in the context of intestate succession, the abandonment of the presumption of joint tenancy in favor of tenancy in common had the unintended consequence of facilitating the fractionalization of ownership and the rise of heirs property as we know it today.[110]

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104 *See id.* at 666; Phipps, *supra* note 99, at 35 n.33, 36.

105 *See* Alex R. Pederson, Note, *The Rejuvenation of the Tenancy-in-Common Form for Like-Kind Exchanges and Its Impact on Lenders*, 24 ANN. REV. BANKING & FIN. L. 467, 469–70 (2005).

106 See Heller, *supra* note 28, at 624 n.11, 665, 671–72 (explaining how agreements among tenants in common allow the co-owned property to be useful despite the fragmentation of ownership); *see* Waldeck, *supra* note 51, at 770 (discussing facilitated agreement among tenants in common to lessen problems with co-management).

107 *See* Craig-Taylor, *supra* note 77, at 740.

108 *See id.* at 750–51; Waldeck, *supra* note 51, at 743 (describing the relationship between tenants in common as a bilateral monopoly problem where "neither co-tenant has good alternatives to dealing with the other").

109 *See* Waldeck, *supra* note 51, at 743.

110 *See* Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L. J. 549, 609 n.235 (2001).

II. THE INTESTACY ENTITLEMENT

The way in which most real property in the United States is owned fits fairly neatly within Property law and its institutions so that the relationship between the property, its owner(s), and the rest of the world is easy to ascertain. To illustrate, when an owner expressly grants or devises land she owns, that express conveyance is filed and indexed in the local land records office.[111] These public filings and indexings inure to the benefit of the conveyor's grantees by protecting them from subsequent competing claims of ownership or interest.[112] Over time, these express conveyances from grantor to grantee or from testator to beneficiary build upon and add to the property's existing, record chain of title.[113] The linking of each transfer to a specific piece of property's chain of title allows anyone in the world to readily—if not instantly—identify the property and its owners and their relationship with each other as regards that particular land. It is by linking a new owner's interest to a preexisting chain of title that the new owner proves that she has something certain and tangible enough to be exchanged for cash in the market.[114]

A. Property Law Condones Excessive Fragmentation

Ownership interests created by intestate succession, however, exist entirely outside of the land records system.[115] These conveyances happen by operation of law; there is no writing that creates them.[116] Because there is no writing, there is no recorded and indexed document that links the heirs at law to the chain of title, thus creating a gap in the record.[117] This gap grows exponentially—both in time and title—when the deceased owner's heirs at law die. As tenants in common, their shares do not consolidate in the survivor of them.[118] Instead, their shares are re-divided among their heirs by

[111] *See* Janczyk, *supra* note 40, at 213.

[112] *Id.* at 215. The U.S. recording system is self-enforcing; it creates a strong incentive for those with an interest in real property to record and index a writing showing their interest as soon as they get it. *See* Chales Szypszak, *Public Registries and Private Solutions: An Evolving American Real Estate Conveyance Regime*, 24 WHITTIER L. REV. 663, 666 (2003). If they do so, they can avoid the claims of those who obtained an interest after they did. *See* GERALD KORNGOLD & PAUL GOLDSTEIN, REAL ESTATE TRANSACTIONS: CASES AND MATERIALS ON LAND TRANSFER, DEVELOPMENT AND FINANCE 237 (Robert C. Clark et al. eds., 6th ed. 2015).

[113] *See* Janczyk, *supra* note 40, at 213–14.

[114] *See* Way, *supra* note 8, at 121.

[115] *See id.* at 152.

[116] *See id.*

[117] *See id.*

[118] *See id.* at 151.

operation of law. Because owners of heirs property have no link to affix to their predecessor's chain of title, no one in the world can tell from an examination of the public filings who currently owns their property.[119]

This may not pose a significant problem for first-generation heirs at law. The surviving spouse and children of a deceased owner can fairly easily—and economically—establish that they are the heirs at law of the deceased owner and formally add a link to the chain of title through a court proceeding if they become aware of the need and have the resources to accomplish it.[120] Successive generations of heirs at law for the same parcel of land are another matter, however. Second generation heirs are remote enough from the initial intestate decedent in time, place, and information to have lost direct knowledge of the family tree, especially as various members of the family move, die, divorce, remarry, and have children with different partners.[121] This natural evolution creates land that once had the capacity to generate wealth for its owners to quickly die, economically speaking that is.[122] Palma Joy Strand's description of how heirs property ownership becomes more tangled over time aligns with this author's own clinical legal practice:

> At some point, this arrangement, with the house still titled to the original owner(s) but with legal ownership as heirs' property spread far and wide, hits a brick wall. Often, the problem is the payment of property taxes. Perhaps the occupant cannot pay, or he or she seeks contributions from the other owners, who cannot or see no reason to invest in a property from which they receive no benefit. Or low-cost loans are available to fix or improve the home, or a reverse mortgage to support the occupant is indicated, but a lack of clear title precludes eligibility. Or the area in which the home is located is being redeveloped and the developer wants to purchase the home. Or disaster hits, and disaster relief is conditioned on proof of title.
>
> Depending on the economic incentives, the current occupant – usually but not always a part owner – may or may not be able

[119] *See id.* at 152.
[120] *See* Deaton, *supra* note 9, at 936.
[121] *See generally* Dyer & Bailey, *supra* note 7, at 319 (discussing the challenges of heirs property with each passing generation).
[122] *See* Deaton, *supra* note 9, at 930; Way, *supra* note 8, at 156–58.

> to secure the legal assistance necessary to open probate, locate all the heirs, and clear title. While conceptually straightforward, this action is often a logistical nightmare: people move away, lose touch, have and adopt children, remarry and have more children, have children out of wedlock, go to prison, and die in faraway places without their families knowing. When the economic benefits are relatively low (saving a modest home from being lost due to property tax liens), legal assistance with estate administration is often unavailable. These cases demand many hours, and the rewards appear minimal - though they may constitute a significant part of the overall wealth holdings of the family. When the economic benefits are high (clearing title to sell the home for a redevelopment project, for example), legal assistance may be forthcoming, but legal fees may take a substantial percentage of the proceeds from the sale.[123]

Over successive generations, again with no public recording or indexing of the passing of ownership, the ownership of the property becomes highly fractionalized. Eventually, this fractionalization may result in so many co-owners who are so far removed from the original owner that it becomes almost impossible for anyone to accurately ascertain who owns the land or the size of any individual share.[124] Thus, heirs property owners have legal title in some fractional amount but no corresponding record title to prove it.[125] Because intestate succession takes place outside the land records registration system, even first-generation heirs lack record title.[126] Second, third, or fourth generation heirs that come into being later are that much further removed from the last document in the chain of title. Within a relatively short time—a generation even—the undivided shares of heirs property owners can become unknown. With this degree of uncertainty, transaction costs grow rapidly,[127] and it becomes impossible for heirs property to freely circulate within the real estate

[123] Palma Joy Strand, *Inheriting Inequality: Wealth, Race, and the Laws of Succession*, 89 OR. L. REV. 453, 494–95 (2010); *see also* Thomas W. Mitchell, *Reforming Property Law to Address Devastating Land Loss*, 66 ALA. L. REV. 1, 28–31 (2014) (also describing how tenancy in common ownership becomes particularly unstable and risky for co-owners over time).

[124] *See* Batra, *supra* note 11, at 746.

[125] See Way, *supra* note 8, at 152.

[126] *See* discussion *supra* notes 110–113 and accompanying text; Way, *supra* note 8, at 151–52.

[127] *See* Deaton, *supra* note 9, at 936–37.

market.[128] Because heirs property is created by operation of law, and exists outside Property law and its institutions,[129] it continues to become more fragmented indefinitely and without restraint. From its position outside the institutions that support private property in the United States, heirs property ownership is uncertain and unmarketable.[130] Indeed, Richard Posner has described tenants in common in general as "formally in much the same position as the inhabitants of a society that does not recognize property rights."[131] Heirs property owners, however, face uncertainty problems many magnitudes greater than the average tenant in common owners:

> Without effective democratic self-governance mechanisms for co-owned property, heir property is rarely improved or developed, due to the threat of partition sales and the difficulty of obtaining credit on partial interests in the property. In fact, a third more heir than non-heir property is not being used at all.[132]

This is an untenable situation. Free circulation of property is an important component of wealth and commerce.[133] Without the "free and active circulation of property," commerce "would be obstructed; the improvement of land checked; its acquisition rendered difficult; the capital of the country gradually withdrawn from trade; and the incentives to exertion in every branch of industry diminished."[134] Such obstruction to the free use of property rights is, "utterly inconsistent with national prosperity."[135] For this reason, heirs property rarely forms the basis for wealth accumulation and transfer in the United States and, in fact, is a significant impediment to wealth accumulation in southern African American, Native American, and Appalachian communities.[136] Similar to possessors of

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[128] *See infra* notes 124–131 and accompanying text; Heller, *supra* note 28, at 687–88; LEWIS M. SIMES, PUBLIC POLICY AND THE DEAD HAND: THE THOMAS M. COOLEY LECTURES 34–35 (1955) (discussing the important role Property law has in ensuring the free circulation of property).

[129] *See* Craig-Taylor, *supra* note 77, at 740.

[130] *See* Dagan & Heller, *supra* note 110, at 606 (explaining that, over time, heirs property cannot be usefully managed, mortgaged, sold, developed or improved and that the co-owners cannot tap into its equitable value).

[131] RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 74 (6th ed. 2003).

[132] Dagan & Heller, *supra* note 110, at 606 (internal quotations omitted).

[133] *See* SIMES, *supra* note 128, at 35.

[134] *Id.*

[135] *Id.*

[136] *See* JOHNSON GAITHER, *supra* note 12, at 13–22; Spivack, *supra* note 10, at 195.

land in third world countries described by Hernando de Soto,[137] these heirs property owners face functionally insurmountable barriers to establishing record legal title to the land they co-own.[138]

Even when it may be possible to determine who owns heirs property, the effort is laborious, uncertain, risky, and expensive.[139] Why? It is laborious and uncertain because, as already explained, there is no recorded and indexed document showing title in the current heirs at law owners.[140] The last recorded and indexed deed for heirs property documents the ownership of the property by a person who died many years ago and will not include the identification of that person's heirs at law.[141] Depending on the state, some combination of children, spouse, parents, siblings, or more remote family members, will be that original owner's undetermined but lawful heirs.[142] Among those first-generation heirs, some will have died with a spouse and children, or more remote heirs, who then became co-owners of that person's share. Over time some of them will have died too, leaving their shares to their own heirs at law. Sorting out current ownership and the shares of current heirs, therefore, requires sorting out one or more family trees going back many generations. For many heirs at law it does not make sense to retain a lawyer to piece together this obscure family history when their share may end up being so small so as to be of little or no value.

The process of untangling ownership is also risky to heirs at law because one or more of them are likely to be currently enjoying the use and physical possession of the property. Like Frank, whose heirs property story is provided below, those using the property are typically the ones who care most about owning it.[143] However, determining ownership might well result in a co-owner—perhaps someone who is a complete stranger—demanding a sale or partition of the property. Similarly, once it is determined who the owners are and their respective shares, land speculators can use this information to capitalize on the fractionalized nature of heirs property to force co-owners to sell valuable land at a fraction of its market value.[144] A speculator can do this relatively easily by purchasing a small

[137] *See generally* DE SOTO, *supra* note 27.
[138] *See* Deaton, *supra* note 9, at 935–37.
[139] *See id.* at 937.
[140] *See* discussion *supra* Part II.A.
[141] *See* discussion *supra* Part II.A.
[142] *See* Deaton, *supra* note 9, at 927.
[143] *See* C. Scott Graber, *Heirs Property: The Problems and Possible Solutions*, 12 CLEARINGHOUSE REV. 273, 273–74 (1978).
[144] *See* Dyer & Bailey, *supra* note 7, at 319.

fractional interest in land from a remote or less invested co-owner and then sue to force a partition sale.[145]

Also, once heirs at law have been determined any of them are entitled to demand partition of the property, which can be ordered to be in-kind or by sale.[146] When a property is partitioned in-kind, the physical nature of the land and its quality is assessed so that shares reflecting the value of the co-ownership shares may be carved out and assigned to the various co-owners.[147] The common law, most state statutes, and the UPHPA favor in-kind partition because it allows owners who desire to keep the land to continue to possess it—at least a portion of it anyway.[148]

Because in-kind partitions are generally favored, partitions by sale are in theory limited to situations where too many fractionalized interests, or the physical nature of the land, make it impracticable to divide it in a way that creates useful portions that accurately reflect the value of the co-owners' shares.[149] That said, partitions by sale are commonplace and are forced upon owners who would prefer to keep the property.[150] Were the co-owners to agree to a sale they wouldn't need to commence a partition suit; they could simply agree to a voluntary partition or to sell the property on the market like any other owners of real estate.[151] Co-owners who desire to keep the property also cannot necessarily buy out the co-owners who want to sell. Many co-owners of heirs property own a small share of the property. Financing the cost of buying out the other shares, absorbing the legal fees required to determine complicated title, and

[145] *See id.* at 319–20*; see also* Dagan & Heller, *supra* note 110, at 607 ("A non-family-member may acquire a distant nonresident heir's fractional share . . . specifically for the purpose of forcing a partition sale at which the outsider can buy the whole tract.").

[146] *See* FREEMAN, *supra* note 77, at §§ 539–42; *see also* Craig-Taylor, *supra* note 77, at 751–60 ("Under the modern approach, there is also nearly an absolute right to judicial partition."). *See generally* Deaton, *supra* note 9, at 936 (describing the differences between partition in kind and partition by sale).

[147] *See* FREEMAN, *supra* note 77, at § 543.

[148] *See* UNIF. PARTITION OF HEIRS PROP. ACT prefatory note (UNIF. L. COMM'N 2010). *See generally* FREEMAN, *supra* note 77, at §§ 536–37 (describing the prejudice to interests of co-owners resulting from a forced sale).

[149] *See* Mitchell, *supra* note 84, at 513 n.40, 513–16.

[150] *See* Reid, *supra* note 90, at 864; Craig-Taylor, *supra* note 77, at 753–54 ("[P]artition sales are the rule rather than the exception."); *see also* UNIF. PARTITION OF HEIRS PROP. ACT prefatory note (UNIF. L. COMM'N 2010) (explaining the effect of court ordered partition sales over the past several decades); Dagan & Heller, *supra* note 110, at 607 ("Despite the heirs' request and the law's nominal preference for partition in kind, courts usually order a partition by sale because the number of heirs and limited size of property make physical division impracticable.").

[151] *See* Yun-chien Chang & Lee Anne Fennell, *Partition and Revelation*, 81 U. CHI. L. REV. 27, 29–30 (2014).

negotiating with remote co-owners, often prove to be insurmountable impediments to co-owners who desire to keep the land.[152] When they cannot overcome these obstacles, heirs lose their interest at the partition sale and are no longer able to use or live on the land.

Unsurprisingly, the detrimental economic effects and general unfairness of forced partition sales disproportionately affect African American heirs property owners, particularly in the Southern United States.[153] Scholars have estimated that one-third of all land held by those of African American descent in the rural South is heirs property;[154] other estimates are even higher.[155] The result has been a significant loss of land wealth for African Americans.[156] Also disproportionately affected are Native Americans and similarly-situated heirs property owners in rural Appalachia.[157] Although originating from different root causes, Native American[158] and Appalachian property ownership[159] are also plagued by vast acreages of land tangled up in tenancy in common ownership created by intestate succession and, consequently, forced partition sales.

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[152] *See id.* at 32; Way, *supra* note 8, at 155–56.

[153] *See* Thomas W. Mitchell, *Reforming Property Law to Address Devastating Land Loss*, 66 ALA. L. REV. 1, 28–31 (2014). Even though forced partitions occur throughout the United States regardless of the geographic location of the property, or the race, ethnicity, or nationality of the heirs, they plague some communities more than others. *See* JOHNSON GAITHER, *supra* note 12, at 13–22; Way, *supra* note 8, at 175–76.

[154] *See* Graber, *supra* note 143, at 273; Craig-Taylor, *supra* note 77, at 772 ("African Americans tend not to engage in estate planning; 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.").

[155] *See* JOHNSON GAITHER, *supra* note 12, at 2, 4 tbl.1 (stating that, in 1980, the Emergency Land Fund estimated that 41 percent (3.8 million acres) of all Black-owned land in the Black Belt South was heirs' property); *see also* Cassandra Johnson Gaither & Stanley J. Zarnoch, *Unearthing 'Dead Capital': Heirs' Property Prediction in Two U.S. Southern Counties*, 67 LAND USE POLICY 367 (2017) (describing reliable methodology for estimating heirs property acreage in two rural counties in Georgia).

[156] *See* UNIF. PARTITION OF HEIRS PROP. ACT 4–5 (UNIF. L. COMM'N 2010); Harold A. McDougall, *Black Landowners Beware: A Proposal for Statutory Reform*, 9 N.Y.U. REV. L. & SOC. CHANGE 127, 127–28 (1979-1980); Mitchell, *supra* note 84, at 511–12 (2011); Faith Rivers, *Inequity in Equity: The Tragedy of Tenancy in Common for Heirs' Property Owners Facing Partition in Equity*, 17 TEMP. POL. & CIV. RTS. L. REV. 1, 58 (2007). *See generally* Craig-Taylor, *supra* note 77, at 771–80.

[157] For a review of the available empirical data regarding the quantity of land loss see JOHNSON GAITHER, *supra* note 12, at 4 tbl.1.

[158] *See, e.g.*, Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559 (2001) (arguing that allotment and partition of Native American land failed because it conflicted with existing tribal property systems).

[159] *See, e.g.*, Deaton, *supra* note 7 (examining the prevalence of heirs property in Central Appalachia); Deaton, *supra* note 9 (exploring the link between poverty, intestate succession, and heirs property in multiple geographic areas, including the Appalachian Region).

C. Scott Graber illustrates how partition works to undermine the value of land owned as heirs property.[160] His example centers on a slave, John Boles, who bought from his former owner ten acres of land which he farmed until his death.[161] At Boles' death without a will, his land passed intestate to his three sons, John, Jr., James, and Hezekiah.[162] As a matter of law, Boles' sons became tenants in common, and upon their deaths their shares of the property passed to their wives and children and so on throughout multiple generations.[163] As a consequence of this mode of intestate succession from tenants in common to tenants in common, in just a few generations, hundreds of Boles' descendants co-owned the ten acres.[164]

In Graber's example, John Jr. remained on the land and farmed it while his brothers moved out of state.[165] John Jr. farmed the land through droughts, floods, famine, the Great Depression, technological revolution, and World War II.[166] John Jr. later turned the land over to his son Frank, who farmed the land for several more decades.[167] Because Frank and his family remained on the land, they also lived in the same house his grandfather had built in the late 1800s.[168] At a certain point, Frank needed to upgrade the house.[169] Unfortunately, Frank was by then a tenant in common with dozens of his relatives.[170] In order to obtain the clear title required by the bank to obtain the loan to finance the necessary repairs, Frank would need every single one of his relatives who owned a fractional share in the ten acres to officially deed the land to him.[171] Unfortunately, Frank does not know his father's brother James.[172] Even with deeds from Frank's siblings and all of Hezekiah's heirs, Frank cannot get a loan without James' share.[173] Consequently, Frank cannot use his interest in the land to solve a present need in his life.[174] In Frank's case, as in many heirs property cases, Property law fails to identify

160 *See* Graber, *supra* note 143, at 273–74.
161 *See id.* at 273.
162 *Id.*
163 *See id.*
164 *Id.*
165 *Id.*
166 *Id.*
167 *Id.*
168 *Id.*
169 *See id.*
170 *See id.*
171 *Id.*
172 *Id.*
173 *Id.*
174 *See id.*

with enough certainty Frank's relationship, rights, or duties as to others with respect to his grandfather's land, the result of which is that he cannot convert his ownership to the capital he needs.[175] It also fails to adequately value Frank's interest and investment in the land over many, many years.

At best, the law of property is cumbersome in this situation; at worst it is a Pandora's box for the heir's property co-owner who is committed to keeping their ancestral land. Returning again to Frank, he first must hire a lawyer to file a lawsuit to legally determine the heirs of (1) John Boles, Sr. who died in 1915 (first generation heirs at law), (2) the heirs at law of Hezekiah, James, or John, Jr., who also may have died intestate (second generation heirs at law), and (3) the heirs at law of any second generation heirs who died intestate (third generation heirs), continuing through the generations to the present date.[176] John Boles, Sr.'s line of descendants will almost certainly include multiple marriages, step children, divorces, surviving spouses of heirs, adopted children, and third or fourth generation heirs who are currently minors.[177] Many of his descendants may have themselves died intestate. Some may have conveyed or promised to convey their share of the property to someone else. They may be spread out across the country in various jurisdictions, complicating public records searches. Piecing together the family tree from the fragments available will alone consume hundreds of hours of an attorney's time, not to mention the time and expense involved getting the information in front of the proper court and all the proper parties served.[178]

Of all the heirs at law, Frank has invested the most time, money, and effort into the land and is the heir who is most committed to preserving the land.[179] These factors, however, do not provide a legal basis for Frank, as a tenant in common, to claim any additional rights or an additional share of ownership.[180] He remains owner of only an undivided one-third share (his father's one-third) despite his longstanding commitment to the land.[181] The heirs who are unaware that they are even the heirs of John Boles, Sr. (known as John Boles,

[175] *See* Way, *supra* note 8, at 156–57.
[176] *See* Graber, *supra* note 143, at 273.
[177] *See id.*
[178] *See* Strand, *supra* note 123, at 494–95; Way, *supra* note 8, at 158.
[179] *See* Graber, *supra* note 143, at 273.
[180] *See id.* at 281.
[181] *See id.* at 273.

Sr.'s *laughing heirs*[182]) or even that the land exists—are tenants in common with Frank and, despite their absence, have equal rights in it.[183] Unlike other long-term, exclusive possessors of land, Frank cannot claim sole ownership by adverse possession. As a matter of property law, all co-owners are legally entitled to physical possession of the co-owned property, no matter how small or large the co-owner's share, which presumptively defeats the *adversity* requirement of adverse possession as a matter of law.[184] While Frank would be entitled to contribution from the other co-owners for the taxes he has paid and could recoup the value of any improvements he has made if and when the land is sold, he still owns just a one-third share of the land as a matter of property law.[185]

Furthermore, if Frank goes into court to get a legal determination of who the heirs of John Boles, Sr. are at a specified point in time, any one of those heirs may ask the judge to partition the land so as to take their share. Because of the fragmentation of the ownership interest and the small amount of acreage, partition will likely result in a forced sale of the land rather than an in-kind partition, which could leave Frank without any land, and only one-third of the value of the ten acres he previously enjoyed the full use of.[186] Since John Boles, Sr.'s remote or laughing heirs are not highly invested in owning the land, they would likely welcome such a sale. Even if the land was partitioned in kind, Frank's share of the land once it is divided from the rest (one-third of ten acres), is much less valuable to him than his physical possession and use of the whole.

When the lawyer explains how much it will cost Frank to get a court order showing that he owns one-third of the ten acres, will he

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[182] A *laughing heir* is a person who gets a windfall inheritance from a relative who died intestate because they are an heir at law as defined by statute despite having no relationship, connection, or even knowledge of the deceased. *See* Cristy G. Lomenzo, Note, *A Goal-Based Approach to Drafting Intestacy Provisions for Heirs Other than Surviving Spouses*, 46 HASTINGS L. J. 941, 949–50 (1995); *see also* David F. Cavers, *Change in the American Family and the "Laughing Heir",* 20 IOWA L. REV. 203, 208–09 (1935).

[183] *See* Deaton, *supra* note 7, at 92.

[184] *See* FREEMAN, *supra* note 77, at 222. One way a co-owner may obtain sole ownership of co-owned property without bargaining with the other owners is to oust the other co-owners. *See* Mitchell, *supra* note 123, at 8–9, 10 n.31. In order to oust the co-owner in physical possession the other owner must exercise "*some act or acts* of exclusive ownership . . . making manifest the fact of a hostile holding and carrying knowledge or notice of it to the ones out of possession." W.W. Allen, Annotation, *Adverse Possession Between Cotenants*, 82 A.L.R.2d 5.

[185] *See* Way, *supra* note 8, at 159 ("Probate laws give the same weight to the interests of an heir who has lived in the home for 50 years and has continually paid taxes and maintained the property, as to the interests of an heir who lives across the country, has never visited the property, and may not even know she has inherited an interest in the property.").

[186] Forced land sales commonly occur when heirs' property is partitioned. *See* JOHNSON GAITHER, *supra* note 12, at 7.

think that this is a good use of his money? Probably not, even if he could afford it. It would make little economic sense for Frank to pay the high cost of legal assistance in order to determine his relatively small share of a ten-acre parcel especially since his suit could result in the sale of the land and Frank's ouster, an outcome entirely opposite his goals.[187] Under these circumstances, the house is almost certain to remain dilapidated and the title tangled for more generations to come, effectively eliminating the property as a source of capital or wealth for any of the co-owners.

B. Focus on the Effect, Rather than the Cause

This individual loss of land, capital, and wealth, and the collective lack of economic growth caused by the vast acreage of heirs property is an ongoing problem, and the disproportionate effects in certain communities in the United States continue to worsen.[188] The consequences of this cycle is unfair to heirs property owners like Frank, but its economic effects are also broadly damaging in an economy that is based in large part upon the free circulation of land.[189] Attempts at reform have not eliminated heirs property, stopped its creation, or reduced its economic consequences. In an effort to reduce the inequities and disparities caused by forced sales of heirs' properties, state legislatures have begun enacting, in whole or in part, the Uniform Partition of Heirs Property Act (UPHPA).[190] Adopted by the Uniform Law Commission in 2010, eighteen states currently have enacted the UPHPA, and UPHPA has been recently introduced to legislatures in Washington, D.C. and seven other states.[191] The UPHPA modifies existing partition law as it applies to heirs' property in three main ways.[192] First, if a co-owner asks for a

187 *See* Batra, *supra* note 11, at 747.

188 *See, e.g.*, JOHNSON GAITHER, *supra* note 12, at 2.

189 *See supra* note 10 and accompanying text; *see also* Way, *supra* note 8, at 121–22.

190 *See* UNIF. PARTITION OF HEIRS PROP. ACT prefatory note (UNIF. L. COMM'N 2010).

191 *A 'Game Changer' Law May Help Black Farmers Secure Threatened Land Legacies*, FOODTANK, https://foodtank.com/news/2021/08/a-game-changer-law-may-help-black-farmers-secure-threatened-land-legacies/ [https://perma.cc/ZDP6-CHBB]; *Partition of Heirs Property Act*, UNIFORM LAW COMMISSION https://www.uniformlaws.org/committees/community-home?CommunityKey=50724584-e808-4255-bc5d-8ea4e588371d [https://perma.cc/GC48-N3ME] (clicking "Enactment History" shows that the UPHPA has been introduced in eight states and enacted in two as of 2022).

192 The UPHPA does not govern all heirs property. *See* UNIF. PARTITION OF HEIRS PROP. ACT prefatory note (UNIF. L. COMM'N 2010). Within this broad category, it includes only the subset of heirs property for which at least one tenant in common obtained title from a relative and twenty percent of co-owners are related to each other. *See id.* § 2(5). It excludes co-owned land for which the co-owners have a voluntary agreement that governs partition. *See* Mitchell, *supra* note 123, at 42. The UPHPA defines heirs property as

partition by sale, the co-owners who did not seek a sale are afforded the opportunity to buy the share of the co-owner who wants out at a price that represents the value of the selling owner's fractional ownership interest.[193] This buyout option or "partition by allotment"[194] allows co-owners who are committed to keeping the land to purchase just those shares.[195] This eliminates the inevitability of a partition sale, works to consolidate interests, and allows the remaining heirs to continue to be tenants in common.[196] Second, the UPHPA requires courts to order in-kind partitions, rather than a sale, when possible, and to weigh subjective and non-economic owner attachments to the land that would have been ignored by courts in the past in favor of the convenience and ease of dividing cash among owners after partition by sale.[197] Third, when an in-kind partition is not possible and a partition by sale is necessary, the UPHPA requires a market-based sale that will maximize value for all of the co-owners.[198]

While the UPHPA buyout gives co-owners the option to buy out those who seek to escape the co-ownership, it does not solve the problem of co-owners who do not possess the financial means to purchase even those shares.[199] For this reason alone, low-income co-owners of heirs property are not necessarily more protected from land loss following the passage of the UPHPA than they were before. Indeed, the UPHPA admits that in cases where a lack of financial resources precludes co-owners from taking full advantage of the UPHPA's buyout provisions,[200] UPHPA partition proceedings will

> [R]eal property held in tenancy in common which satisfies all of the following requirements as of the filing of a partition action: (A) there is no agreement in a record binding all the cotenants which governs the partition of the property; (B) one or more of the cotenants acquired title from a relative, whether living or deceased; and (C) Any of the following applies: (i) 20 percent or more of the interests are held by cotenants who are relatives; (ii) 20 percent or more of the interests are held by an individual who acquired title from a relative, whether living or deceased; or (iii) 20 percent or more of the cotenants are relatives.
>
> UNIF. PARTITION OF HEIRS PROP. ACT § 2(5) (UNIF. L. COMM'N 2010).

193 *See id.* § 7; Mitchell, *supra* note 123, at 51–52.

194 Rivers, *supra* note 156, at 59.

195 *See* UNIF. PARTITION OF HEIRS PROP. ACT § 7; *see also* Mitchell, *supra* note 123, at 52.

196 *See* UNIF. PARTITION OF HEIRS PROP. ACT § 7; *see also* Mitchell, *supra* note 123, at 53.

197 *See* UNIF. PARTITION OF HEIRS PROP. ACT § 9.

198 *Id.* § 10(a).

199 *See id.* § 8(a). Heirs property owners are likely to be lower income. *See* Janice Dyer et al., *Ownership Characteristics of Heir Property in a Black Belt County: A Quantitative Approach*, 24 J. OF RURAL SOC. SCI. 192, 194–95 (2008).

200 *See* UNIF. PARTITION OF HEIRS PROP. ACT § 9 cmt. 1 & 2.

continue to be lengthy, expensive, and unmanageable for the vast majority of heirs property co-owners.[201] In fact, those heirs property owners who have the financial resources to deal with their heirs property could probably have adequately protected their interests even without the UPHPA.

More critically, like property law itself, the UPHPA does not attempt to address the creation of heirs property, but only its dissolution through forced partition.[202] Unfortunately, even after the passage of UPHPA, new heirs property is created each time an owner dies intestate across the United States. The heirs property that was extant at the time of passage of the UPHPA has not disappeared because of it and continues to cause its owners the same heirs property problems, its title becoming more tangled every time a co-owning heir at law dies intestate.[203] The effect is that large swaths of land in the United States will remain or become untitled and unproductive heirs property for the foreseeable future that cannot be a source of wealth for its owners.[204] This begs the question: why does Property law tolerate the creation and perpetuation of heirs property?[205]

C. Property Law Mistakenly Tolerates Unreasonable Restrictions on Alienability Caused by Intestate Succession

One of the traditional roles of Property law is to temper the power of owners to control their property after death in order to reduce the inefficiencies and other harms this control can cause to the living and to society.[206] One way that Property law keeps owners in check is by application of the Rule Against Perpetuities (RAP).[207] The RAP cuts

[201] *See id.* prefatory note.

[202] *See* Mitchell, *supra* note 123, at 36–42 (providing a brief history of heirs property reform efforts, including more ambitious proposals proposed by the American Bar Association's Property Preservation Task Force, that were rejected because of enactment concerns).

[203] *See* UNIF. PARTITION OF HEIRS PROP. ACT prefatory note. Heirs property problems grow exponentially each time an heirs property owner dies intestate, a common occurrence in the United States where it has been estimated that "sixty-five percent of Americans do not have a will." *See* Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 887–88 (2012).

[204] *See* UNIF. PARTITION OF HEIRS PROP. ACT prefatory note.

[205] *See* Dagan & Heller, *supra* note 110, at 603 ("Property law can do better.").

[206] *See* FRIEDMAN, *supra* note 66, at 125–30; SIMES, *supra* note 128, at 34–35.

[207] *See* JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES § 268 (4th ed. 1942) ("The tying up of property is therefore restrained, as to present estates, by making them alienable, and, as to future estates, by subjecting them to the Rule against Perpetuities."). The origin of the RAP is generally attributed to The Duke of Norfolk's Case. *See* 22 Eng. Rep. 931 (1682); *see also* George Haskins, *Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule Against Perpetuities*, 126 U. PA. L. REV. 19, 20 (1977). RAP is intended to strike:

off *future* interests in land that are not certain to vest within the time provided by the RAP.[208] Conveyances that violate the RAP are voidable as a matter of law and may be reformed by a court.[209] Similarly, when an express conveyance directly prohibits *current* interest from selling or conveying property, Property law will void the restriction as an unreasonable restraint on alienation.[210] Both of these doctrines limit the ability of prior owners to unreasonably control property rights in the present and over time.[211] They are traditionally justified as a means to encourage the alienability and marketability of property, to allow for the efficient current and responsive future use of land, a more equitable distribution of control among generations of successive owners, and to ensure that current

> a fair balance between the satisfaction of the wishes of the members of the present generation to tie up their property and those of future generations to do the same. The desire of property owners to convey or devise what they have by the use of trusts and future interests is widespread, and the law gives some scope to that almost universal want. But if it were permitted without limit, then members of future generations would receive the property already tied up by future interests and trusts, and could not give effect to their desires for the disposition of property.

Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U. L. Q. 667, 704 (1986). RAP is not as strong a rule of law as it once was. In recent years, a few jurisdictions have abolished traditional RAP, and many have exempted trusts owned property from its application in order to attract trust business to those states. *See* FRIEDMAN, *supra* note 66, at 130–36.

[208] *See* GRAY, *supra* note 207, § 191; SIMES, *supra* note 128, at 33.

[209] *See* RESTATEMENT (THIRD) PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 27.1 (AM. L. INST. 2011); SINGER ET AL., *supra* note 86, at 790 (courts may modify a conveyance that violates RAP using the *cy pres* doctrine); GRAY, *supra* note 207, §§ 643–70 (surveying early examples of the use of *cy pres* to reform conveyances that would otherwise violate RAP); *see also* UNIF. STATUTORY RULE AGAINST PERPETUITIES § 3 (UNIF. L. COMM'N 1990).

[210] *See* GRAY, *supra* note 207, § 120 ("When a person is entitled absolutely to property, any provision postponing its transfer or payment to him is void."); Epstein, *supra* note 207, at 713.

[211] *See* Heller, *supra* note 15, at 1179–80.

> Early property law developed boundary rules to limit inter-temporal fragmentation that have been mostly subsumed into the tortuous Rule Against Perpetuities (RAP). Scholars use several familiar vocabularies to discuss how the RAP addresses excessive fragmentation. Some scholars refer to conflicts over alienability between current and future generations; others argue that the RAP does not increase alienability in general, but only makes one particular estate, the fee simple, more alienable. Following this approach, some scholars frame the debate as one between an individual's freedom to alienate and society's interest in preserving the marketability of the underlying resource. Recognizing that purely private decisions about the use of property can impose long-term social costs, the RAP conclusively presumes a point after which the social cost of fragmentation exceeds private gains.

Id.

and future owners are able convert property into capital or wealth.[212] Property law tolerates some restrictions on alienation for public policy reasons.[213] When there is not sufficient justification, however, it is the norm for a court to apply these common law tools to limit the ability of prior owners to control current and future ownership or use of their property.[214]

As already argued, heirs property is comprised of ownership interests that are effectively inalienable by the current owners and therefore unable to freely circulate in the market, often for generations.[215] Courts, however, disregard the significant restrictions on alienability caused by heirs property ownership and do not use their power under the common law to void such restrictions and to reform title to heirs property to remedy these problems.

By way of an example, consider again the story of John Boles.[216] When John Boles died, his three sons, John, Jr., James, and Hezekiah, became tenants in common owners of his land by operation of law via intestate succession.[217] When they then died their heirs at law succeeded each of them until the present date, resulting in generations of related co-owners who have extremely fragmented title.[218] The indirect effect, if not the direct intent, of Mr. Boles dying intestate was to restrict the alienation of his land for generations. Such a restriction clearly would violate the common law limitations on restrictions of alienation if it had been expressly structured this way by him prior to his death.[219] Imagine, for example, that Mr. Boles willed or deeded the land to generations of his heirs at law so as to "keep it in the family" instead of dying intestate.[220] The language of his deed or will would have read something like this:

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[212] *See* Mitchell, *supra* note 84, at 554–55; *see also* Lee Anne Fennell, *Adjusting Alienability*, 122 HARV. L. REV. 1403, 1405 n.5 (2009) (discussing alienability as "both the right to the wealth represented by an asset and the ability to transmit the asset to another").

[213] *See generally* Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931 (1985) (describing various public policy rationales that may justify the inalienability of some forms of property, including economic efficiency, distributional goals, and democratic concerns); Mitchell, *supra* note 84, at 557–61 (discussing cases in which courts have relaxed the rules against restraints on alienation when the restraint is deemed to meet an important social purpose or to support an important policy).

[214] *See id.* at 554.

[215] *See supra* text accompanying notes 97–99.

[216] *See supra* text accompanying note 131.

[217] *See supra* text accompanying note 132–133.

[218] *See supra* text accompanying note 133–134.

[219] *See* discussion, *supra* at 22–23.

[220] *See* Dyer & Bailey, *supra* note 7, at 196–97 (discussing the reasons why some heirs property owners may value and desire to create heirs property at their deaths).

> I, John Boles, hereby devise (or deed) my ten acres to my sons, John, Jr., James, and Hezekiah, in equal parts, then to their surviving spouses and my grandchildren per stirpes,[221] then to their surviving spouses and my great grandchildren per stirpes, then to their surviving spouses and my great, great grandchildren per stirpes, etc. and in perpetuity, until the land is partitioned by a court of law.[222]

If John Boles directly restricted alienation of his land for the foreseeable future by a direct conveyance like the one above, a court would certainly find that it violated the RAP or that it was void as a repugnant restraint on alienation. This begs a key question: if Property law would normally reject an express conveyance that restricted the alienability of land in perpetuity, then why would it privilege a conveyance that has similar deleterious effects simply because it is a product of intestate succession? In his seminal 2007 article about heirs property, James Deaton asks "why wouldn't cotenants choose another form of property ownership?"[223] The question this Article asks is why does Property law tolerate it? Is the answer that courts must uphold the strict application of intestate succession laws despite their detrimental effects in these circumstances and even though they significantly undermine Property law rules intended to facilitate alienation?[224] I have been able to unearth an adequate answer. Certainly, if a court refused to strictly apply the rules of intestate succession so as to increase alienability, this would likely eliminate some interests that would otherwise exist.[225] But as discussed *infra*, the elimination of these

[221] This example is based upon the way in which Mississippi law identifies heirs at law in order to divide an intestate decedent's property. Mississippi's law provides a child's share to the surviving spouse. If one of the decedent's children predecease the decedent, that child's share will be divided equally between that child's surviving spouse and children. *See* MISS. CODE ANN. § 91-1-7 (2021). Jurisdictions have different ways of allocating shares to intestate heirs at law. In South Carolina, where the John Boles hypo is said to occur, the surviving spouse receives a half share of the intestate decedent's property, and the children have equal shares of the remaining half. *See* S.C. CODE ANN. § 62-2-102 & 62-2-103 (2021).

[222] *See* S.C. CODE ANN. § 62-2-102 & 62-2-103 (2021).

[223] Deaton, *supra* note 9, at 936.

[224] *See, e.g.*, *In re* Shiflett, 490 S.E.2d 902, 908 (1997) (quoting White v. Gosiene, 420 S.E.2d 567, 575 (W. Va. 1992)) ("[I]t is 'loathe' for this Court 'to interfere with the legislative determination as to those persons who should be entitled to the benefit of this statutorily created right of action, even where it results in injustice. Our role is to interpret the law, not to create it.").

[225] *See* Mitchell, *supra* note 84, at 565–66 (rejecting the notion that remote co-owners of heirs property should be cut out because of the "lack of individual fairness" afforded to them).

interests should not dictate the policy choices needed to allow for the free alienability of heirs property.[226] As it stands now, and in despite of the problems it causes, those who die intestate appear to have an entitlement to create heirs property even though its effect is to make land inalienable in perpetuity, an effect that Property law otherwise prohibits.[227]

III. IMPROVING ALIENABILITY

By recognizing that Property law includes an intestacy entitlement—that the property rules that normally curtail dead hand testator control do not curtail dead hand intestate control—scholars and judges can think differently about how to eradicate heirs property. Recall that highly fractionalized heirs property did not come to exist until fairly recently for three reasons: (1) because primogeniture and multigeniture were the main forms of intestate succession in the American colonies;[228] (2) because, until recently, the law presumed co-owners to be joint tenants with rights of survivorship;[229] and (3) because joint tenants could not unilaterally alienate their share at that time.[230] After the Revolution, the former colonies enacted fully partible inheritance among an intestate's surviving spouse and children as joint tenants with rights of survivorship.[231] It was only in the modern era that states began treating co-owners of property by intestacy as tenants in common as the default rule,[232] which had the unintended consequence of creating the heirs property problem as we know it.[233]

That is not to say that states need to return to primogeniture.[234] Courts need to recognize, however, that just as they may void and reform express conveyances that violate the RAP or that restrain alienation; they may also use these longstanding common law doctrines to void and restructure the ownership of heirs property that results in similar harms. Likewise, and equally important, states need to recognize that their own intestate succession laws and default ownership rules are the root cause of the heirs property

[226] *See* discussion *infra* Part III.C.
[227] *See* discussion *supra* Part III.A.
[228] *See* SHAMMAS ET AL., *supra* note 53, at 32.
[229] *See supra* notes 89–91 and accompanying text.
[230] *See supra* notes 89–91 and accompanying text.
[231] *See* discussion *supra* Section I.B.
[232] *See* 4 THOMPSON ON REAL PROPERTY, *supra* note 17, § 32.06(b)(2).
[233] *See* Dagan & Heller, *supra* note 110, at 609 n. 235.
[234] *See* Mitchell, *supra* note 84, at 566 (discussing and dismissing a return to primogeniture as a way to consolidate fragmented shares of heirs property).

problem. It is their own laws that mandate the creation of heirs property whenever an owner dies without a will. This leads to successive generations of heirs at law and increasingly smaller fractionalized shares. This does not have to be the case. Just as they did after the Revolution, states may modify the rules regarding how intestate property is divided in their jurisdictions and how the subsequent owners relate to each other as regards the property.[235] In this instance, states would act not to end primogeniture but to eliminate or reduce heirs property.

A. Common Law Limits

Courts apply the RAP to truncate remote interests that are not certain to vest within the time period provided by the RAP.[236] Thus, if a future interest is already vested, the RAP will not apply to it.[237] A future interest is vested when there is either an immediate right of present enjoyment or a present fixed right of future enjoyment.[238] A future interest is not vested when it is either subject to a condition precedent or owned by unascertainable persons, or both.[239]

At first blush, heirs property owners would appear to have vested interests that are immune from the reach of the RAP. Heirs property ownership can be seen as vested because heirs at law obtain legal, if not record, title to an intestate's property at the moment of the owner's death by operation of law.[240] As years pass and first-generation heirs at law die, the interests of the next generation of heirs vest at the moment of *their* predecessors' deaths by operation of law.[241] The interests of these multiple generations of heirs at law can be seen as fully vested although their interests may remain undetermined and undivided for their lives and in perpetuity and although none of them have record title.

On the other hand, the interest of heirs property owners may also be characterized as highly contingent. As explained already, the

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[235] *See supra* notes 67–76 and accompanying text.
[236] *See* GRAY, *supra* note 207, § 278.3.
[237] *See id.*
[238] *See id.* §§ 101, 118.
[239] *See id.* § 101.
[240] 23 AM. JUR. 2D *Descent and Distribution* § 13 (2021). An intestate heir may not have record title, but they have legal title at the moment of death. *See id.*; *see, e.g.*, Abbott v. Everett Tr. & Sav. Bank, 312 P.2d 203, 204 (Wash. 1957) ("[D]ecedent died intestate; and, by virtue of the statute, the remainder vested immediately upon decedent's death in her heirs, subject to the right of possession by the trustee and enjoyment by the beneficiary during the lifetime of the beneficiary. This does not violate the rule against perpetuities.").
[241] *See* AM. JUR. 2D *Descent and Distribution* § 13.

chain of title for heirs property abruptly ends with the deed that provided legal title to the first owner who died intestate.[242] Although legal title passed to the first owner's heirs at death, the heirs did not obtain title that could be recorded and indexed.[243] When the heirs died, their heirs at law took their shares of ownership by operation of law, and they also did not obtain title that was recorded and indexed.[244] In this way, it became impossible for family members and outsiders alike to identify owners at any given time except through a costly and uncertain legal proceeding that may never take place.[245] The uncertainty surrounding who owns heirs property is so profound that neither potential buyers, nor those who believe they may be co-owners, are likely to invest in piecing together the family tree so as to determine with sufficient certainty the fractional interests of the generations of heirs at law.[246] Given this, owners of heirs property have the *ultimate* contingent interests that will remain unknown until a significant contingency—a court proceeding—is concluded.[247] Heirs property interests that are very remote from the last title owner in time or relation, therefore, may not actually be vested if that term is to have any substantive meaning.[248] If they are not vested, then they may be voided under the RAP.[249] Doing so would align with

[242] *See* discussion *supra* Section II.A.
[243] *See* discussion *supra* Section II.A.
[244] *See* discussion *supra* Section II.A.
[245] *See* SINGER ET AL., *supra* note 86, at 787. Vesting that relies upon a court proceeding is known as the *endless will contest* problem that violates RAP. *See id.*
[246] *See* UNIF. STATUTORY RULE AGAINST PERPETUITIES 5 (UNIF. L. COMM'N 1990) ("The task of going back in time to reconstruct not only the facts existing when the interest or power was created, but facts occurring thereafter as well may not be worth the effort. In short, not only would births and deaths have to be kept track of, but adoptions, divorces, and possibly assignments and devises, etc., also, over a long period of time.").
[247] *See* SINGER ET AL., *supra* note 86, at 787. Vesting that relies upon a court proceeding is known as the *endless will contest* problem that violates RAP. *See id.*
[248] *See* GRAY, *supra* note 207, § 101 n.2 ("If a contingent remainder-man fails to come into possession, it is not because his estate is destroyed, but because he has never had an estate, only the potentiality of an estate.").
[249] *See id.* § 99.

> Vested rights, of course, may be impaired "with due process of law" under many circumstances. The state's inherent sovereign power includes the so called "police power" right to interfere with vested property rights whenever reasonably necessary to the protection of the health, safety, morals, and general well being of the people. The annals of constitutional law are replete with decisions approving, as constitutionally proper, the impairing of, and even the complete confiscation of, property rights when compelling public interest justified it.

Barbara N. Armstrong, *"Prospective" Application of Changes in Community Property Control—Rule of Property or Constitutional Necessity?*, 33 CALIF. L. REV. 476, 495 (1945).

centuries old Property law aimed at limiting interests that are too remote, especially those that are unvested.[250]

Vested or not, courts can void heirs property interests that are so remote and uncertain as to be an unreasonable restraint on the ability of owners to alienate those interests.[251] Courts have rejected prior owners' attempts to restrain the alienation of their property since the Middle Ages.[252] Except in a few narrow contexts, direct restraints on the right of alienation will not be tolerated by a court.[253] Indirect restraints on alienability, like the restraints imposed by the heirs property ownership, are those that do not directly prohibit the alienation of property but have the incidental effect of limiting the use of the property.[254] Indirect restraints are also void if there is not some rational basis that justifies them.[255]

Property law abhors restraints on alienation because they prevent the efficient uses of property and can result in land being excluded from the economy for lengthy, indefinite periods.[256] Although the creation of heirs property through intestate succession may only indirectly restrain alienation, restraint is, nevertheless, its effect.[257] Intestate succession of heirs property creates profound restrictions on alienation without any justification. By recognizing that the rule against restraints on alienation applies not only to *express and direct*

[250] *See* GRAY, *supra* note 207, §§ 119–21.

[251] *See id.* § 269.

[252] George Haskins, *Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule Against Perpetuities*, 126 U. PA. L. REV. 19, 27–35 (1977).

[253] *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.4 (AM. L. INST. 2000); 10 POWELL ON REAL PROPERTY § 77.02 (Michael Allen Wolf ed., 2021); *see also* Mitchell, *supra* note 84, at 558–61 (providing examples of the narrow contexts in which courts allow direct restraints on alienation).

[254] *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.5 (AM. L. INST. 2000) (regarding servitudes that indirectly restrict alienation).

[255] *Id.*

[256] *See* Dagan & Heller, *supra* note 110, at 606 ("In fact, a third more heir than non-heir property is not being used at all."); *see also* POSNER, *supra* note 131, at 75.

[257] *See, e.g.*, C. Scott Graber, *Heirs Property: The Problems and Possible Solutions*, 12 CLEARINGHOUSE REV. 273, 278 (1978) ("Because ownership is divided and uncertain, heirs property land cannot be mortgaged. Those who describe the "equity base" that blacks have in Southern farmland refuse to recognize that much of this equity base cannot generate credit. This land will not finance a home or farm equipment or serve as collateral for an emergency loan."); SIMES, *supra* note 128, at 36 ("In order to make a profit from land, one must have a type of ownership which insures enjoyment forever or for a fixed and determinable period of time. People who purchase land, whether for profit or for their own use and enjoyment, are not likely to buy unless they can secure either a fee simple absolute or a lease for a fixed term of years."); *see also* POSNER, *supra* note 131, at 75 ("[M]any of these grants are once-in-a-lifetime transactions for the grantor, and he may not have good information about the problems they create . . . Moreover, people who create excessively complex interests burden the courts as well as themselves and their grantees, so this is some externality that might warrant public intervention.").

conveyances by individuals, but also to *indirect* restraints caused by operation of law, including by the application of intestate succession statutes, these remote and uncertain interests may be voided entirely.[258]

In what way could a court exercise this discretion? One idea is that when determining heirs, a court could, in the face of terribly tangled and highly fragmented ownership, cut off remote interests by "closing the class" of heirs at the first or second generation heirs at law—the heirs at law at the moment that the original decedent's estate passed by operation of law—and by then treating the resulting group of heirs as joint tenants with rights of survivorship in relation to each other.[259] This is similar to when courts apply the rule of convenience——a judge made rule of construction[260]—to fix at a particular point in time the maximum membership within a class of takers to allow for immediate distribution, even if it means excluding some members.[261] In this case, the survivors' interests would be subject only to the legal and equitable claims of those heirs at law who have been cut out *and* who can additionally demonstrate their interest in the property as manifested by their possession and use of it or regular contribution to its maintenance.[262]

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[258] *See* Epstein, *supra* note 207, at 713–14; RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.4 (AM. L. INST. 2000).

[259] In jurisdictions that recognize it, courts apply the rule of convenience to close a class so that those in it can enjoy their interest without being subject to other members of the class who may become eligible to join it at a later date and so that the court can dispose of the matter. *See* David M. Becker, *A Critical Look at Class Gifts and the Rule of Convenience*, 42 REAL PROP., PROB. & TR. J. 491, 494 (2007). For a thorough description of the rule of convenience and how it generally operates see *id. et. seq*. The rationale for applying the rule of convenience applies equally to the justification for reforming heirs property remote ownership interests:

> [Waiting for a class to close] is an inconvenience courts are unwilling to undertake because of the costs such a solution imposes on them, representatives, trustees, devisees and beneficiaries, and ultimately upon society as a result of the consequential delay in creation of indefeasible interests. As a result, courts find it impractical and undesirable to administer each of A's directions respecting equal division, immediate distribution, and inclusion of all of B's children whenever born. Absent an express distributive mechanism that overcomes such administrative inconvenience, courts find it necessary to tamper with one of [the grantor's] objectives.

Id. at 497.

[260] *See id.* at 509.

[261] *See id.* at 494, 497.

[262] *See* Lomenzo, *supra* note 182, at 950 (citing for the proposition that some heirs who are legally entitled to ownership through intestate succession may be less entitled due to other policy considerations, including minimizing uncertainty in land titles); Way, *supra* note 8, at 176 ("[S]tates should consider prioritizing the interests of homeowner-occupants over the interests of other co-tenant interests when the occupant has been the sole party to exercise the responsibilities that come with homeownership, such as paying property taxes and property

Society is under no obligation to suffer the indirect restraints on alienation caused by intestate succession or to make a RAP exception for intestate conveyances that result in highly contingent ownership interests. While probate scholars hardily debate whether judges should have the discretion to revise estate plans or wills to achieve fairer outcomes in the distribution of estates, as opposed to simply effectuating the testator's written desires, these debates are more about judicial interference with testamentary devises. The same concerns about interfering with testamentary freedom do not arise with intestate succession.[263] Even so, the law does not privilege testator desires in all circumstances, even when those desires are codified in a will.[264] Rather, an owner who disposes of their property at death does so at the sufferance of the state, to which a deceased owner's property would naturally escheat except that the sovereign has decided otherwise.[265] While there is a very long-standing legal tradition in the U.S. legal system to protect the desires of testators to dispose of their property by will,[266] there is no corresponding

upkeep"); FRIEDMAN, *supra* note 66, at 12 (regarding the strong tendency to wipe out the intestate rights of laughing heirs).

[263] *See* Jennifer R. Boone Hargis, *Solving Injustice in Inheritance Laws Through Judicial Discretion: Common Sense Solutions from Common Law Tradition*, 2 WASH. U. GLOB. STUD. L. REV. 447, 464 (2003); *see generally* Daniel B. Kelly, *Restricting Testamentary Freedom: Ex Ante Versus Ex Post Justifications*, 82 FORDHAM L. REV. 1125, 1159–61 (2013) (describing countervailing policy concerns that may lead the law to curtail a testator's or trustor's freedom of disposition, including to maximize social welfare). In a large 1978 study of public attitudes about succession to property at death, not a single respondent indicated that they did not have a will because they were satisfied with their state's intestate succession statute, and most did not know who would inherit their property under default intestate succession rules. Mary Louise Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, AM. BAR. FOUND. RSCH. J. 319, 339–40 (1978).

[264] *See* Kelly, *supra* note 263, at 1128; *see also* Fellows et al., *supra* note 263, at 334–35.

[265] *See, e.g.*, Irving Tr. Co. v. Day, 314 U.S. 556, 562 (1942) (citing Mager v. Grima, 49 U.S. 490, 493–94 (1850)) ("Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction."); Magoun v. Ill. Tr. & Sav. Bank, 170 U.S. 283, 288 (1898) ("The right to take property by devise or descent is the creature of the law, and not a natural right—a privilege, and therefore the authority which confers it may impose conditions upon it."); Babbit v. Youpee, 519 U.S. 234, 237 (1997). *Irving Trust Co.* was limited by the later holding in *Hodel* in which the Court held that the complete abolition of both descent and devise was a taking that required just compensation. Hodel v. Irving, 481 U.S. 704, 717–18 (1987).

[266] *See Hodel*, 481 U.S. at 716 ("In one form or another, the right to pass on property—to one's family in particular—has been part of the Anglo-American legal system since feudal times."); 1 RESTATEMENT 3RD OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 10.01 (2011); Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS U. L. J. 643, 643 (2014) ("The organizing principle of the American law of succession, both probate and nonprobate, is *freedom of disposition*."); Kelly, *supra* note 263, at 1137–38.

protection for those who die intestate.[267] Those who die without a will are not entitled to complain about how or to whom their property is distributed.[268] An owner who dies intestate or who opted for intestacy believing that their property would be distributed according to a particular statutory scheme[269] can raise no due process challenge if the scheme changes after her death so that her property is distributed differently than she may have believed it would be by operation of law.[270]

B. Survivorship

In addition to eliminating remote and uncertain interests created by intestate succession by applying the common law property rules to foster alienation and certainty, states should also act to minimize and eliminate heirs property by revising their intestate succession statutes themselves so that heirs property is no longer created and exacerbated by default. Many scholars consider intestate succession statutes to be outdated and in need of reform as a general matter.[271] These scholars advocate for statutes to be updated to reflect growing changes in the American family and to accomplish broader social priorities like, for example, providing for succession of persons who have a strong affinity with the deceased, like a same-sex partner, rather than those who have no relationship with the deceased, but do possess consanguinity.[272] Historically the goals of intestate

[267] Reid K. Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. Rev. 877, 884 (2012).

[268] *See id.* at 884 n.35 ("Hodel's dictum suggests that states may alter or abolish the default rules of descent, meaning that the constitutional protection afforded by the Takings Clause favors disposition by will rather than by intestacy."); *Hodel*, 481 U.S. at 718 (Brennan, J., dissenting) ("It may be appropriate to minimize further compounding of the problem by abolishing the descent of such interests by rules of intestacy, thereby forcing the owners to formally designate an heir to prevent escheat to the Tribe.").

[269] It is unlikely that many property owners choose to pass their property pursuant to and in reliance on their state's intestate succession statute. *See* Lomenzo, *supra* note 182, at 943 n.9; Olin L. Browder, Jr., *Recent Patterns of Testate Succession in the United States and England*, 67 MICH. L. REV. 1303, 1313 (1969); *see also* Paul L. Sayre, *Recent Ideologies in the Law of Succession to Property*, 32 ILL. L. REV. 691, 699 (1938) (observing that "[i]ntentional intestacy of large estates is surely rare"); *but see* John H. Beckstrom, *Sociobiology and Intestate Wealth Transfers*, 76 NW. U. L. REV. 216, 231 n.53 (1981) (stating that some of those who die without a will do so in reliance upon their understanding of how their estate will be distributed via the applicable intestate succession statute and that, therefore, intestate succession statutes should reflect the testamentary desires of the average person who will die intestate).

[270] *See* Weisbord, *supra* note 267, at 884.

[271] *See* Boone Hargis, *supra* note 263, at 447.

[272] *See* Weisbord, *supra* note 267, at 881–89; *see also* Boone Hargis, *supra* note 263, at 448–49 ("[T]he American family is changing tremendously, making rules of intestate succession more unjust and out of tune with the goals of American inheritance law.").

succession laws in the United States have been to support ownership of private property, to effectuate the wishes of owners of property, to take care of the family, and to enhance the well-being of society.[273] Arguably current intestate succession regimes fail to satisfy any of these goals by constantly creating and exacerbating heirs property by default creation of tenancies in common.[274] Prominent heirs property scholar, Thomas Mitchell, and others have identified tenancy in common as a major cause of land loss for African American owners.[275] As discussed already, heirs property harms private property rights because it exists in a legal void outside the bounds of Property law and its institutions, making its title extremely uncertain and incapable of exchange on the market.[276] When title to heirs property becomes so fractionalized and uncertain as to be dead capital, it fails to effectuate the wishes of deceased owners who surely desired their heirs to be financially benefitted by their legacy.[277] Heirs property also doesn't benefit society overall because it does not prioritize those who are the most deserving owners and possessors of it, instead allowing remote and undeserving heirs to clog the title of those heirs who are truly invested in the property.[278] Just the opposite: The most time consuming and costly part of a partition suit is the identification and valuation of the minimal interests of remote heirs who know and care nothing about the deceased or the property, thus increasing the costs of the suit that will be charged against the value of the property.[279]

The obvious and simple solution to the excessive fragmentation of heirs property going forward is to change the default intestacy rules so that heirs at law are joint tenants with rights of survivorship by

[273] *See* Boone Hargis, *supra* note 263, at 451.

[274] *See* Spivack, *supra* note 10, at 202 ("The laws of real property inheritance operate to increase vulnerability in communities of color through the default rules of tenancy in common and partition.").

[275] *See* Mitchell, *supra* note 84, at 532.

[276] *See supra* Part II.A.

[277] Just like there are property law limits on dead hand control, intestate desires do not dictate the rules of intestate succession. *See* Fellows et al., *supra* note 263, at 324 ("If society's well-being requires a distributive pattern different from the determined wishes of intestate decedents, the decedents' wishes should be subordinated."); Lomenzo, *supra* note 182, at 945 (""[T]he desires of normal or average decedents do not provide the sole basis for framing or justifying an intestacy [statute].' In fact, satisfying a decedent's presumed intentions seems relatively unimportant in comparison to more compelling goals of intestacy schemes, such as producing a fair pattern of distribution among surviving family members and serving society's interests.").

[278] *See* Lomenzo, *supra* note 182, at 948–51.

[279] *See* UNIF. PARTITION OF HEIRS PROP. ACT, prefatory note (UNIF. L. COMM'N 2010); Lomenzo, *supra* note 182, at 952–53.

default, rather than tenants in common by default.[280] This small change would mean that: (1) there would be fewer future generations of intestate heirs since title would, moving forward, consolidate in fewer owners at every generation until only one line of succession remained, (2) the number of heirs at law would be smaller, easier and more affordable to determine, making alienation of ownership by heirs at law easier to achieve, (3) shares would be equal at their inception and remain so until there was only one share left, limiting the problem of excessive fractionalization among generations, and (4) the ownership interests would be more certain and less contingent, and therefore less likely to lead to the property becoming unmarketable and inalienable.[281] Changing the default form of co-ownership to joint tenancy with rights of survivorship for intestate succession would work no real harm on the reasonable expectations of the deceased owner since at least one of his heirs at law would end up the ultimate owner of the property, and the property would remain in the family for a reasonable amount of time, if not forever.[282] Also, just as with tenancy in common, joint tenancy co-owners who did not want their share to automatically pass by survivorship could convey it during their life so as to pass it to their own heirs, or the group of joint tenant owners could enter into an agreement to provide access and continuity to an entire consanguineous group if desired.[283] In fact, it appears that the only real objection to a return to a joint tenancy intestate succession default rule is that it "flies in the face of the wishes of most owners of heirs property."[284] This seems like flimsy reasoning at best. While there is no doubt that there are heirs property owners who value the collective ownership of ancestral land over the benefits of it being useful and valuable financially-speaking,[285] the data is extremely light regarding the default intestacy rule preferences of the vast group of existing heirs property owners in the United States and probably impossible to characterize in any event. Studies of what owners want prior to death show that most desire their spouses to inherit their entire estate and, if the estate goes to a subsequent generation, for the shares be equal but

[280] *See* Spivack, *supra* note 10, at 206–07.

[281] *See id.* at 206–07.

[282] *See* SIMES, *supra* note 128, at 10–11; SINGER ET AL., *supra* note 86, at 163–64.

[283] *See* Spivack, *supra* note 10, at 207 (discussing management agreements among tenant in common heirs at law); *see generally* Orth, *supra* note 93, at 428–30 (regarding the modern ability of joint tenants to unilaterally and easily divest or change their share of ownership to a tenancy in common despite the default rule of survivorship at death).

[284] Spivack, *supra* note 10, at 207.

[285] *See generally* Dyer & Bailey, *supra* note 7 (sharing their findings from interviews with twelve heirs property owners).

with no particular preferences about co-ownership itself.[286] Second, the personal preference of some group of heirs property owners to keep their co-owners trapped in a form of ownership that devalues their co-owned land and makes it impossible for some group of them to fruitfully use it or divest, which undermines core liberal property values. Not only does the threat of exit from a group, or selling one's share, help in corralling group members to work better together, the right to exit—to alienate one's property—is fundamental to the very character of ownership in a liberal society:[287]

> Generally, liberals are committed to "open boundaries," that is, to the idea that people should be able to leave the groups with which they choose to associate . . . In some accounts, liberalism may even be *defined* as a theory that adopts, justifies, and applies a strong commitment to geographical, social, familial, and political mobility—all in the name of promoting individual freedom necessary to secure one's own personal happiness . . . But a regime that . . . unreasonably delay[s] exit, is incompatible with the most fundamental liberal tenets.[288]

C. Undeserving Versus Committed and Invested Heirs

It should not be controversial to advocate for heirs property owners to have less fragmented title and more effective ownership via joint tenancy ownership as the default rule. A more controversial suggestion is that heirs at law who have shown no interest in or commitment to the co-owned land should be entirely excluded from the heirs at law co-owner group. This is controversial, of course, because one result of limiting intestate succession to deserving heirs only is that some of the decedent's heirs who would have inherited under prior law would no longer inherit. Eliminating the windfall of undeserving heirs, however, should not trouble us. Excluding undeserving and marginal fractional interests held by laughing heirs serves society by eliminating heirs property and by minimizing many of the legal and equitable problems posed by partition.[289] Other rationales for cutting off remote heirs in favor of heirs who are

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[286] *See* Fellows et al., *supra* note 263, at 354–59.
[287] *See* Dagan & Heller, *supra* note 110, at 567–70.
[288] *Id.* at 568–69 (emphasis added).
[289] *See* Lomenzo, *supra* note 182, at 950–51; Way, *supra* note 8, at 176.

personally, emotionally, or financially invested in the property include that it simplifies legal proceedings, decreases transaction or negotiation costs, increases the certainty of land titles, and rewards those who were close enough to the decedent or to the decedent's property to remain involved after the decedent's death.[290]

Probate scholars are already engaged in a general discussion regarding the desirability of and rationale for excluding heirs who can be fairly categorized as remote, uninvolved, or "laughing" heirs[291] for whom the decedent (and the decedent's property) is of no personal interest as demonstrated by the person's lack of involvement.[292] Their rationale for focusing succession on those for whom it will not simply be a windfall applies equally to heirs at law who stand to obtain an interest in heirs property. After all, consolidating the ownership of heirs property in the person or persons who benefit most from and make the most use of an ancestor's land increases access to capital, encourages intergenerational wealth transfer, and avoids land loss by deserving heirs,[293] all of which also benefits broader society and achieves what we can assume to have been among the deceased's most important reasons for acquiring property during their life.

A new intestacy statute, even one that provides for joint tenancy ownership by heirs as the default form of intestate succession, may still protect the interest of the relatives of the deceased who are active users, contributors, and long-term possessors of the land, even if they would otherwise own a minimal share or even no claim to a share of

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[290] *See* Lomenzo, *supra* note 182, at 950–51; *see also* FRIEDMAN, *supra* note 66, at 12 (explaining the modern tendency to eliminate distant relatives from inheritance).

[291] *See* MARVIN B. SUSSMAN ET AL., THE FAMILY AND INHERITANCE 16–23, 144–45 (1970) ("Laughing heirs have been considered unworthy takers, and they saw themselves as such. They had rendered the deceased no service of any kind; they could not justify their windfall to themselves. Unlike Irish Sweepstakes winners, they did not even risk a shilling for their good fortune.").

[292] *See* Lomenzo, *supra* note 182, at 948.

> [S]tates should consider prioritizing the interests of homeowner-occupants over the interests of other co-tenant interests when the occupant has been the sole party to exercise the responsibilities that come with homeownership, such as paying property taxes and property upkeep. For homeowner-occupants, the home is the place where they live on a day-to-day basis and may have been the only place they have called home for their entire lives.

Way, *supra* note 8, at 176.

[293] *See* Lomenzo, *supra* note 182, at 948–51 (describing the "tragedy of the anticommons" as what happens when property is owned by multiple owners who are each endowed with the right to exclude others from a scarce resource, and no one has an effective privilege of use, resulting in underuse. Heller's concept of the "anticommons" describes the heirs property that is the subject of this Article).

ownership—people who others have described as having a cordial relationship with the deceased and who "can show evidence of a history of amicable correspondence or meetings between the intestate and the potential heir."[294] Similarly, deserving heirs are heirs who can demonstrate a long-term relationship with the property itself, through possession, or active contribution to its maintenance, as compared to others who may be more closely related to the deceased but do not do so.[295] Eliminating undeserving heirs would make room for the claims of cordial next of kin to a share of ownership, or a more substantial share, without requiring the purchase of the shares of undeserving heirs. This would allow for the investment and commitment of deserving heirs at law to be more accurately valued, resulting in fairer outcomes when the property is partitioned or sold.

By way of example, consider John Boles once again.[296] If he had died intestate in a jurisdiction that divided his property among his heirs at law as joint tenants with right of survivorship, then title to his property would have progressed in this way: after his death, his three sons, John, Jr., James, and Hezekiah, would have each owned an equal share as joint tenants.[297] If they had not otherwise conveyed their shares or restructured their ownership, when the first of these three died, the remaining two would each have had a fifty percent share of the whole. The last of the final two to survive would have become the sole owner. The property today would have one owner and would not be heirs property—or at least not as complicated heirs property.

Proving title under these circumstances would be much simpler than under a tenancy in common intestate succession scheme because the property's ownership would not be fragmented.[298] The rub is that Frank, the grandson of John Boles who has lived on the property his whole life—taken care of it, used it, paid the taxes on it—should be able to tap into its value and the value of his contributions. If, however, John, Jr. was not the last of his three brothers to survive, then Frank would have no legal interest and he would get no reward for his longstanding commitment to the

[294] *See id.* at 959–60.

[295] Heather K. Way, *Informal Homeownership in the United States and the Law,* 29 ST. LOUIS U. PUB. L. REV. 113, 716 (2010). Eliminating undeserving heirs and next of kin who are not cordial would make room for the claims of deserving and cordial heirs to a share of ownership, or a more substantial share, without requiring the purchase of the shares of undeserving and non-cordial heirs.

[296] *See supra* text accompanying notes 156–170.

[297] *See supra* text accompanying note 97; *see also* 20 AM. JUR. 2D COTENANCY AND JOINT OWNERSHIP, § 7.

[298] *Cf.* Lomenzo, *supra* note 182, at 952–54.

property. Eliminating his interest entirely because his father did not survive his uncle would not be an equitable outcome or a satisfactory statutory solution from Frank's perspective or as a matter of policy since Frank is an active user who contributes to society and has even protected the interests of the title owner through his occupancy and maintenance of the property.[299] Frank, however, does not have to lose out if he is treated as a cordial next of kin[300] or as a deserving heir[301] who has effectively "earned" a share of ownership.[302] Society's interest in consolidating the ownership of heirs property[303] in the person or persons who make the most use of land so as to increase capital, encourage intergenerational wealth transfer, and avoid land loss or the homelessness of deserving heirs is superior to the interest laughing heirs may have in obtaining a windfall.[304] Eliminating laughing heirs from co-ownership of heirs property and recognizing as superior the interests of active, participating heirs may be a radical shift away from current intestate succession law, but Property law is able and needs to make this sort of shift.[305] For

[299] Note, however, that under this new regime, Frank would not be a co-owner of the property as a matter of law if his father, John, Jr., did not survive James and Hezehiah. Frank, therefore, could claim title through adverse possession, an option that he is effectively precluded from if he is a tenant in common.

[300] *See* Way, *supra* note 8.

[301] *See* Lomenzo, *supra* note 182.

[302] *See* Way, *supra* note 8, at 176.

[303]

> [P]rivate property emerges less successfully in resources that begin transition with the most divided ownership. In such resources, poorly performing anticommons property is most likely to appear and persist. In contrast, private property emerges more successfully in resources that begin transition with a single owner holding a near-standard bundle of market legal rights. In such resources, the transition from a socialist to a market economy occurs more smoothly.

Heller, *supra* note 28, at 631.

[304] Legislators should recognize that

> "the desires of normal or average decedents do not provide the sole basis for framing or justifying an intestacy [statute]." In fact, satisfying a decedent's presumed intentions seems relatively unimportant in comparison to more compelling goals of intestacy schemes, such as producing a fair pattern of distribution among surviving family members and serving society's interests.

Lomenzo, *supra* note 182, at 946 (internal citations omitted); *see also* Fellows et al., *supra* note 263, at 324 ("If society's well-being requires a distributive pattern different from the determined wishes of intestate decedents, the decedents' wishes should be subordinated. But our society places high value on testamentary freedom. Thus, the preferred distributive pattern of intestate decedents should be given full effect and should be deviated from only if necessary to satisfy an overriding societal interest.").

[305] *See* Jessica A. Shoemaker, *Like Snow in the Springtime: Allotment, Fractionalization, and the Indian Land Tenure Problem,* 2003 WIS. L. REV. 729, 782–83 (2003) (advocating for more "radical" solution to the problem of tribal land fractionalization caused by intestate succession).

example, as inherited from English law, the United States once provided no affirmative legal rights to squatters on either public or private land.[306] Due, however, to the practical need to provide stability of land titles[307] and to respond to the demands of the squatters themselves, the doctrines of preemption and adverse possession quickly arose to provide squatters' rights in both situations.[308] The same type of radical shift is possible today to accommodate the needs of heirs property owners and to solve the heirs property problem.

D. The Possibility of Retroactivity

Changes to state intestate succession statutes may obviously be applied prospectively—to intestate estates that do not yet exist—but they may also be applied retroactively—to already extant heirs property to eliminate the current ownership shares of heirs at law who are uninvolved, remote, or laughing heirs. Two concerns arise when upending current intestate succession law and applying it retroactively to the interests of existing owners of heirs property: undermining the testamentary freedom of the intestate decedent and interfering with vested rights.

Testamentary freedom is the organizing principle of succession in the United States, where owners of property may, subject only to a few limits, dispose of their property after death however they desire.[309] The policy rationale for enforcing owner dispositions even after their death is that it encourages people to work hard to accumulate assets during life, knowing that they can preserve them

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306 *See* DE SOTO, *supra* note 27, at 106–33. *See generally* Green v. Biddle, 21 US 1 (1 Wheat.) (1823) (finding unconstitutional a Kentucky statute that recognized squatters' rights to compensation after being dispossessed by title owner).

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> [T]he formal law contributed to "[e]ver growing costs of litigation to clear titles, eject persons with rival claims, and protect land from intrusion and plunder." Combined "with court fees and the high interest on borrowed capital," the inadequacy of formal law was a "constant threat to the security of investments and kept litigants in continued turmoil."

DE SOTO, *supra* note 27, at 128.

308 *See* DE SOTO, *supra* note 27, at 120–27 (explaining that the preemption doctrine was addressed toward squatters who were subject to removal, asking whether they should be compensated for the value of improvements or allowed to purchase the property from the title owner prior to its sale); *see also* John Lovett, *Disseisin, Doubt, and Debate: Adverse Possession Scholarship in the United States (1881-1986)*, 5 TEX. A&M L. REV. 1, 22–24 (2017) (describing the American law of adverse possession as distinct from the earlier English law of disseisin, as imported into the American colonies, which gave title owners the ability to remove squatters within a statutory period, but did not provide an affirmative right to fresh title like the doctrine of adverse possession, as developed in the United States).

309 Kelly, *supra* note 263, at 1133–34.

to an extent after death.[310] Similarly, it is thought that owners who are not entitled to govern their property at death will be profligate with it at the end of life—a use it or lose it mentality.[311] It is said that testamentary freedom will lead to greater wealth accumulation, greater testator enjoyment of property, and greater incentives for relatives to take care of owners before they die in the hope that they will be rewarded at the owner's death.[312] Also, testators are considered to have more relevant and personalized information about how their property can best be used by those they leave behind after they die than any court or law maker might possess.[313] Testator preferences are thought to often align closely with broader public social and economic welfare concerns, like supporting immediate family members after death, and thus, testator wishes should generally not be disturbed after the testator's death, as they are not able to be renegotiated with the deceased.[314]

Testamentary freedom is important but is nevertheless sometimes outweighed by competing policies and social goals. For example, testator desires may be curtailed when a testator tries to dispose of property or to achieve a purpose that is prohibited or restricted by an overriding rule of law.[315] Specific rules of law that override testamentary freedoms include, "spousal rights; creditors' rights; unreasonable restraints on alienation or marriage; provisions promoting separation or divorce; impermissible racial or other categoric restrictions; provisions encouraging illegal activity; and the rules against perpetuities and accumulations."[316] Thus, certain

[310] *Id.* at 1136; *see* DEATH, TAXES, AND FAMILY PROPERTY 5–6 (Edward C. Halbach, Jr. ed., 1977); Robert C. Ellickson, *Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights*, 64 WASH. U. L. Q. 723, 735–36 (1986).

[311] *See* Kelly, *supra* note 263, at 1135–38 (arguing that restricting testamentary freedom affects both individuals and societies negatively); *see also* HALBACH, *supra* note 310, at 5–6 (suggesting that there are objectionable ways to manage assets at death).

[312] *See* Kelly, *supra* note 263, at 1135–38, 1147–53.

[313] *See id.* at 1136–37.

[314] *See id.* at 1138.

[315]

> American law curtails the freedom of disposition only to the extent that the donor attempts to make a disposition or achieve a purpose that is prohibited or restricted by an overriding rule of law. The term "rule of law" is used in a broad sense to include rules and principles derived from the U.S. Constitution, a state constitution, or public policy; rules and principles set forth in federal or state legislation or in municipal ordinances; rules and principles of the common law and of equity; and rules and principles contained in governmental regulations.

RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 (AM. L. INST. 2003); *see also* Kelly, *supra* note 263, at 1138.

[316] RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1.

limitations on testamentary freedoms have always been recognized as legitimate when public policy demands it. Put differently, owners enjoy specific testamentary rights, but those rights are always subject to public policy concerns which, in certain instances, may abrogate an owner's right to dispose of their property in a specific way at death.[317]

In fact, federal and state governments have very broad powers to control the terms of succession to property in their jurisdictions.[318] In *Hodel v. Irving* the U.S. Supreme Court considered the constitutionality of Congress's attempt to help tribes consolidate property that had become extremely fractionalized.[319] This fractionalization was caused by federal land acts from the 1880s that prohibited Native American land owners from alienating their land during their lifetime.[320] The result was that most of the land passed by intestate succession to heirs at law, creating later generations of tenant in common co-owners with highly fractionalized interests.[321] Later reforms alleviated the further fractionalization prospectively, but left vast amounts of extant heirs property fractionalized and unusable.[322] In 1983, Congress passed the Indian Land Consolidation Act to help alleviate the heirs property problem.[323] The Act prohibited the owners of small, fractional shares of tribal land inherited via intestate succession from alienating those shares when they died.[324] When they died, these fractional interests were required to escheat to the tribe and could not be devised or pass by intestate succession.[325]

The U.S. Supreme Court struck down the Act as unconstitutional because it virtually abrogated the right of owners to pass on the property to their heirs.[326] In doing so, however, the Court affirmed that the states and the federal government have broad control over intestate succession to property within their jurisdictions.[327] According to *Hodel*, as long as a state does not entirely abrogate the right to pass property at death, the state may adopt new succession

317 *See* Fellows et al., *supra* note 263, at 334–35.
318 *See id.*; Hodel v. Irving, 481 U.S. 704, 717 (1987).
319 *Id.* at 706–09.
320 *See* Heller, *supra* note 28, at 685.
321 *See Hodel*, 481 U.S. at 707.
322 *See id.* at 708.
323 *See id.* at 708–09.
324 *See id.* at 709.
325 *See id.*
326 *Id.* at 716.
327 *Id.* at 717.

laws, even going so far as to entirely eliminate intestate succession.[328] If states have the power to entirely eliminate intestate succession, then they certainly have the power to significantly modify their intestate succession statutes in order to ameliorate the heirs property crisis in their jurisdictions.[329] A well-functioning intestate succession scheme should avoid complicating property titles and excessive subdivision of property and encourage the consolidation of property.[330] In fact, the American Indian Probate Reform Act of 2004, Congress' later attempt to tackle the Native American heirs property problem, avoided additional fractionalization of land by creating the presumption that devises to two or more persons create joint tenancy with rights of survivorship rather than a tenancy in common.[331]

Furthermore, a new intestate statutory scheme may have a retroactive effect so as to eliminate the undetermined interests of remote heirs. Prior to an owner's death those persons who will become heirs at law have no legal entitlement to inherit anything.[332] At the moment of death, legal title passes immediately to intestate heirs by operation of law.[333] If the interests of the heirs at law at this point are treated as contingent interests, or as mere expectancy interests, then applying a new statutory scheme retroactively to those interests that works to eliminate them would not be problematic, at least from a takings perspective, since retroactive legislation passes constitutional muster if it does not affect "vested rights."[334] On the other hand, because it is possible to ascertain the heirs and the prior estate has naturally ended, the interest of heirs at law are arguably vested at the moment the decedent dies, whether

[328] *See id.* at 717–18. The Court held that the Act was unconstitutional in this case because it entirely eliminated the owners' rights to dispose of their property at death, not because it eliminated intestate succession. *See id; cf.* Babbit v. Youpee, 519 U.S. 234 (1997) (holding amended Indian Land Consolidation Act unconstitutional because it entirely eliminated succession for a certain group of fractional interests in native allotments).

[329] *See Hodel*, 481 U.S. at 718.

[330] *See* Fellows et al., *supra* note 263, at 324.

[331] American Indian Probate Reform Act of 2004, Pub. L. No. 108-374, §3, 118 Stat. 1773, 1780 (2004).

[332] *See* Irving Trust Co. v. Day, 314 U.S. 556, 562 (1942) ("Expectations or hopes of succession, whether testate or intestate, to the property of a living person, do not vest until the death of that person.").

[333] *See* discussion *supra* Part I.B.

[334] *See* Laura Ricciardi & Michael B.W. Sinclair, *Retroactive Civil Legislation*, 27 U. TOL. L. REV. 301, 332–37 (1996) ("A newly enacted statute can be retroactive in two ways. First, it can by its terms come into effect at a date earlier than its enactment. Second, it can have effects on legal rights and relations established under prior law.").

or not those heirs or their shares are ever legally determined.[335] Thus, improving the state's intestate succession scheme and applying it retroactively to alleviate the heirs property problem may eliminate or affect vested interests and trigger due process concerns.[336] These concerns, while legitimate, should not necessarily stop states from moving forward.[337]

It is beyond the scope of this Article to fully examine the constitutionality of retroactively eliminating the interests of remote, undeserving, and laughing heirs at law whose interests have arguably already vested. It is an opportunity to note, however, that there are many circumstances in which states may impair vested rights. A state's police power allows it to impair vested property rights by retroactive application of a new law "whenever reasonably necessary [for] the protection of the health, safety, morals, and general well being of the people."[338] Since 1994, the U.S. Supreme Court has applied a rational basis review standard to legal challenges based upon the retroactive application of a new law:

> To be sure, . . . retroactive legislation does have to meet a burden not faced by legislation that has only future effects. . . . "The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." But that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose.[339]

In the case of heirs property, states have excellent justification to apply new legislation retroactively to achieve the purpose of eliminating the heirs property problem once and for all. In addition, eliminating the interests of undeserving heirs would not undermine

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[335] *See* D. Benjamin Barros, *Toward a Model Law of Estates and Future Interests*, 66 WASH. & LEE L. REV. 3, 16 (2009) (explaining that a vested interest is one that is in an ascertained person and not subject to a condition precedent other than the natural end of a preceding estate).

[336] *See id.* at 65 n.349; Armstrong, *supra* note 249, at 495.

[337] *See* Armstrong, *supra* note 249, at 495–96 (arguing that for important public policy reasons, a new community property regime in California should be applied retroactively even though it would impair the existing vested rights of the spouses). *Contra* Mitchell, *supra* note 84, at 566 n.365 ("[A]ny attempt to resolve the issue by limiting the number of persons entitled to inherit would be resisted by prospective heirs. Even though the value of their interests may be paltry, forced disinheritance would only create resentment and, ideally, should therefore be avoided.").

[338] Armstrong, *supra* note 249, at 495.

[339] United States v. Carlton, 512 U.S. 26, 31 (1994) (quoting Pension Benefit Guar. Corp. v. R.A. Gray & Co., 487 U.S. 717, 730 (1984)).

justifiable expectations or reliance on the status quo since undeserving heirs, as contemplated by this Article, would not be involved with the heirs property to even this extent.[340] Thus, at least arguably, a state may adopt a fresh statutory intestate succession scheme to decrease or eliminate current undeserving heirs property interests in favor of deserving heirs and consolidation goals. As explained already, states can certainly insist that heirs property pass only by devise, or that if it passes to heirs via intestate succession, that it is held by heirs at law as joint tenants with rights of survivorship.[341] Laughing and remote heirs at law interests can also likely be constitutionally eliminated since their interests, even if vested, are mere windfalls.[342] Truly invested heirs can then receive shares that more fairly and accurately reflect their commitment and investment. These prospective and retroactive changes to the default form of intestate succession would work no real harm on the reasonable expectations of deceased owners since some iteration of theirs heirs at law—their deserving heirs—would still own shares, and the property would remain in the family until they freely disposed of it, unencumbered by uncertainty.

IV. CONCLUSION

This Article recasts the heirs property problem as one caused by state intestate statutes that create by default successive generations of tenant in common owners of land whose interests and rights are inadequately protected by property law. The goal is to encourage judges, legislatures, and scholars to pursue a prospective, and perhaps even retroactive, solution more aggressively, even if it means sacrificing the interest of underserving heirs and finding creative ways to recognize and protect the enhanced claims of deserving ones. I understand that I am taking a position that is an unusual one for a public interest lawyer who advocates for the rights of low-income

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[340] *See* W. David Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 CAL. L. REV. 216, 226 (1960).

> In order to obtain judicial relief against change in the law, however, an individual must have incurred a measurable loss. Moreover, the Supreme Court decisions also strongly indicate that a litigant has little chance of success unless he can show reliance in the form of showing that his lost property represented the product of planned investment of labor or value. Windfalls, even when substantial, are given little protection.

Id.

[341] *See supra* Part III.B.

[342] *See* Slawson, *supra* note 340, at 226.

people, some of whom would certainly fit into the category of the undeserving heir. As argued, however, there are many competing concerns that, when balanced, outweigh the interests of the undeserving heir and more importantly the interests of the deserving heirs. Deserving heirs are also often also low-income people, who have, nevertheless, done what it takes to preserve their inheritance from their ancestor, including investing in the property despite the uncertainty of their title. They, like their ancestors, who often beat the odds in acquiring the property in the first place, are truly the successors to the decedent in spirit, intent, and commitment. Consolidating ownership of their ancestor's property in the heirs who are truly deserving does not just consolidate and clarify legal title, it also consolidates wealth that can be used to increase the likelihood that some iteration of the ancestor's decedents can participate in the American Dream of financial and social mobility. When scholars and others accept as a *fait accompli* that heirs property ownership is fragmented and will just remain that way, we accept a less just society and underestimate the power of property law to solve the problem. In our society, wealth is opportunity, but if the wealth represented by property ownership is spread too thinly among too many heirs at law, it cannot serve this purpose for any one of them.[343] In this way, allowing ongoing creation of fragmented interest over generations truly defeats the accomplishments of prior owners who strove to create opportunity for those they left behind.

[343] Spivack, *supra* note 10, at 192 ("[I]nheritance law often fails to pass wealth as effectively among the already disadvantaged as it does among others. This failure contributes to higher rates of poverty among these groups. These broken links of our property inheritance system deserve attention because they contribute to inequality and vulnerability. They also compound, rather an ameliorate, historical injustice.").