



United States Department of Agriculture

*“Have Not Our Weary Feet
Come to the Place for Which
Our Fathers Sighed?”*

HEIRS' PROPERTY IN THE SOUTHERN UNITED STATES

Cassandra Johnson Gaither



Forest Service
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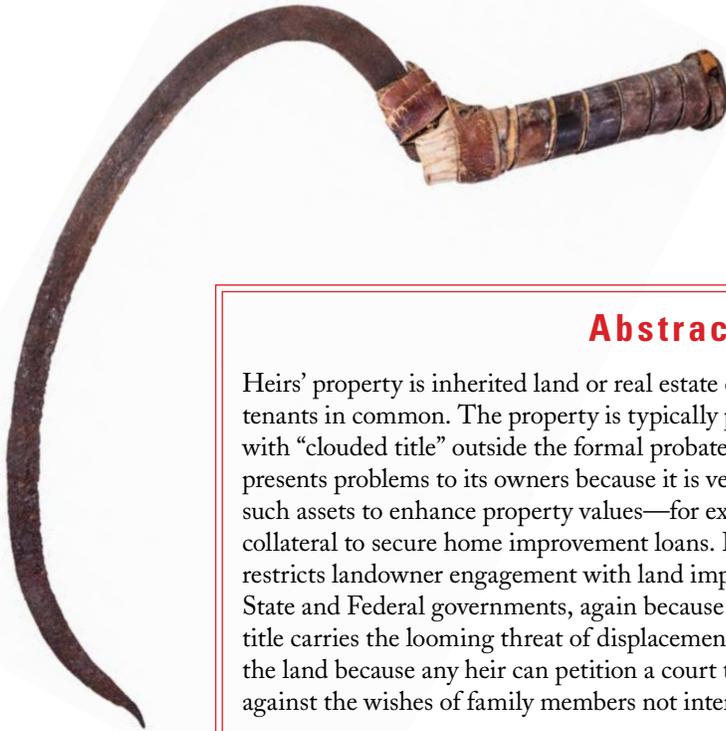
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Abstract

Heirs' property is inherited land or real estate owned by two or more people as tenants in common. The property is typically passed to heirs without a will or with "clouded title" outside the formal probate process. This type of land tenure presents problems to its owners because it is very difficult for heirs to leverage such assets to enhance property values—for example, to use these assets as collateral to secure home improvement loans. Heirs' property ownership also restricts landowner engagement with land improvement programs offered by State and Federal governments, again because of unclear titles. As well, unclear title carries the looming threat of displacement for family members who live on the land because any heir can petition a court to divide the land, which may be against the wishes of family members not interested in selling.

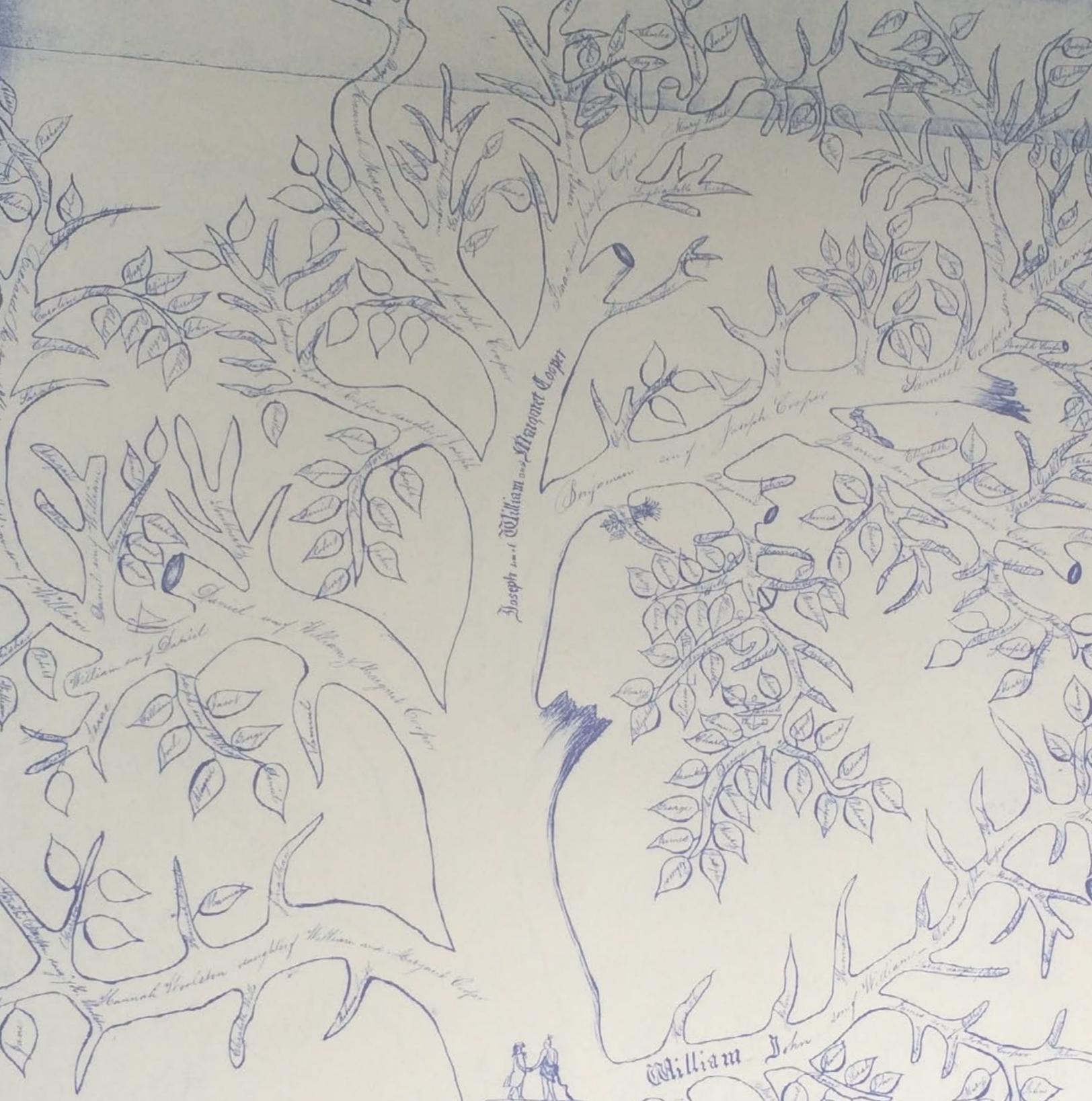
Federal agencies like the Forest Service, U.S. Department of Agriculture, are interested in estimations of the extent of heirs' property ownership because of their commitment to rural economic development. However, only a few studies have addressed estimations of this land tenure form or the culture of place that may have created it. As well, the bulk of the existing literature on this topic focuses mostly on issues arising from such ownership in the southern Black Belt. This literature review extends this scholarship to heirs' properties among Native American tribes in the South. The review also covers the limited research directed to this issue in Appalachia and identifies future research areas.

Keywords: Appalachia, Black Belt, Five Tribes, heirs' property, land tenure.

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held in ye parish of Amersham and ye County of Bedford hath
 been of ye said parishes, to transport himself with his wife
 and three children, and hath desired a testimonial from this church
 here, unto whom he may be outwardly unknown. The church
 certify all whom it may concern that the said William Cooper
 these parts for many years, nor was ye fact of this, otherwise
 they amongst ye agreedly to ye profession and testimony
 in and knowledge of them.
 do set our hands. This fifth day of ye month of
 meeting of Colechall aforesaid.

William and Margaret Cooper
 came from England in the
 year 1678, either in which
 is now called Colechall
 opposite to Amersham,
 and lived the same time
 for at Cooper's Church.

William Cooper died 1711. 1710

Amersham or Amersham, an ancient town
 This parish with the adjoining hamlet of Colechall

INTRODUCTION



Land ownership and its conveyance of belongingness, rootedness, and cultural identity are integral to notions of the self-sustaining American community (Stolzenberg 2000). These ideas are at the core of the American mainstream but have also been evoked by anti-establishment groups like the Black Panther Party, which articulated a Ten Point Program in the 1960s stressing the urgency of Black land access (Dr. Huey P. Newton Foundation 2008). In the same vein, Eldridge Cleaver's essay, "The Land Question and Black Liberation," articulates a "deep land hunger in the heart of Afro America" (Cleaver 1969, p. 62). Certainly, an asset such as real property offers security to its possessors and possibilities for leveraging smaller assets into larger resources. Demsetz (1967) argues that wealth accumulation is a logical expectation of property acquisition and utilization. Thus, the quote from an early twentieth century Cherokee, Richard Glory, before a U.S. Senate select committee, rings oxymoronic: "We [Native Americans] are rich in land and poor in everything else. If we could eat the land it would be all right, but we can't" (U.S. Congress 1907, p. 115). Glory and other members from the Five Civilized Tribes of what is now eastern Oklahoma offered testimony, hoping that Congress would rescind Federal restrictions on Native Americans' rights to sell their land to non-tribal members. These Native Americans were newly vested owners of private property allotments from the Federal Government, a system of land ownership that eventually resulted in fractionated land holdings or tenancies in common (Shoemaker 2003).

Tenancy in common is a type of joint ownership of real property. The property is often transferred intestate (without a will) and without clear title, typically to family members. The resulting jointly held properties are also described as "heirs' property." The lack of clear title severely limits owners of heirs' property from accessing credit (i.e., using the property as collateral for loans), participating in land improvement programs offered by the Federal Government, and in some cases, selling resources such as timber. These restrictions result in wealth diminution rather than augmentation for affected families. While heirs' property is private property, the associated rights and responsibilities mimic those attached to other types of common property, as each heir or owner holds an undemarcated, fractional interest in the entire property (Deaton 2005, Mitchell 2001). Heirs' property ownership typically

arises because of the lack of estate planning. If a person with real property dies without a will, or if that will is not probated in court, State laws of intestate succession determine property distribution, assuming the property deed does not include a right of survivorship that transfers the decedent's interests to a specific party. Heirs' properties can also be created via wills. Decedents can intentionally cloud titles by willing property to all of their children without clearly specifying which portions of the property belong to whom (Deaton 2005).

Much of the research and commentaries on heirs' properties centers on its widespread existence and consequences in the southern Black Belt region of the United States (Baab 2011; Casagrande 1986; Chandler 2005; Emergency Land Fund 1980; Graber 1978; Mitchell 2001, 2005; Rivers 2006, 2007; Tinubu and Hite 1978). The southern Black Belt includes mostly rural counties extending from southern Virginia across the Carolinas and as far west as east Texas (fig. 1), with African-American populations that exceed national averages (Wimberley and Morris 1997). 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 the section "Heirs' Property Estimation" for a more thorough review of estimations for the entire region.) A high-profile case in the South Carolina Lowcountry, which resulted in the eviction of 25 members of an extended family, brought heirs' property dilemmas for African

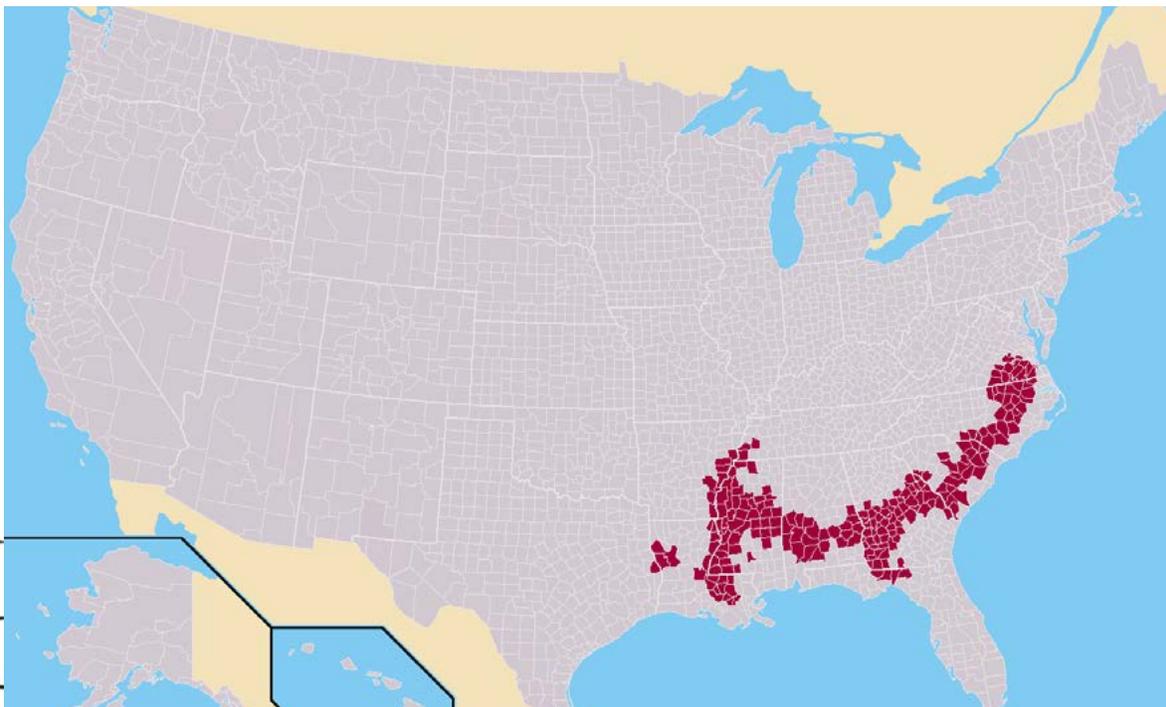


Figure 1—Black belt counties (red) in the U.S. South. (source: J intela, English Wikipedia Creative Commons CC BY-SA 3.0 license.)

Americans to national attention in the early 2000s (Bartelme 2000, 2001, 2002; Chandler 2005). This example and others show clearly the need for research and policy focusing on these communities (Baab 2011). However, heirs' property is not a function of race alone, but involves a complex web of cultural ideas about land ownership and kin, emotional ties to land, lack of knowledge about estate planning, and Government intervention, among others.

As indicated, tenancy in common is also well documented as "allotments" issued historically to Native American tribal members. Moreover, tenancies in common are thought to pervade poor, rural Appalachian communities (Deaton 2005, 2007; Deaton and others 2009). Thus, a more comprehensive review of the heirs' property literature must explore references to how heirs' properties or fractionated properties manifest outside the Black Belt South.

This report reviews the heirs' property literature broadly, beginning with constraints associated with heirs' property ownership and estimates of this land tenure form in the Southern United States (table 1). The report also concentrates on the historical origins of tenancies in common in three subregions in the 13 States of the U.S. Department of Agriculture Forest Service's Southern Region: the Black Belt, Oklahoma Native American communities, and central Appalachia (Kentucky).



Table 1—Heirs’ property estimation (non-Native American)

Source	Area examined	Parcels	Method	Heirs’ acres	Average acres per parcel	Percentage of land	Total value
Multi-State							
Graber (1978)	10 counties in 5 States	–	Local auditor review of tax digests	–	–	33 percent of rural, Black-owned	–
Emergency Land Fund (1980)	5 States	101,648	Landowner survey	3,836,498	37.7	41	–
Multi-county							
Tinubu and Hite (1978)	3 rural South Carolina electric cooperatives	37	Landowner survey	–	–	3.5	–
Rivers (2006)	2 South Carolina counties	3,300 (approx.)	n/a	17,000 (one county)	13.01 (in Berkeley Co.)	–	–
Alabama Appleseed (Baab 2011)	2 Alabama counties	771	Review of tax records	11,000+	>14.23	1.5	>\$31 million
Center for Heirs’ Property Preservation (2014) ^a	6 South Carolina counties	–	Review of tax and court records	41,000	–	–	–
Georgia Appleseed (2013)	5 Georgia counties	1,620	Review of tax and court records	5,215	6.2	–	\$58.6 million
Single county							
Deaton (2005)	Kentucky county	–	Telephone survey of property owners	–	–	24.4	–
Southern Coalition for Social Justice (2009)	North Carolina county	475	Local official review of tax records	5,623	11.8	2	–
Dyer and others (2009)	Alabama county	1,516	Researcher review of tax and court records	15,937	10.5	4.1	> \$25 million

– = not applicable or information not available.

^aPersonal communication. 2014. Jennie Stephens, Executive Director of the Center for Heirs Property Preservation, Charleston, SC. April 18.



As a land management agency of the U.S. Department of Agriculture, the Forest Service is tasked with delivering programs and conducting research to strengthen rural economic, social, and ecological systems. One of its primary goals is the conservation of open space in rural and rural-proximate communities (USDA Forest Service 2015). Attention to social drivers of private land management is critical, such as land tenure and use, and threats to the same. Underserved and limited-resource landowners are central to this effort. The Forest Service, as well as the U.S. Department of Agriculture, is very interested in understanding better the extent of heirs' property across the South and the historical and contemporary factors that reproduce this land tenure form (U.S. Endowment for Forestry and Communities 2014). Better knowledge of heirs' property characteristics, and how these vary by subregion, will help governmental agencies develop programming and partnerships aimed at alleviating the burden of clouded titles for lower wealth and underserved landowners (U.S. Endowment for Forestry and Communities 2014).



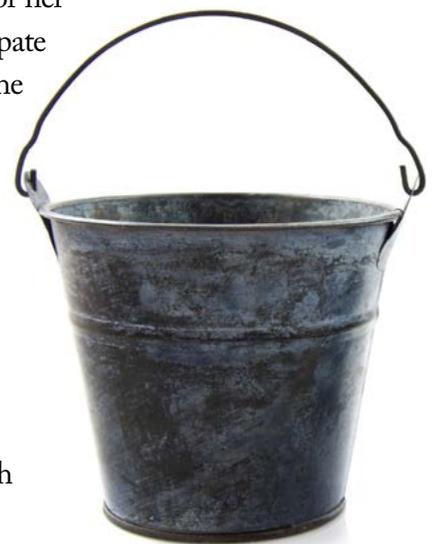
LEFT: A home with a tin roof in Apalachicola, FL. RIGHT: A barn near Arnoldsville, GA. (photos by Cassandra Johnson Gaither, USDA Forest Service)



A Tangled Ownership Web

As the name implies, heirs' property involves inherited co-ownership by two or more individuals. How this ownership plays out in cases of intestate succession depends on a respective State's law. Consider the example of Mr. and Mrs. Newowner, who purchased 100 acres of rural land in Georgia in 1940. They lived on the land and had four children. If Mr. and Mrs. Newowner do not create a will specifying how the land should be divided upon their death (and the deed contains no right of survivorship for a spouse), Georgia's intestate laws would apply to the estate. After Mr. Newowner's death, Mrs. Newowner would receive a one-third partial interest in the 100 acres. Each of the four children would inherit a one-fourth undivided interest in the two-thirds remainder of the estate, or a one-sixth interest in the entire estate. If each of these children has four children of his or her own, each grandchild would inherit one-quarter of the one-sixth interest that was inherited by the grandchild's parent. This assumes, of course, that the property title had not been cleared by the second generation. Thus, in just three generations, the property can fractionate substantially, with each subsequent heir inheriting ever-smaller fractional interests in the property (fig. 2).

Each Newowner family interest holder, no matter the size of his or her interest, amount of financial investment in the land, or physical proximity to the land, has the same rights to the full extent of the acreage. At the same time, each heir may exercise his or her exclusionary right to the land, meaning any heir could choose not to participate in activities that might improve the economic or ecological functioning of the land (Deaton and others 2009, Heller 1998). As well, banks are reluctant to lend to owners unless they (as borrowers) have clear or marketable title. While loans are possible for heirs' property owners, all heirs must assume legal responsibility for the loan. Such agreement may be next to impossible to obtain given the sheer number of heirs in some cases. Many heirs may live far from the property and have no interest in assuming a loan. In some instances, heirs may not even know one another. The same constraints apply to selling the entire physical estate and in some States may apply to the sale of any improved assets or resources from the land, such as timber (Chang 2012, Dyer and Bailey 2008, Dyer and others 2009).



Some scholars charge that the greatest threats to heirs' property owners have been court-ordered land sales (Casagrande 1986, Craig-Taylor 2000, Rivers 2006). This process is set in motion when one or more heirs or co-owners wish to obtain fee simple title to their share of the property. They no longer desire to hold the property in common. To divide the property, a court could order a sale of the entire property or a partition in kind (i.e., physical distribution with clearly delineated boundaries). If a few known heirs agree on land division, partition in kind seems a reasonable way to proceed. However, if there are numerous heirs, subdividing the land may become complex to the point of infeasibility. In such cases, a court typically orders a partition sale, resulting in distribution of monetary proceeds of the forced sale rather than land distributions to co-owners (Baab 2011, Chandler 2005, Craig-Taylor 2000). In some notable cases (and many not so notable), land speculators have acquired an interest in the land from a family member, and that outside entity (now a co-owner) initiates the partition with the ultimate aim of acquiring the total property in a closed bidding scenario that includes only heirs and the new outside shareholder. Often, family members are unable to outbid a cash-rich real estate developer, and the family loses the land (Casagrande 1986, Chandler 2005, Rivers 2007).

Although most State laws governing property divisions favor partition in kind over partition sale, more sales occur because subdividing small acreage among a large number of heirs is often impractical (Craig-Taylor 2000). Also, courts have ruled that if a partition in kind is requested, those making the request must show that the land can be divided in this manner. Although a co-owner requesting a partition sale has to show financial damages resulting from partition in kind, Craig-Taylor (2000) writes that these damages can be minimal. Courts favor economic efficiency/equity over other considerations in the disposition of tenancies in common. However, Craig-Taylor (2000) challenges courts' adoption of a money metric as

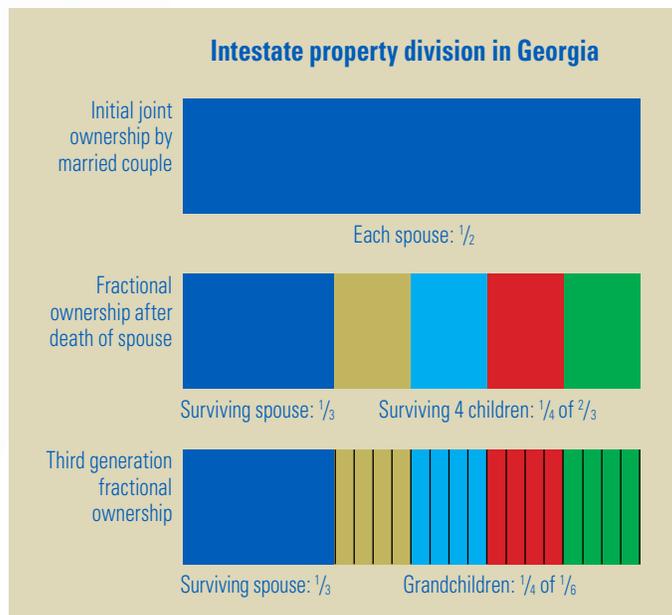


Figure 2—A simplified three-generation depiction of undivided ownership.



LEFT: Jeremiah Green farm in coastal South Carolina. (photo by Cassandra Johnson Gaither, USDA Forest Service). RIGHT: Farm, SC. (photo by Ricky Layson, Ricky Layson Photography, Bugwood.org)



the optimal criteria for dividing property. She argues that property should not be viewed primarily as a means of wealth enhancement but rather that sentimental aspects of land and home should be considered along with market value in determining how properties are divided. Dyer and Bailey (2008), too, point out that the cultural basis of heirs' property ownership reinforces strong communal relations in rural Black culture.

The Uniform Partition of Heirs Property Act is considered by legal scholars as a first, significant step in addressing the cultural aspects of heirs' property ownership. Sponsored by the National Conference of Commissioners on Uniform State Laws, the Uniform Partition Act has been submitted to States for consideration (Mitchell 2014). Approved in 2010 by the Uniform Law Commission, it has been enacted in Alabama, Arkansas, Connecticut, Georgia, Montana, Nevada, and South Carolina, and has been introduced in Hawaii, Mississippi, and West Virginia (Uniform Law Commission 2016). Some of the key provisions are: 1) a clearer definition of heirs' property; 2) in the event of a property sale, those heirs not wishing to sell could purchase the interests of the seller, and the former would have to match only the amount that the seller had invested in the property rather than the land's larger fair market value; and 3) crucially, the court must consider both economic *and* noneconomic factors in determining whether property should be partitioned in kind or sold. Noneconomic aspects include intangible sentiments, attachments, and histories associated with land ownership.

Not Necessarily Tragic?

Writers have used emotionally laden terms to describe heirs' property, given the persistent haunt that partition sales could dislodge families from the only homes they may have ever known. Consider, for example, Pearce's (1973) "problems" and "pitfalls," Chandler's (2005) "loss in my bones," Deaton's (2007) "dead capital," and Mitchell's (2014) "devastating land loss." These terms reference cultural and/or familial dissolution (Chandler 2005).

Writers in this tradition tend to be legal scholars or social scientists attuned to the historical marginalization of rural small-scale farmers and landowners, African Americans in particular (Baab 2011; Chandler 2005; Dyer and Bailey 2008; Georgia Appleseed Center for Law and Justice 2013; Hinson and Robinson 2008; Mitchell 2001, 2005).

Although economists are aware of the "displacement" concerns associated with heirs' property ownership (Deaton 2012, Deaton and others 2009), their writings on the topic tend to emphasize problems associated with land productivity. For instance, Heller (1998) describes heirs' property management as a "tragedy of the anticommons." He observes that undivided, jointly held properties result in inefficient management because of the statutory right that all heirs have to deny any single heir a reasonable use of the land. If "commons" are understood as properties where all users have full rights of access, then "anticommons" arise when any owner of said property can be prohibited from any reasonable property uses (Hardin 1968, Heller 1998). Conflicting ideas about the best uses or priorities for the land result in either underuse or disuse of land, and the result is wealth reduction.

Like Heller (1998), Chang (2012) stresses that a tenancy in common becomes tragic only when division of the physical property results in fragmented—i.e., "share chopped" or "big-inch"—parcels (Chang 2012, p. 518; Heller 1998, p. 77) that are too small to be economically or ecologically maximized. Chang's (2012) critique contrasts with those who lament the loss of culture and history when land is transferred from African-American hands to (White) developers. Chang (2012) argues that the *land*, as opposed to the people, who may have historically owned land, would be better off if it were sold as an aggregate because a single, presumably wealthier owner could manage the land with more intention and resources than various owners with disparate management intentions. Chang (2012, p. 523) wrote:

The partition sale (loss) of Black farms transfers the underused co-owned property to the highest bidder who, probably as a sole owner, has the capacity and incentive to use and invest optimally... [T]he *sale* (or, for that matter, loss) of Black farms actually *avoids* underuse and underinvestment, rather than creating them. Therefore, the loss of Black farms might be tragic for African Americans, but it is neither a tragedy of the commons nor a tragedy of the anticommons" [*italic original*].

Miceli and Sirmans (2000) caution, however, that partition by sale is justified only when two conditions are met. First, the sale price received must reflect scale economies—that is, the offer for the land in aggregate is greater than the sum of offers for the land subdivided.

Second, courts must recognize subjective values given to land by nonconsenting heirs—that is, those who do not wish to sell the land. To the extent that this intangible value can be determined (and quantified!), it should be added to the price paid for the land in aggregate to help ensure that nonconsenting sellers are sufficiently compensated for the larger range of values they attach to the land. Also advocating for partition in kind over partition sales, Mitchell and others (2010) emphasize that a partition sale is a *forced* sale that, by its nature, precludes compensation to the seller of a fair market value for the property. They argue that, in purely economic terms, heirs would always receive a higher price from their individual sales of physical partitions as opposed to an aggregate sale. In a forced sale of undivided heirs' property, individual common owners are severely restricted from bargaining with potential buyers, and a less than fair market value for the property is routinely obtained. After partition in kind, each shareholder would receive a deed to clearly titled property. Title holders would own their property as outright fee simple, private property that could be sold without the duress of a court order. The sale price for this clearly titled property would be more consistent with an objective assessment of fair market value.

Alternative Forms of Land Ownership

Implicit in many discussions related to resolution of the heirs' property dilemmas is the assumption that individual ownership (i.e., whether effected by sale or physical split of the land) would provide the most reliable, long-term solution because of the rights and benefits associated with fee simple ownership (Chang 2012, Deaton 2007, Deaton and others 2009, Heller 1998, Pearce 1973). Certainly, the benefits of clear title are indisputable, especially for generationally poor landowners seeking to enter markets that have been historically closed to them. However, individual ownership as the only or even optimal means of achieving this aim *is* disputable. Ostrom's (1990) treatise on localized, collective management of common pool resources suggests viable alternatives to individualization. Ostrom's (1990) influential study in South Asia, Western Europe, and the United States demonstrated that common property regimes can succeed if specific design principles are incorporated into the regimes. These include the understanding that landowners be included in decision-making processes and that conflict resolution strategies can be easily implemented.

Common ownership may be crucial to preserving aspects of rural culture that could dissipate with individual ownership. Dyer and Bailey's (2008) research on heirs' property in Bullock and Hale Counties in Alabama draws attention to the cultural underpinnings of heirs' property ownership. While fully acknowledging the economic constraints of owning heirs' property, the authors suggest that this form of land ownership persists in African-American communities of the rural South as an adaptive measure or form of resiliency, given the structural privations encountered by these populations. These findings are consistent with Penningroth's (2003) study of slave and freedmen's property ownership, which revealed that some Blacks consciously chose to keep land as heirs' property because the familial bonds of communal ownership outweighed the legal and economic security of having clear title.

Himmelfarb and others (2014) argue, too, that market-centered interventions bent on “resurrecting ‘dead capital’” may do more harm than good to affected families because the emphasis on *economic value* excludes *social values*. Meyer (2008) also questions whether the focus on property as capital is apt for all landowners. He stresses that it is important for legal practitioners and policymakers to fully understand the benefits (including intangible ones) and costs associated with title clearance.

As discussed, the Uniform Partition of Heirs Property Act now offers statutory assistance in cases involving heirs’ property partitions. Before this comprehensive legislation was drafted, legal scholars recommended specific revisions to State property laws. Those changes included: 1) establishing exemptions to progressive tax regimes for land classed as heirs’ property (Rivers 2007); 2) requiring that the parties urging partition sale show that the property could not be partitioned in kind (Chandler 2005, Rivers 2007); 3) mandating that a supermajority of co-tenants agreed to property sale rather than a single interest holder; 4) permitting heirs to buy back property that had been sold by partition sale within a specified period; and 5) guaranteeing co-tenants a license in sold properties so those interest holders who did not request the sale would receive compensation from the party initiating the sale (Craig-Taylor 2000). Meyer (2008) also recommended statutory change, such as adopting Mississippi’s practice of establishing ownership through heirship affidavits, changing partition proceedings, and reducing transfer taxes.

Writing specifically about heirs’ property problems in South Carolina’s Lowcountry, both Chandler (2005) and Rivers (2007) addressed the public use doctrine as a means of resolving heirs’ property issues. Faith R. Rivers (2007) critiques the State’s public trust doctrine, the intention of which is to protect the State’s natural resource base from degradation. The doctrine provides the basis for anti-growth legislation; for instance, it specifies limits for housing densities on rural residential land (Brabec and Richardson 2007, Charleston County Council 2008, Johnson and others 2009, Ogawa 2008). Rivers (2007) maintains that, while well-meaning, such policies could actually undermine heirs’ property holders because of the tendency of heirs’ property owners to live in clustered, higher density family compounds. Rather, Rivers (2007, p. 20) argues that a more effective strategy for protecting heirs’ property in the Lowcountry would





be establishing a Gullah Culture Preservation Exemption. This tax exemption would help to limit taxes assessed against heirs' properties by restricting taxable property values to “the *current use*” (italic in original) rather than to “highest and best” market values, which have steadily increased.

Drawing on the sociological literature related to a specific type of co-owned, “identity property” (the family cottage), Waldeck (2013) also argues that laws governing tenancies in common should be revamped to recognize alternatives to both partition by sale and partition in kind. For instance, agreements such as family trusts, limited partnerships, or limited liability companies are routinely used by co-owners who wish to deemphasize the economic value of family cottages and stress their intrinsic value to the family. These agreements may have the effect of reducing co-owners' incentives to bring a partition suit. However, if partition action is pursued, Waldeck (2013) proposes that courts consider temporal partition in cases where physical partition is impractical. Temporal partition would permit those not wanting a partition to remain on the land while compensating the party wishing to exit the tenancy in common.

The following section discusses historical factors contributing to the evolution of heirs' property holdings among African Americans, Appalachian Whites, and Native Americans in the South. This is followed by a review of attempts to estimate the amount of heirs' property in the region.

Roots of Heirs' Property in the Black Belt South

As indicated, much of the literature on heirs' property references problems experienced by Black Belt African Americans. To understand better why common ownership may be prevalent among this population segment, it is important to understand the origins of Black land ownership in the region and the distinctive forms it assumed, compared with the White landowning classes. Traditional West African cultures are instructive in this regard.

Penningroth (2003) writes that property ownership in the precolonial, coastal, Fante region of West Africa (modern day Ghana) was based on intricately woven family lineages that functioned like the network of extended heirs' kin that evolved in Black North American communities in the late nineteenth and twentieth centuries. The similarity lay in the importance of lineage and its effects on land ownership, specifically that family members in both scenarios strove to retain land within the family by asserting ancestral claims to land (Awuah-Nyamekye and Sarfo-Mensah 2011). Similarly, land was and is passed intestate in northern Ghana along patrilineal lines, and the same sort of land fragmentation and loss of wealth witnessed in the United States results for Ghanaian families.¹

Besley (1995) describes traditional property-owning systems in Ghana as communal, which means that people's rights and access to property were granted and governed by a central authority—the chief—not individual families. It is important to understand that, both historically and to some extent today, despite the desire to maintain family land within related kin groups, the chief, and not individual families, was the ultimate authority in matters of land acquisition and disposition. The chief acted as spiritual protectorate of the communal resource, “holding the land in care for their ancestors and the unborn” (Awuah-Nyamekye and Sarfo-Mensah 2011, p. 1).

There has been much discussion concerning African culture in the New World, most notably the famous debates between E. Franklin Frazier and Melville J. Herskovits (Frazier 1957, Herskovits 1940). Frazier adamantly maintained that Africans lost all ties to their cultural heritage when they were brought to the Western Hemisphere, while Herskovits insisted that African retentions are apparent in many aspects of Black American life. Most contemporary scholars agree that African Americans were able to hold on to some of their cultural heritage, although these practices had to be modified to fit New World structural conditions (Holloway 1990). Scholars in the Herskovits tradition would argue that communal understandings of land survived the Middle Passage (the Atlantic route transporting African slaves from West Africa to the West Indies) and became evident in how Blacks conceptualized and practiced land tenure in North America.

In the decades after American slavery, land acquisition for African Americans proceeded slowly and arduously (Penningroth 2003). General Sherman's Field Order Number 15, issued

¹Personal communication. 2016. Email dated May 5, 2016 from Dr. Daonima (Rita) Yembilah, Faculty of Arts, Mount Royal University, Calgary, Canada to Dr. Cassandra Johnson Gaither. On file with author: Forestry Sciences Lab, 320 Green St., Athens, GA 30602.



Tree farmer Huge Schnitzler in Waynesburg, Kentucky, gazing at his woodlot of young locust trees outside the fence, 1950s. Photographer: unknown. (Forest History Society, Inc.)



in spring 1865, called for 400,000 acres of land along the South Carolina and Georgia coasts to be redistributed to African Americans. However, hopes for universal and swift land ownership quickly dissipated when President Andrew Johnson revoked the order later that year (Litwack 1979). It would be nearly 50 years before a largely landless and illiterate people would accumulate significant amounts of land. Yet, the land ownership ideal provided motivation and direction for African Americans during the Reconstruction era and into the twentieth century. Schwenger (1990) and Penningroth (2003) both maintain that Blacks realized that ownership, rather than mere access to land, which they had been given during slavery, was the key to advancing in American society. Land had the power to create a sense of place, a connection to family, and a physical and emotional dwelling realm for the owner and his or her descendants. The significance of lands, imbued with memories of home (e.g., “home places” and “down home”), contextualized rural southern African Americans and linked them to their Black *North American* ancestors to whom the home places often paid homage (Penningroth 2003, p. 158; Stack 1996). Litwack (1979) stresses the importance freed slaves placed on land acquisition. The freed men and women believed that their freedom would be made more palpable with land of their own.

Penningroth (2003) writes that the defining feature of the newly freed person’s relationship to the land was the interplay between land and kinship. The concept and practice of family were more malleable among African Americans compared to Whites. Blood relations, of course, defined family, but kinship could also be extended to fellow ex-slaves who may have been reared on the same plantation or met in one of the many refugee camps that sprang up after the Civil War. These open-ended concepts of family allowed African Americans to build families and pool resources to acquire more land than they would have been able to singularly. Importantly, such social and kin networks distinguished Black land ownership modes from those characterizing the land-owning White gentry and poor White farmers. Penningroth (2003) cautions, however, that naturally, like other groups, relations among African Americans were not without conflict. Blacks could wield their claims to kinship and



Historic "Borough House" at 35 Calhoun St. in Charleston, SC (LEFT). The home was constructed by Irish immigrants in 1852 in the Charlestonian single-house style. It was purchased in 1939 by Willis Johnson, Sr., an African American. His descendants, Rebecca Campbell, Catherine Braxton, (RIGHT) and Esther Chandler (not pictured), are Willis Johnson heirs and current owners of the home. (photo by Cassandra Johnson Gaither, USDA Forest Service)

land to unite as well as exclude and marginalize other Blacks deemed different enough from them. Also, communal concepts of land ownership should not be considered an indelible feature of how African Americans practiced land tenure. According to Schweninger (1990), the Black emulation of White American concepts of private property rights was evidenced as early as the Antebellum era, for example, when free Blacks purchased slaves and accumulated other property. These modalities signaled the Black embrace of individualism and move away from communal notions of land ownership, especially by Blacks who had more contact with Whites. This assertion is at odds with widely held assumptions of African Americans' continued belief in communality over individualism (Penningroth 2003, Pollitzer 1999). While it is beyond this report's scope to explore this contradiction, Schweninger's (1990) assertion points to the complexity of the plantation-based African-American culture that developed after slavery and helps to avoid over-simplifications of African-American cultural and social practices.

By 1910, African-American landownership had grown to 15 million acres, with the vast majority of these lands being rural agricultural holdings in Mississippi, Alabama, and the Carolinas (Nembhard and Otabor 2012). Nineteenth and twentieth century African Americans sought desperately to retain land in the family and to transfer this land intact, inter-generationally, to their kin. In doing so, post-slavery African Americans tended to bypass the legalities of formal probate, or they may have legally transferred land in an ambiguous manner, both with the ultimate aim of keeping the land in family hands (Dyer and Bailey 2008, Penningroth 2003, Way 2009, Zabawa 1991). Ironically, however, Meyer (2008) notes that such methods of transferring property likely contributed to the prevalence of heirs' property holdings among Black Belt African Americans.

Black rural land holdings declined steeply during the twentieth century (Daniel 2013, Gilbert and others 2002). African Americans were the principal operators of just 3.2 million acres of

farmland or full owners of just 1 percent of all farms in 2007 (National Agricultural Statistics Service 2009). Nembhard and Otabor (2012) report that the rate of Black land loss has far exceeded losses for other racial and ethnic groups since the turn of the twentieth century. Again, one of the primary contributors to Black land loss has been the vulnerability of heirs' property to tax sales and other forced sales (Chandler 2005; Dyer and Bailey 2008; Dyer and others 2009; Rivers 2006, 2007). To help stem the tide of southern rural African-American land loss, the U.S. Endowment for Forestry and Communities, in collaboration with two U.S. Department of Agriculture agencies (the Natural Resources Conservation Service and the Forest Service), industry, and minority-serving community groups, are focusing on forest lands as an incentive for land retention. The program emphasizes sustainable forestry practices, with the associated aims of increasing forest health and building economic assets via forest market participation for Black forestland owners, many of whom hold forest land as heirs' property. The program started in 2012 with three pilot projects in South Carolina, North Carolina, and Alabama, and expanded to Georgia and Arkansas in 2016 (Schelhas and others, 2016).²

² Hitchner, S.; Schelhas, J.; Johnson Gaither, C. [In review]. A privilege and a challenge: challenges faced by African American landowners with heirs' property in the Southeastern U.S. Submitted to Small-Scale Forestry. On file with author: Forestry Science Lab, 320 Green St., Athens, GA 30602.



LEFT: Longleaf pine stand in South Carolina. (photo by Ricky Layson, Bugwood.org). RIGHT: Sam Cook, former Director of the Sustainable Forestry Program with the Center for Heirs' Property Preservation in Charleston, SC, points out a longleaf pine in coastal South Carolina. (photo by Cassandra Johnson Gaither, USDA Forest Service)

“Dead Capital” in Central Appalachia

President Lyndon Johnson launched the Nation’s War on Poverty from the front porch of an east Kentucky home in 1964. More than 50 years later, poverty continues to distinguish central Appalachia from most other places in the country, despite the region’s vast natural resource base, including timber, mineral, and petroleum reserves (Billings and Blee 2000). Regional scholars argue that the disproportionate amount of land held by absentee and corporate landowners is a leading contributor to persistent poverty in Appalachia. In the early 1970s, Gaventa and others’ study (as cited in Gaventa 1995) reported that nine coal companies owned 34 percent of the land and roughly 80 percent of the coal wealth in five east Tennessee counties, but paid less than 4 percent of local property taxes. The influential 1979 study, *Who Owns Appalachia?: Land ownership and Its Impact*, provided a broader examination of real property ownership in Appalachia, which included 80 counties in Alabama, Kentucky, North Carolina, Tennessee, Virginia, and West Virginia (Appalachian Land Ownership Task Force 1983). Results again supported local speculation that a handful of corporate owners controlled private land ownership in these counties. As well, absentee owners held 72 percent of the land surface and 80 percent of mineral rights. Like Gaventa (1980), the authors of *Who Owns Appalachia* insist that poverty continues in the region because corporations are taxed at very low levels, resulting in woefully underfunded



The Shenandoah Valley, with its rich, cultural history, is located in Appalachia. (photo courtesy of Karen Nutini, Wikipedia Creative Commons CC BY-SA 3.0 license).





public services. Billings and Blee (2000) counter that the mere conditions of absenteeism and corporate ownership do not cause poverty; rather, it is influence wielded by myriad corporate entities *over time* that is problematic.

Eller (1982) stresses that such unevenness of resource possession and influence is not new to the region. In contrast to other areas of the South where (White) yeomen farmers attained some measurable degree of economic successes, the same class of workers in Appalachia could not succeed on these fronts after the Civil War because the most productive lands and resources were harnessed and monopolized by wealthy landowners from the earliest eras of massive White settlement. Before that time, subsistence farming and households thrived across the Cumberlands, as Appalachia's timber and mineral resources lay largely dormant because of the lack of demand; but when the U.S. economy expanded in the post-Civil War era and technological innovations made it possible to harness materials, much of the land on which and under which these resources lay was purchased by industrial interests.

The foremost researcher drawing attention to heirs' property in Appalachia is B. James Deaton (Deaton 2005, 2007; Deaton 2012), who argues that while absenteeism and corporate ownership have been studied in some detail for the region, far less research concentrates on real property owned by residents. Deaton (2005) borrowed the term "dead capital" from Peruvian economist Hernando de Soto (2000), who used it to characterize poverty and the inertia of capital formation in Third World countries. De Soto attributed lingering impoverishment in developing countries to the ambiguous or poorly documented ownership status of property. Similarly, Deaton's (2005) premise is that generational poverty in places like central Appalachia is linked to economic stagnation caused by flimsy property rights associated with tenancies in common or heirs' property ownership.

Deaton (2007) and Deaton and others' (2009) interest in heirs' property extends Heller's (1998) anticommons concept and empirically examines two specific concerns arising from heirs' ownership: "efficiency" and "displacement," or wealth and vulnerability, respectively (Deaton 2012). "Efficiency" is defined as the best fiscal use of property. An efficiency problem occurs when property is not optimized in terms of return on investment. In Deaton's (2007) terms, tenancies in common turn tragic because non-cooperation among co-tenants of property leads to resource underutilization or waste. "Displacement" has to do with heirs' worry of losing partial interest in property because of the actions of co-owners; that is, anxieties around forced sales. Like Dyer and Bailey (2008), Deaton (2007) explores the question of why heirs' arrangements persist when they appear to result in lowered net economic benefits to co-owners. Deaton (2007) reasons that high transaction costs of dissolving heirships contribute to their persistence; but unlike Dyer and Bailey (2008), Deaton's writings give no consideration to emotive or intangible associations with land ownership.

Deaton (2012) addresses proposed reforms contained in the Uniform Partition of Heirs Property Act. He uses a version of game theory to illustrate that the buyout option, a key tenet of the legislation which allows non-partitioning heirs to buy the interests of the exiting heir, may actually perpetuate the problems of heirs' ownership. Such an option, while both lessening the vulnerability concern for non-exiting heirs and benefiting the heir wishing to exit the heirship, does nothing to remediate the fundamental problems associated with heirs' ownership. That is, the legislation does not address the reasons heirs' property originates. Not unlike Chang (2012), Deaton (2012) implies that partition or individualization of property rights, whether in kind or by sale (preferably by sale), is a better alternative to any form of co-ownership.

Native Americans and Fractionated Allotments

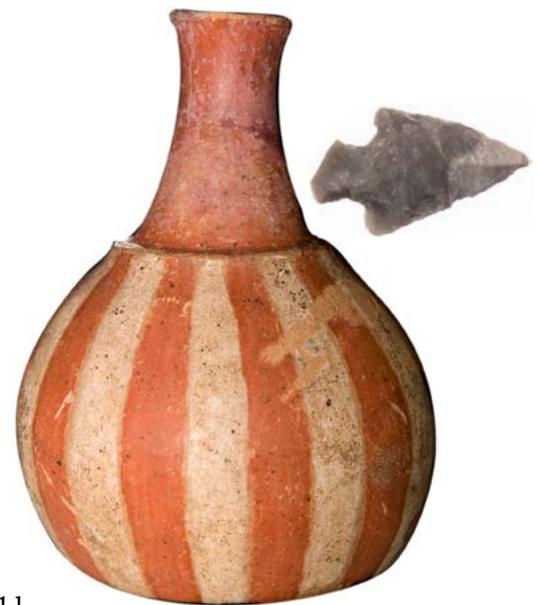
In the nineteenth century, reform-minded Whites (Friends of the Indian) considered communal ownership of land by Native peoples as incompatible with the successful and presumed integration of the same peoples into mainstream American society (Bobroff 2001, Debo 1940). Passage of the Dawes Severalty Act of 1887 (also the General Allotment Act) represented an initial effort by the U.S. Congress to align traditional Native American land governance and tenure systems into a structure based on individual ownership (Debo 1940, Shoemaker 2003). The act authorized the U.S. President to divide Native American reservations into distinct plots for tribal members—160 acres for each family head, 80 acres for each single adult, and 40 acres for each child (Williams 1971). These allotments were to be held in trust by the U.S. Government for 25 years so that the land would be protected from White appropriation (Bobroff 2001, Shoemaker 2003). During this period, legislators reasoned, Native peoples would have time to successfully assimilate into the agrarian-based economy of the nineteenth and imminent twentieth century. Excess or "surplus lands" not allotted were made available for purchase by White homesteaders (Bobroff 2001).

Crucially, the Dawes Act made inheritance of Native lands subject to State and territorial succession laws. Traditional practices that had passed land to successive generations based on family or clan considerations of merit were superseded by State laws governing transference, without regard for culturally based understandings of inheritance (Bobroff 2001). Because Native lands were now under the purview of State or territorial laws of transference, wills, rather than tribal knowledge, were the effective legal mechanism for land distribution. However, it was not until 1910 that Native peoples were permitted to use wills to transfer allotted lands, which set in motion land fractionation (Bobroff 2001). Even after wills could be used to convey land, few Native Americans used them because of their unfamiliarity with the concept of land as commodity (Shoemaker 2003).

As well, Federal legislation created virtual absentee landlords because Native Americans were eventually compelled to lease their lands to Whites (Shoemaker 2003). Again, these conditions severely constrained rather than enhanced Native Americans' ability to participate in free market economies and set the stage for an inoperable land tenure system that has yet to be reconciled (Heller 1998). According to Shoemaker (2003, p. 738), "[t]his result [allotment] practically mandated the start of fractionation" and set into motion a process of "constructive dispossession," which ostensibly established private property rights for Native Americans, but in actuality resulted in wholesale, de facto disenfranchisement of Native peoples of their ancestral lands and those territories to which they had been assigned.

Because this literature review focuses on tenancies in common in the South, of particular interest is fractionated land held by descendants of the original Five Civilized Tribes in Oklahoma (Cherokee, Chickasaw, Choctaw, Creek/Muscogee, and Seminole) (fig. 3), who had been forcibly removed from areas east of the Mississippi River in the early 1800s (Debo 1940). They settled in "Indian Territory," which would later comprise parts of eastern Oklahoma. The Five Civilized Tribes were deemed "civilized" compared to other Native groups because of the former's early adoption of European-American customs, including engagement with a free market economy, educational reform that mimicked European forms, conversion to Christianity, and the creation of a constitution (Baird 1990, Debo 1940). Eventually, the Five Civilized Tribes also relinquished communal conceptions of property and land ownership (Debo 1940). Initially, these Nations had been excluded from mandates of the Dawes Act because of their communalism, although Bobroff (2001) argues that the Cherokees recognized private land rights even before they developed a constitution in the Southeast.

A decade after passage of the Dawes Act and considerable pressure from the U.S. Government, the Curtis Act of 1898 extended stipulations of the Dawes Act to the Five Civilized Tribes. Baird (1990, p. 8/9) writes: "By 1898, tenure in common was no longer a



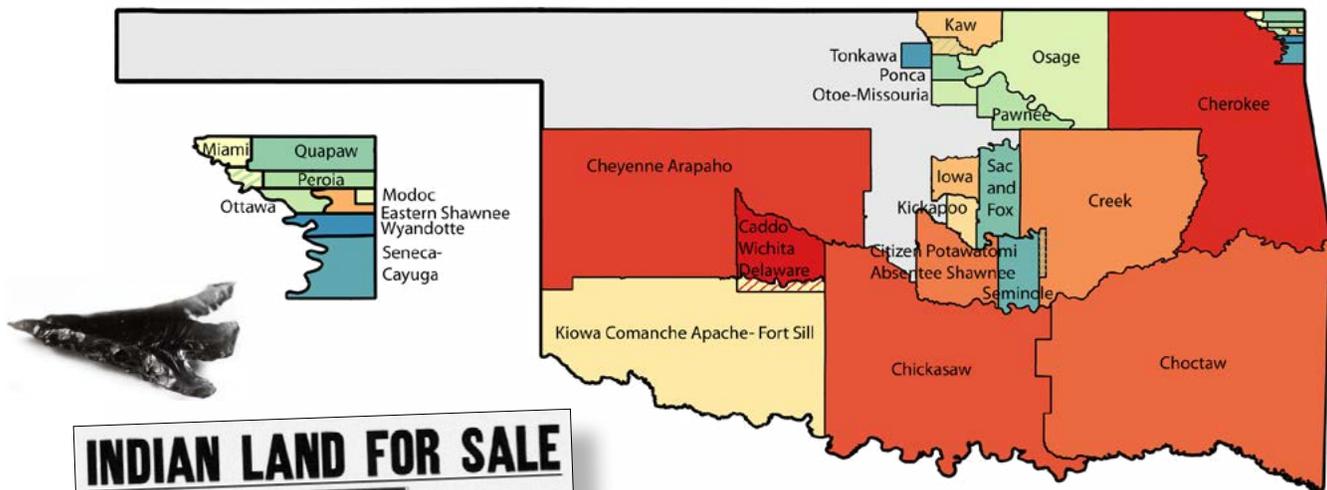


Figure 3—Map of the Oklahoma Tribal Statistical Area, which recognizes tribes in Oklahoma that had reservations in the past, but currently do not.

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Location	Acres	Average Price per Acre	Location	Acres	Average Price per Acre
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Idaho	17,013.00	24.85	Oregon	1,020.00	15.43
Kansas	1,684.50	33.45	South Dakota	120,445.00	16.53
Montana	11,034.00	9.86	Washington	4,879.00	41.57
Nebraska	5,641.00	36.65	Wisconsin	1,069.00	17.00
North Dakota	22,610.70	9.93	Wyoming	865.00	20.64

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WALTER L. FISHER, Secretary of the Interior.
ROBERT G. VALENTINE, Commissioner of Indian Affairs.



sacred principle. ... By 1900, the majority of the Five Tribes people undoubtedly understood the concept of individual land ownership. They preferred the old [English common law] tenure system, primarily because it had served their individual economic interests so well." Debo (1940) writes that ordinary Native Americans abandoned communal notions of land ownership because their leaders did so. They also conceded to the allotment system because the apportionments would deed land to the individual Native person, which meant less control of Indian lands by the Federal Government. They understood that they—the Indians and not the Federal Government—would control their lands.

Both the Dawes and Curtis Acts restricted Native allotment holders from land alienation (i.e., selling their land to non-Indians). These restrictions were included to help protect these new private property owners from unscrupulous land dealers. However, Debo (1940) and Baird (1990) stress that pressure from “grafters” (White land buyers), the Federal Government, Friends of the Indian, and the tribes themselves (Baird only) loosened restrictions. Baird (1990) argues that because the tribes, for the most part, had come to



Farmer plows a large field surrounded by a fence with forest beyond in Kentucky. Photographer: unknown. (Forest History Society, Inc.)

embrace ideas of individual land ownership, they viewed allotment as an imposition on their ability to engage in free enterprise and assert themselves as bona fide contenders in a market economy. Restrictions were loosened, but rather than building capital via real estate dealings, Native landholders were quickly stripped of property by trickery and fraudulent land devaluation. For instance, Debo (1940) reports that a Creek town with taxable assets valued at more than \$1 million received only \$141,227 from land sales, which sold at between one-half and two-thirds the market price.

Many of the same constraints faced by other groups for whom tenancy in common is problematic also plague Native Americans, including inefficient economic utilization, lack of credit access, and disincentives to make land improvements (Shoemaker 2003). Sentimental values are diminished as well because many fractional landowners have no actual physical connections to their land. Ironically, homelessness has been an enduring characteristic of peoples with millions of acres of “theoretical” land (Shoemaker 2003). However, historically Native American co-tenancy differed from non-Native American joint ownership in that land was not subject to partition sales because the land was held in trust by the Government and prohibited from sale. But here as well, high transaction costs restrict landowners’ ability to leverage the property. For example, the extreme efforts required in any individual attempt to harness the property’s equity would make such negotiations prohibitive because of the morass of information exchanges required to identify owners. Also, lands that are sufficient for productive agricultural uses are typically leased to others (for their productive uses!), or the land is so miniscule as to render it ridiculously small for production or habitability.

Mandated allotments ended in 1934, along with a loss of nearly 90 million acres of Native American land (Bobroff 2001). The Indian Land Consolidation Acts of 1983, 1984, and 2000 were passed to remedy the failings of the General Allotment (Dawes) and Curtis Acts. One important remedy involves “buy back” of fractionated lands from allottees in exchange for consolidated tribal acreage (U.S. Department of the Interior 2012). Observers remark that these efforts have not been effective, given the daunting and cumbersome process of having the exchanges approved by various Federal and tribal bureaucracies. Another remedy is the stipulation that small fractional interests escheat or revert back to tribal authority when the interest holder dies. Land escheatment has also been ineffective in addressing allotments, in part because escheatment focuses on restoring fractionated lands *after* they have been divided rather than on halting the source of the fractionation (i.e., the mandate that Native American lands be conveyed via the State laws of succession). Failure of these policies is evidenced by the U.S. Department of the Interior (2012) report that Native American fractionation increased by 12.5 percent from 2007 to 2011.

In 2012, roughly 150 Native American reservations contained approximately 93,000 fractionated tracts, 2.9 million fractional interests eligible for purchase, and 10.6 million fractional acres. The number of individual owners of these interests was 219,000. These figures include 884,865 acres in the Southern Plains (including Oklahoma) and eastern Oklahoma (U.S. Department of the Interior 2012). The most recent attempt at rectification is provided by the *Cobell* settlement (a part of the Claims Restoration Act of 2010), which authorizes the U.S. Department of the Interior to use a \$1.9 billion Trust Land Consolidation Fund, again, to purchase fractional land interests (Indian Land Tenure Foundation 2015, U.S. Department of the Interior 2012). These lands will be placed in trust for the tribes. Land purchases commenced in December 2013. As of November 2014, individual landowners had received \$209 million from sales, and tribal lands had increased by 7,500 tracts. More than 350,000 acres had been placed into tribal trust (U.S. Department of the Interior 2014).

Heirs' Property Estimations

I am aware of 10 attempts, spanning a period of roughly 40 years, to quantify the extent of heirs' property in the South, which do not include Native American allotments in Oklahoma. These estimations have been conducted for the region as a whole, for counties within States, for rural electric cooperatives, and for individual counties. [See table 1 for a summary of findings.] The first account is provided by Graber's (1978) examination of 10 counties across 5 States with the highest rural African-American concentrations (Alabama, Georgia, Mississippi, North Carolina, and South Carolina). With the assistance of local tax officials, Black landowners listed on county tax rolls were identified. The tax auditor of each county was then asked to identify heirs' properties. Graber (1978) estimated that one-third of all rural Black-owned land was heirs' property across these five States. However, several methodological problems with this approach were noted, including: 1) some auditors were reluctant to make the identifications more than once; 2) multiple names could be associated

with the same acreage; and 3) some acreage could have been partitioned but had not been noted in the tax records. Despite these limitations, Graber (1978) was confident that estimates were accurate approximations based on discussions with informed local officials.

Multi-county approximations are also provided by Tinubu and Hite's (1978) assessment of heirs' property in three South Carolina electric cooperatives. The data indicated that 3.5 percent of 1,067 landowners had heirs' property; however, the low response rate to a mail survey (19.5 percent) and the very small number of respondents indicating heirs' property (n=37) prohibited generalization to the larger population of rural cooperatives surveyed.

In 1980, the Emergency Land Fund employed a robust method for identifying African-American landowners using statistical techniques combined with extensive ground-truthing, and involving local tax and court officials to verify Black land ownership. Heirs' property estimation for the entire South was extrapolated from amounts reported in a survey of 1,708 Black landowners across 5 States. Just over 9 million acres of Black-owned land was estimated, with roughly 3.8 million estimated heirs' property acres. This amount represented 41 percent of African-American-owned land at that time.

Working on behalf of South Carolina's Coastal Community Foundation and the Charleston Trident Urban League, Peter Plastrik (as cited in Rivers 2006 and Ogawa 2008) estimated roughly 3,300 heirs' property parcels in the late 1990s for 2 coastal counties: 2,000 parcels in Charleston County and 1,300 parcels totaling 17,000 acres in neighboring Berkeley County. The project report and the methodology were not available for public review.

Deaton's (2005) study of a single Kentucky county (Letcher) was the first to document heirs' property in central Appalachia. The study employed a random sample of property owners from Letcher County's Property Valuation Administrator's office, the tax assessment authority in the county. The survey simply asked respondents (52 percent response rate) to classify their property as fee simple (full ownership), partial interest (heirs'), life estate (legal title divided between owners until one owner dies), or some other arrangement. Approximately 24 percent of respondents indicated they owned a tenancy in common, interpreted as heirs' property.

As well, the Southern Coalition for Social Justice examined heirs' property extent in one North Carolina county (Orange County) (Southern Coalition for Social Justice 2009). The nonprofit obtained a list of 475 parcels, totaling 5,623 acres that had been classified as heirs' property by an official with the Orange County Land Records office. Table 1 shows that the mean number of acres held was relatively small at 11.8. This amount represented about 2 percent of total land acreage in the county. Although useful in helping to understand the extent of heirs' property in the county, the study is limited because the method used to derive these estimates was not described; for instance, there is no indication that the estimates were for African-American-owned land only or for the broader populous.

Dyer and others (2009) also made use of county level tax records in Macon County, Alabama to document the extent and impact of heirs' property in a single Black Belt county. The study



identified tax accounts that noted “heirs of” or “both dec’d” (deceased) after the individual(s) listed as property owner. These designations were considered to be a conservative estimate of heirs’ property in the county because there could have been others with no such notation. Estimated heirs’ property in Macon County was 15,937 acres (1,516 parcels) or 4.1 percent of all land in the county. Heirs’ property was valued at greater than \$25 million.

The Alabama Appleseed Center for Law & Justice estimated the number of heirs’ property parcels for Pickens and Calhoun counties by analyzing 45,000 residential tax files (Baab 2011). Similar to the Dyer and others (2009) study, properties were identified with notations such as “et al.,” “heirs of,” and “estate of.” Unlike prior estimates, however, only about 1.5 percent of residential parcels were classed as heirs’ property using this methodology. Still, these parcels (n=771) accounted for more than 11,000 acres worth more than \$31 million. In South Carolina, the Center for Heirs’ Property Preservation (CHPP) mapped approximately 41,000 acres of heirs’ property in 2011 for six Lowcountry counties—Berkeley, Buford, Charleston, Colleton, Dorchester, and Georgetown.³ A public records search of tax and court records identified heirs’ property parcels using a methodology developed by the Supervising Attorney with the CHPP.

Most recently, Georgia Appleseed (2013) utilized tax assessor accounts and Superior Court records in five Georgia counties to assess heirs’ property extent. With the assistance of numerous volunteers, this probe began with a review of 20 counties but was narrowed to 5 counties because of the extensive amount of work involved. In Chatham, Chattooga, Dougherty, Evans, and MacIntosh Counties, a total of 1,620 parcels were found, totaling 5,215 acres and with an estimated fair market value of \$58,649,195.

³ Personal communication. 2014. Email dated April 23, 2014 from Dr. Jennie Stephens, Executive Director, Center for Heirs’ Property Preservation, Charleston, South Carolina to Dr. Cassandra Johnson Gaither. On file with author: Forestry Sciences Lab, 320 Green Street, Athens, GA 30602.

CONCLUSION

This review indicates that the characteristics of places likely containing significant instances of tenancies in common—the Black Belt, central Appalachia, and eastern Oklahoma—display some commonalities, specifically economic stagnation resulting in generational poverty. However, the literature suggests that historical factors contributing to the prevalence of heirs' property in each of these regions are somewhat distinct. Schweninger (1990) notwithstanding, in the Black Belt, a communal culture and distrust of the legal system are thought to have created extensive heirships. In Indian Territory, the federally mandated allotment system resulted in fractionated titles. In Central Appalachia, Gaventa (1980), Dunaway (1994), and Billings and Blee (2000) indicate that resource domination by wealthy interests usurped power from small landowners, thus removing landowners' ability to leverage resources and accumulate wealth. However, this does not explain the genesis of communal property in Central Appalachia. Why did private property ownership take this form? If Deaton's (2005, 2007) hypothesis is correct, high transaction costs involved with title clearance contribute to the perpetuation of tenancies in common in this subregion and elsewhere across the South.

While the efficiency aspects of heirs' property ownership have been analyzed in the academic literature and the popular press, I am aware of only several empirical efforts that have examined the extent of heirs' property ownership in the South. Other than Native American ownership, the few estimates made so far focus nearly exclusively on the Black Belt. As discussed, these studies vary in their scope—from a single county to South-wide estimations (Baab 2011, Dyer and others 2009, Emergency Land Fund 1980, Georgia Appleseed 2013, Graber 1978, Southern Coalition for Social Justice 2009, Tinubu and Hite 1978). Also, I am aware of only Deaton's (2005, 2007) estimates for a single Kentucky county, although, again, Central Appalachia is thought to contain large numbers of heirs' parcels.

Further, no studies have considered questions related to the spatial arrangement of heirs' properties; that is, whether they tend to cluster in a given geographical space or whether their distribution is more randomly displayed. Also, virtually no data exists on the physical structure of land cover on heirs' properties. A pertinent question is whether this form of land ownership (a social driver) is a strong enough factor to render the physical characteristics of heirs' properties differently, in systematic ways, from properties with clear title. Again, Deaton (2007) and Deaton and others (2009) discuss inefficient land management and suggest that such lands might be more degraded in ecological measures. For instance, Deaton

and others (2009) describe a case study from Letcher County, Kentucky where co-owners' reluctance to periodically harvest timber resulted in forest undergrowth, thus increasing fuel loadings. This example suggests a less than optimal fire management scenario for these landowners, but the study provided no details on timber structure or how land cover may have changed over time.

These research gaps present an opportunity to explore three avenues that can extend heirs' property scholarship. One area of research involves examining the extent of heirs' property holdings in places outside the Black Belt South. In a subsequent paper, my co-authors and I estimate heirs' property extent in a Kentucky and a Texas county by utilizing data from county tax databases. This research focuses attention on heirs' property ownership in Appalachia and in a region of the South (west Texas) where no estimates of tenancies in common have been made. Ward and others' (2012) and Way and Wood's (2013) research on home ownership and estate planning among residents, primarily Hispanic, living in west Texas *colonias* suggested a situation of heirs' properties in the making given that householders in 89 percent of the more than 1,300 households surveyed in the study had not created wills. This investigation also examines the spatial location of these properties; for instance, whether they tend to cluster in specific geographic locations or whether they can be characterized by dispersed patterns.⁴ This research is important in understanding better the extent to which this form of social vulnerability (heirs' status) clusters. Intense clustering of heirs' properties in a given area undermines the ability of homeowners to use those properties to create wealth because of the many limitations on the use of heirs' properties as collateral.

A recurring question at academic conferences where heirs' property research is presented is: how much exists, and what is the magnitude of the problem in a local, regional, or national context? As well, published scholars have called for more research on the extent of heirs' ownership (Baab 2011; Deaton 2005; Dyer and Bailey 2008; Mitchell 2001, 2005). To address this need, attorneys with the Carl Vinson Institute at the University of Georgia and Research Work Unit 4952 (U.S. Forest Service, Southern Research Station) have developed an automated method of identifying potential heirs' property parcels from county tax rolls. The process uses Computer Assisted Mass Appraisal tax data to identify primary indicators of heirs' property such as sale date, parcel address, and date of property improvements.⁵

At this juncture, research on the extent of heirs' property is crucial because of the many constraints associated with this type of land ownership. Federal efforts to offer remediation to heirs' property owners, in the form of home or land improvement loans, are hindered because landowners with unclear titles are typically not eligible for assistance programs. A better understanding of the extent and characteristics of these properties is a first step in helping American landowners more fully realize the value of their lands.

⁴Johnson Gaither, C. [In review]. Appalachia's "Big White Ghettos" and Texas colonias: exploring spatial dimensions of heirs' property in lesser known places. Submitted to Rural Sociology. On file with author: Forestry Sciences Lab, 320 Green St., Athens, GA 30602.

⁵Jones, S.; Pippin, J.S.; Johnson Gaither, C. [In preparation]. A GIS methodology for heirs' property estimation. On file with author: Forestry Sciences Lab, 320 Green St., Athens, GA 30602.



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Abstract: Heirs’ property is inherited land or real estate owned by two or more people as tenants in common. The property is typically passed to heirs without a will or with “clouded title” outside the formal probate process. This type of land tenure presents problems to its owners because it is very difficult for heirs to leverage such assets to enhance property values—for example, to use these assets as collateral to secure home improvement loans. Heirs’ property ownership also restricts landowner engagement with land improvement programs offered by State and Federal governments, again because of unclear titles. As well, unclear title carries the looming threat of displacement for family members who live on the land because any heir can petition a court to divide the land, which may be against the wishes of family members not interested in selling.

Federal agencies like the Forest Service, U.S. Department of Agriculture, are interested in estimations of the extent of heirs’ property ownership because of their commitment to rural economic development. However, only a few studies have addressed estimations of this land tenure form or the culture of place that may have created it. As well, the bulk of the existing literature on this topic focuses mostly on issues arising from such ownership in the southern Black Belt. This literature review extends this scholarship to heirs’ properties among Native American tribes in the South. The review also covers the limited research directed to this issue in Appalachia and identifies future research areas.

Keywords: Appalachia, Black Belt, Five Tribes, heirs’ property, land tenure.





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