BLACK LANDOWNERS BEWARE: A PROPOSAL FOR STATUTORY REFORM

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I
INTRODUCTION

Black people have been losing their land at an alarming rate and may soon become an entirely landless people.[1] Black ownership of land has declined from a peak of 15 million acres in 1910 to 5.5 million today,[2] reflecting the disappearance of one of the most significant means of producing wealth available to black people. Although this land loss is associated with larger trends in the American economy which have spelled the demise of the small farmer generally,[3] the historic oppression of black people plays a special and critical part in the decrease of black land ownership.[4]

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1. Black Economic Research Center, *Black Land Loss: The Plight of Black Ownership*, SOUTHERN EXPOSURE, Fall, 1974, at 112.

2. THE EMERGENCY LAND FUND, REMOTE CLAIMS IMPACT STUDY (PHASE I—INTERIM RPT.) 26 (1980) [hereinafter cited as ELF REMOTE CLAIMS STUDY]. Estimates made from census figures available in 1972 indicate that black farmers owned no more than 5 million of America's 1 billion agricultural acres. *Blacks in the South Struggle to Keep Their Land*, N.Y. Times, Dec. 7, 1972, at 39, col. 3, 53, col. 1.

3. Agriculture has become increasingly capital-intensive in recent years. The United States Department of Agriculture states that farmers who own less than a certain number of acres and amount of farm machinery do not have sufficient economies of scale to operate efficiently. *See, e.g.*, Finger, Fowler & Hughes, *Agribusiness Gets the Dollar*, SOUTHERN EXPOSURE, Fall, 1974, at 150.

4. In 1969, Housing and Urban Development Assistant Secretary Jackson charged that racism is pervasive in property laws and warned that land available to blacks and the poor was rapidly disappearing. *Blacks Form Pro-Militant Legal Unit*, N.Y. Times, June 1, 1969, at 45, col. 1. Blacks gave their life savings to acquire this land. ELF REMOTE CLAIMS STUDY, *supra* note 2, at 31. The fabled "40 Acres and a Mule" promised by the Freedman's Bureau never materialized. Even the land actually conveyed to blacks in the South Carolina and South Georgia coastal areas by Sherman's Special Field Order #15 was "reclaimed" by former Confederate officials after the Civil War. *See* J.S. ALLEN: RECONSTRUCTION, THE BATTLE FOR DEMOCRACY 42 (1966). In 1974 blacks comprised 11.5% of the population, but owned only 3/10% of all privately held land. Clift, *Black Land Loss: 6,000,000 Acres and Fading Fast*, SOUTHERN EXPOSURE, Fall, 1974, at 108.

Many ways to push poor people from the land are legally permissible.[5] The loss of black-owned land is partly a function of a formidable obstacle course of tax, civil procedure, inheritance, and real estate laws which must be overcome if a black person is to retain his or her land. Each of these laws accounts for the substantial acceleration in the shift in land ownership from blacks to whites. The rural black, marginally literate at best, often signs away rights which he does not understand or which he does not know he has. Illiteracy and racism thus work hand-in-hand to deprive many barely self-sufficient people of their land, forcing them into urban ghettos and onto welfare rolls.[6] Despite these obstacles, however, some black landowners have begun to fight back, trying to retrieve the land that has been taken from them.[7]

This Article will survey the laws used to remove blacks from their land, such as partition sales, tax and debt foreclosure, adverse possession, and eminent domain, and suggest reformation of these laws to stop the attrition of black land ownership.

II
HEIRS' PROPERTY

Much land owned by blacks has been lost and more may be lost because older generations of black landowners failed to write wills to control disposition of their land. Some landowners were superstitious and believed they would die soon after writing a will; others hoped to maintain a "family estate," owned in cotenancy, as a home for succeeding generations, which would retain value only as long as the estate was preserved.[8] Much black-owned land thus has passed by intestate descent, both historically and currently.[9] When a landowner dies intestate, title to the property passes to his heirs according to state statutes of descent and distribution,[10] and the heirs

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5. *See* the discussion of partition sales, tax and debt foreclosure, adverse possession, and eminent domain in sections II-V, *infra*.

6. Black Economic Research Center, *supra* note 1, at 112-13.

7. In United States v. Timmons, No. 279-50 (S.D. Ga., filed June 12, 1979), blacks in Harris Neck, Georgia, are challenging the federal government's appropriation of their land by eminent domain. *See* text accompanying note 209, *infra*.

8. THE BLACK ECONOMIC RESEARCH CENTER, ONLY SIX MILLION ACRES: THE DECLINE OF BLACK OWNED LAND IN THE RURAL SOUTH 53-55 (1963) [hereinafter cited as SIX MILLION ACRES]. *See also* note 19, *infra*.

9. *See* SIX MILLION ACRES, *supra* note 8; *see also* note 19, *infra*.

10. *E.g.*, GA. CODE ANN. § 113-901 (1973). The heirs may be many and varied. They are usually descendants of the intestate, but some jurisdictions include parents of the intestate, siblings and their descendants, next of kin of the surviving spouse, and next of kin of a predeceased spouse. *See, e.g.*, GA. CODE ANN. § 113-903 (1978), which provides:

> The following rules shall determine who are the heirs at law of a deceased person:
> 1. Upon the death of the husband without lineal descendants, the wife is his sole heir, and upon the payment of his debts, if any, may take possession of his estate without administration.
> 2. Whenever the husband or widow of a deceased person shall be under the age of 21 years and entitled to a share in the estate of such deceased husband or wife, he or she

generally hold as cotenants or coparceners.[11] This creates heirs-at-law property ("heirs' property").

Though the land stays in black hands, this means of passing land ownership from generation to generation works to the detriment of black landowners. The problems resulting from the older generation's reluctance to write wills are detailed below.

A. Statutes of Descent and Distribution

State statutes generally have similar provisions for the division of an intestate's real property. If the sole survivor is the spouse, he or she often takes

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shall be entitled to take and hold such share without the intervention of a guardian or other trustee.

3. If, upon the death of the husband, there are children, or representatives of deceased children, the wife shall have a child's part, unless the shares exceed five in number, in which case the wife shall have one-fifth part of the estate. No election by the wife shall be necessary to entitle her to such portion of the husband's estate, but she shall be entitled thereto as a matter of law, unless she shall, within 12 months from the death of the husband, notify the administrator that she elects to take her dower, or, if there be no administrator, file such notice in the office of the judge of the probate court of the county. If such notice is given, the wife shall have no interest in the realty beyond her dower rights, but such election shall not affect her rights under this section with respect to the personal property of the decedent.

4. Children shall stand in the first degree from the intestate and inherit equally all property of every description, accounting for advancements as hereinafter provided. Posthumous children shall stand upon the same footing with children in being upon all questions of inheritance. The lineal descendants of children shall stand in the place of their deceased parents, but in all cases of inheritance from a lineal ancestor the distribution is per stirpes and not per capita.

5. Brothers and sisters of the intestate shall stand in the second degree, and shall inherit, if there is no widow, child, or representative of a child. The half-blood, both on the paternal and maternal side, shall inherit equally with the whole-blood. (Brothers and sisters of the whole-blood, brothers and sisters of the half-blood and brothers and sisters adopted by a mutual parent of the intestate shall stand in the same degree and inherit equally from each other.) The children or grandchildren of brothers and sisters deceased shall represent and stand in the place of their deceased parents, but there shall be no representation further than this among collaterals. If all the brothers and sisters be dead at the death of the intestate, then the distribution is between the nephews and nieces per capita; and if any of the nephews and nieces be dead, leaving children, distribution is to be made as though the nephews and nieces were all alive, the children of the deceased nephew or niece standing in the place of the parent.

6. The father and mother inherit equally with brothers and sisters and stand in the same degree.

7. In all degrees more remote than the foregoing the paternal and maternal next of kin shall stand on an equal footing.

8. The grandfathers and grandmothers of the intestate stand next in degree.

9. Uncles and aunts stand next in degree with the children of any deceased uncle or aunt inheriting in the place of their parent.

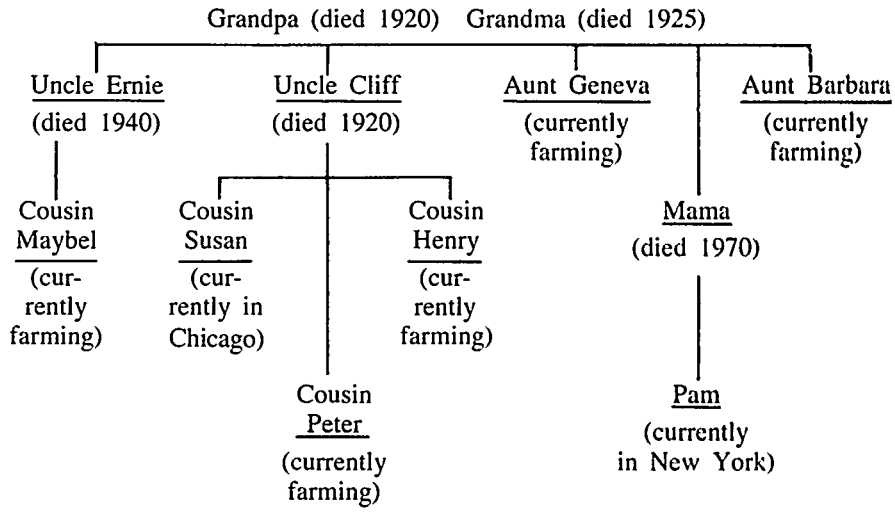
10. First cousins stand next in degree.

11. The more remote degrees of kinship shall be determined by counting the steps from the claimant to the closest common ancestor and from said ancestor to the intestate. The sum of the two chains shall be the degree of kinship.

11. *See* note 18, *infra*, and accompanying text.

everything.[12] If the survivors include the spouse, children, and parents, distribution may be among all of them.[13] Adopted children may inherit just as natural children do, provided the formalities of a legal adoption have been met.[14] Childless black couples often take in the children of others and rear them as members of their family without formal adoption proceedings. These couples might wrongly assume that such children would be recognized as legal heirs, and fail to write a will or make other provisions for the disposition of their property upon death. When the only potential heirs of a childless couple are children who were not formally adopted, the estate may escheat to the state for want of a proper heir.[15]

An even more critical complication, however, is the multiplicity of owners who may be entitled to inherit when intestate estates must be administered according to statutory rules of distribution. If Grandpa and Grandma had owned a fifty-acre farm in 1910, for example, intestate succession might involve the following family members:



If Grandpa dies without a will, the distribution of the fifty acres would be according to statutory rules. In Georgia, for example, Grandma would take one-fifth (ten acres) of the fifty acres. The remaining four-fifths (forty acres) would be divided equally among the four surviving children with heirs of any

12. *See, e.g.*, GA. CODE ANN. § 113-903(1) (1973), *supra* note 10.

13. *See, e.g.*, GA. CODE ANN. §§ 113-903(3),(6) (1973).

14. *See, e.g.*, GA. CODE ANN. § 74-413 (Supp. 1979). In Georgia, a "parol obligation to adopt the child of another, accompanied by virtual though not statutory adoption, and acted upon by all parties concerned for many years and during the obligor's life," may provide the basis for a claim in equity against that portion of the obligor's estate undisposed by will. Rucker v. Moore, 186 Ga. 747, 747-48, 199 S.E. 106, 106 (1938). *See also* GA. CODE ANN. § 113-903(5) (1973), *supra* note 10.

15. *See, e.g.*, GA. CODE ANN. § 85-1101 (1970) (upon failure of heirs, the estate of an intestate escheats to the State).

deceased children taking by representation. Had all five children survived, each would have taken one-fifth of four-fifths (four-twentififths) of the estate (eight acres), while Grandma would still take one-fifth.[16] Uncle Cliff, however, predeceased Grandpa and left behind three children of his own. These children, Cousins Susan, Henry, and Peter, would take equally of their father's four-twentififths share of the fifty acres (a four-seventififths share, two and two-thirds acres each). Upon Uncle Ernie's death in 1940, Cousin Maybel, as his sole surviving heir, would take his entire four-twentififths share. Pam would succeed to Mama's four-twentififths share. Aunt Geneva and Aunt Barbara, the only surviving children of Grandpa and Grandma, would each take four-twentififths of the fifty acres. Matters would be further complicated if Grandma died without a will as her one-fifth share would be similarly divided among the surviving children and grandchildren.[17]

The diagram thus illustrates the complexity of ownership patterns which can result from the succession of property by the statutes of descent and distribution without benefit of probate or supervised administration. Numerous relatives can be left as cotenants or coparcenors, each holding a small share of a very small piece of property.

Because most statutes regulating intestate succession provide that children take land as cotenants,[18] the property becomes controlled by several owners. These new owners, although related, may have different and incompatible ideas about the use of the land. Some relatives might remain on the farm to work the soil while others, possibly unaware of their inheritance, might move away and have little to do with the property. Each heir has an undivided interest in a single parcel of property and each has an equal right of ownership and possession. Although it is possible to probate an intestate estate and divide the property among heirs, few blacks do so.[19] After several generations, the heir in occupancy may know the identity of only a few of his cotenants. Title to the property is thus clouded and cannot be mortgaged, sold, or otherwise disposed of without the consent of every heir. The heir who actually lives on the property soon discovers that no bank will accept the property as collateral for a loan because there is no clear title.[20] Improvements which would make

16. *See* GA. CODE ANN. § 113-903(3) (1973), *supra* note 10.

17. *Id.*

18. The term "cotentants" is here meant to describe tenants in common as well as joint tenants. *See generally*, Moss & Siebert, *Classification and Creation of Joint Interests*, 1959 U. ILL. L.F. 883.

19. *See* ELF REMOTE CLAIMS STUDY, *supra* note 2, at 46. According to the report, the failure of blacks to probate intestate estates is attributable to the same factors which discourage the writing of wills: "Illiteracy and ignorance caused by lack of education and exposure to business and economic endeavors, coupled with superstition, unique religious beliefs and distrust for the legal system. . . ." *Id.*

20. Programs of the Farmer's Home Administration, for example, a federal government lending agency with a mandate to serve low-income landowners, particularly minorities, have been less responsive to the needs of people in rural areas than those elsewhere, because clear title cannot be obtained. *See* SENATE COMMITTEE ON BANKING, HOUSING AND URBAN

the land more productive or marketable, therefore, cannot be financed because no reputable lender will lend money against land with a clouded title.

When the property is jointly owned by two or more heirs, the occupant heir has little incentive to use his or her own resources to make improvements. The non-occupant heirs, through their cotenancy, would share in any increased value of the land.[21] The risk presented by disputes among the heirs also discourages the occupant heir from improving the property's value. While the occupant heir must pay taxes and make those repairs mandated by local health and building codes, he has little reason to develop the land or devote it to a higher use. The risks presented by joint ownership thus exacerbate the black land loss problem, because land which cannot be developed is uneconomical to hold.[22]

The heir in possession has few alternatives. He or she may purchase the interest of all the heirs and merge their estates. Alternatively, the heir may bring an action to quiet title,[23] to allege acquisition of title by adverse possession,[24] or to determine the interests of all heirs and to partition the property accordingly. The heir may then force a partition sale.[25]

AFFAIRS, AUTHORIZATIONS FOR RURAL HOUSING PROGRAM: HEARING BEFORE THE SUBCOMM. ON RURAL HOUSING ON S. 1359 TO AMEND THE HOUSING ACT OF 1949, 95th Cong., 1st Sess. 27 (1977). The Farmer's Home Administration refers to these title clouds as "remote claims." *Id.* at 9-13. For discussion of the hesitancy of private lenders to make loans against heirs' property, *see* ELF REMOTE CLAIMS STUDY, *supra* note 2, at 146-47.

21. If an heir is a tenant in common or joint tenant, he improves the common property not only for himself, but for the benefit of all heirs. *See, e.g.*, Weston v. Morgan, 162 S.C. 177, 160 S.E. 436 (1929).

22. *See* ELF REMOTE CLAIMS STUDY, *supra* note 2, at 16, 18.

23. *See, e.g.*, ALA. CODE § 6-6-540 (1975), which provides:

> When any person is in peaceable possession of lands, whether actual or constructive, claiming to own the same, in his own right or as personal representative or guardian, and his title, thereto, or any part thereof, is denied or disputed or any other person claims or is reputed to own the same, any part thereof or any interest therein or to hold any lien or encumbrance thereon and no action is pending to enforce or test the validity of such title, claim or encumbrance, such person or his personal representative or guardian, so in possession, may commence an action to settle the title to such lands and to clear up all doubts or disputes concerning the same.

24. The doctrine of constructive ouster has been adopted in many states. According to this doctrine, a tenant in common under certain circumstances is presumed to have ousted his cotenant, thereby giving rise to a hostile relationship, which could support an "adverse possession" defense to an action by the ousted tenant for ejectment. (For a discussion of adverse possession, *see* text accompanying note 193, *infra*.) The presumption arises when the ousting cotenant claims to have been in sole and undisputed possession and use of the land for twenty years and the ousted cotenants have not demanded an accounting of rents and profits nor moved to be admitted to possession. Collier v. Welker, 19 N.C. App. 617, 199 S.E.2d 691 (1973). *See also* Monte v. Montalbano, 274 Ala. 6, 145 So. 2d 197 (1962); Alewine v. Pitcock, 209 Miss. 362, 47 So. 2d 147 (1950); Wells v. Coursey, 197 S.C. 483, 15 S.E.2d 752 (1941).

25. Heirs who take land simultaneously through descent and distribution laws (intestate succession statutes) presently take land as tenants in common in all jurisdictions. *See* C.J. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 224 (1st ed. 1962). Any heir, as tenant in common, can force a partition sale, regardless of the size of his interest. *See, e.g.*, ALA. CODE § 35-6-20 (1977); S.C. CODE § 15-61-10 (1976).

Each of these alternatives, however, has its drawbacks. Buying out the interests of all the heir-cotenants may be impractical because of the expense involved and the difficulty of locating the heirs. If one heir is overlooked, or is a minor or an incompetent, the securing of fee title can be stalled or defeated.[26] An action to quiet title by showing adverse possession may be legally arduous because of the heavy presumption that possession by a cotenant is not adverse.[27] Furthermore, the statutory period for establishing adverse possession may be extended by the minority or incompetency of an heir.[28]

Occupant heirs generally clear title by partition sale,[29] an expensive and time-consuming method which may result in the loss of the entire property. When the acreage is small and the heirs many, a sale of the land and division of the cash proceeds from the sale may be the only practical solution. In the paradigm on page 00, Maybel, Geneva, Barbara, and Pam each would have about eight acres; Susan, Henry, and Peter each would have two acres. Pam and Susan may be living in big cities and therefore are not interested in the land; they might prefer to sell it. If the other cotenants cannot accumulate enough money to buy them out, Pam and Susan might ask that the land be sold and the proceeds divided among the cotenants.

The land is usually sold at public auction[30] rather than being divided in kind. Some jurisdictions permit the heir in possession to acquire title by paying into a court-established account a sum of money equal to the fair market value of the land as determined by the court.[31] More commonly, the land is sold at

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26. An overlooked heir or one who is incapable of conveying good title because he or she is a mental incompetent or a minor would maintain ownership of the property or an interest therein. Such an heir could thereafter assert that claim against any ownership or interest based on the conveyance. *See, e.g.*, GA. CODE ANN. § 29-106 (1973).

27. *See* Wells v. Coursey, 197 S.C. 483, 15 S.E.2d 752 (1941); Hays v. Dillard, 176 Ala. 109, 57 So. 695 (1912). This presumption can be overcome by a presumption of "constructive ouster" in some circumstances. *See* note 24, *supra*.

28. *See, e.g.*, Whitworth v. Whitworth, 233 Ga. 53, 210 S.E.2d 9 (1974) (infancy); Warlick v. Plonk, 103 N.C. 81, 9 S.E. 190 (1889) (mentally disabled persons). *See generally* 43 C.J.S. *Infants* § 121 (1978); 44 C.J.S. *Insane Persons* § 105 (1945).

29. Typically, the heirs cannot agree on what must be done with the property, which therefore renders impossible any settlement of the problem by contract. Adverse possession is very difficult to establish among cotenants. Partition forces all heirs to participate, and does, at least, resolve the dilemma by dividing the property in kind or by dividing the proceeds of a partition sale among the heirs.

30. *See, e.g.*, S.C. CODE § 15-61-90 (1977), which provides:

> If it shall appear to the court that it will be for the benefit of all parties interested in the estate or property that it should be vested in one or more of the persons entitled to a portion of it, on the payment of a sum of money assessed as provided in § 15-61-80, the court shall determine accordingly, and the person or persons, on the payment of the consideration money, shall be vested with the estate so adjudged to such person or persons. But if it shall appear to the court that it would be more for the interest of the parties interested in the estate or property that it should be sold and the proceeds of sale be divided among them, then the court shall direct a sale to be made on such terms as to the court shall seem right.

31. *See, e.g.*, S.C. CODE § 15-61-80 (1977), which provides for the valuation of the parties' interests so that the heir-cotenant may purchase his cotenants' claims. The commissioners

a public auction[32] following public notification of unascertained heirs.[33] The proceeds of the sale are then divided among the known heirs in proportion to their interests in the land.[34] Funds for unknown heirs are held in a court-appointed escrow account or deposited in the county treasury.[35] In the South, the highest bidder at these public auctions is frequently a speculator in heirs' property[36] and often is wealthy and white.[37] As the heir in possession is the only competitor at such sales, the wealthier speculator may be able to purchase the land for a fraction of its market value.[38]

Heirs' property is easy prey for swindlers and speculators, who purchase an heir's interest with the deliberate intention of forcing a partition sale.[39] Frequently, a speculator's first act is to acquire the interest of an absentee heir[40] who does not know the value of the property he has inherited; the speculator then offers to buy the remaining tracts from the other ascertainable heirs. Threatened with expensive and protracted litigation, the heirs generally concede. Eventually, through partition sale, outright purchase, or other means, the speculator secures a clear title, usually at far below market value.[41] This is a major cause of blacks' loss of land.

The problem of heirs' property is typified by the situation of rural blacks in the coastal counties of South Carolina.[42] Much of their property has been

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(selected pursuant to S.C. CODE § 15-61-60 (1977)) must advise the court whether it would be to the benefit of all the parties either to divide the property, upon payment of the price determined by the commissioners, or to sell the property at public auction.

32. *See, e.g.*, ALA. CODE § 35-6-57 (1977), which provides for such auction if the commissioners determine it to be in the best interests of all the cotenants. *See also* Hicks v. Hicks, 348 So. 2d 1368 (Ala. 1977). *But see* Raper v. Belk, 276 Ala. 370, 162 So. 2d 465 (1964).

33. *See, e.g.*, ALA. CODE § 35-6-25 (1977) which provides that if the plaintiff demonstrates exercise of "reasonable diligence" in his attempts to locate a party defendant, service of process may be effected by publication. A valid judgment may be entered on the defendant, binding on both him and his heirs or devisees. *See also* Copeland v. Giles, 271 Ala. 302, 123 So. 2d 147 (1960).

34. *See, e.g.*, ALA. CODE § 35-6-63 (1977).

35. *See, e.g.*, ALA. CODE § 35-6-1 (1977).

36. ELF REMOTE CLAIMS STUDY, *supra* note 2, at 126-27.

37. Probate judges, having tremendous influence in local political and legal affairs, are often themselves purchasers at partition sales. *Id. See also* SIX MILLION ACRES, *supra* note 8, at I-1. County assessor-collectors often help whites acquire property from black landowners at low prices.

38. SIX MILLION ACRES, *supra* note 8, at I-1–I-4.

39. Titles to the interest become "marketable" because the partition action conveys to the purchaser all rights, title, and interest of all heirs who are parties to the action. 68 C.J.S. PARTITION § 202 (1950); *see also* Eastlawn Dev. Co. v. Wells, 311 So. 2d 334 (Miss. 1975); Evett v. Mitchell, 251 Ala. 22, 36 So. 2d 98 (1948).

40. The purchaser of the interest of any tenant in common succeeds to all that tenant's rights, including the right to force a partition sale. *See* C.J. MOYNIHAN, *supra* note 25, at 224, and text accompanying note 25. Regarding the loss of black-owned land through partition sale, *see* text accompanying notes 30-38, *supra*.

41. *See* SIX MILLION ACRES, *supra* note 8, at I-1–I-4.

42. Note, *"Heirs' Property" The Problem, Pitfalls, and Possible Solutions*, 25 S.C.L. REV. 151, 153 (1973) [hereinafter cited as *Heirs' Property*].

lost to resort developers who purchased the interest of one or more heirs and then forced a partition sale. This tactic has been used with great frequency in the South Carolina Sea Islands, where the development potential and value of the land has increased dramatically over recent years.[43]

South Carolina provides another example of the manner in which heirs' property can exacerbate a land loss problem. To permit expansion of the Beaufort Naval Station, the federal government simply condemned surrounding property, claiming that the expense and time involved in locating and buying out all the heirs was prohibitive.[44] The heirs received only judicially determined "just compensation" for their property, rather than the possibly higher amount a public or private sale might have brought. The money raised from the Beaufort land condemnation was paid into a court-appointed escrow account,[45] and the unclaimed funds will ultimately escheat to the state.[46]

The Model Heirs' Property Act and the Uniform Probate Code, which are discussed in the following sections, suggest two possible legislative remedies to the heirs' property problem.

B. Model Heirs' Property Act

The partition sale is the basic way blacks lose land ownership.[47] Enactment of a Model Heirs' Property Act[48] would avert partition sales by protecting the rights of those heirs who occupy and utilize land while providing an inexpensive, equitable, and constitutional method of clearing title.[49] Such an Act, to be effective, would: (1) provide for compulsory administration of estates within one year of the landowner's death;[50] (2) protect any improvements made by a cotenant in possession against claims by other cotenants;[51] (3) enable a long-standing heir in possession to purchase the interests of his coten-

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43. Reed, *Blacks in South Struggle to Keep the Little Land They Have Left*, N.Y. Times, Dec. 7, 1972, § 1 at 39, col. 4.

44. *Heirs' Property*, *supra* note 42, at 153.

45. S.C. CODE § 15-59-10 (1976).

46. S.C. CODE § 47-19-10 (1976).

47. *See* ELF REMOTE CLAIMS STUDY, *supra* note 2, at 120-25.

48. The basic format of the Model Heirs' Property Act was developed by the staff of the Emergency Land Fund, note 214, *infra*, especially by Judith Bourne, Esq., of Charleston, South Carolina, between 1971 and 1974. Other developments relating to legislation directed specifically at the problems of heirs' property are discussed in *Farmer's Home Administration Housing Authorizations: Hearings Before the Subcomm. on Rural Housing of the Senate Comm. on Banking, Housing and Urban Affairs*, 95th Cong., 1st Sess. (Mar. 9-10, 1978).

49. Note that the Uniform Probate Code cuts off intestate succession with the grandparents of the intestate and their lineal descendants, regardless of who may occupy and use the land. UNIFORM PROBATE CODE § 2-103 (1977). The comment to this section explains that "in line with modern policy, it eliminates more remote relatives tracing through great-grandparents." UNIFORM PROBATE CODE § 2-103, Comment (1977).

50. This would ensure that title difficulties, which might hinder the development of the land, would be resolved quickly.

51. This would provide an incentive for the occupant heir to improve the property. California courts have provided this protection. *See, e.g.*, Pico v. Columbet, 12 Cal. 414, 420 (1859).

ants at a private sale, with proceeds held in escrow for the other heirs and the unclaimed portion ultimately refunded to the heir in possession;[52] (4) create in any heir a superior right to a voluntary partition *vis-a-vis* any non-heir owner;[53] (5) provide that the amount any heir received as a result of a partition sale would be credited against any sums which would normally be paid into court; (6) simplify the method of adversely possessing against an absentee heir;[54] (7) provide that the minimum bid at a partition sale equal or exceed the fair market value of the land;[55] (8) create a special court to administer the statute with simplified procedures;[56] (9) enable the state attorney general or local district attorney to initiate actions, upon the request of an heir in possession, to determine the identity of all ascertainable heirs and the extent of their interests, thus reducing the costs of "quiet title" actions and partition sales;[57] and (10) permit heirs in occupancy to tack[58] the occupancy of their immediate predecessors in title, thus allowing the occupant heir to accumulate time toward the statutory period for adverse possession.

A Model Heirs' Property Act might also provide that the heirs each be given the right to buy out their cotenants' interest before any partition could take place. When families cannot agree on the provisions for a buy-out of any heir's interest, the court could arrange for a condemnation of that interest. Fair market value would be paid to the heir with funds secured by an assessment against all remaining heirs. Such a remedy is drastic, and it should only be available in special circumstances, such as when more than two-thirds of the heirs petition the court for such action.

A model statute such as this would ease the problem of intestate succession. Until such statutes are enacted, heirs could be encouraged to deed their interests for a minimal price to a small number of family members or to one member of the family as trustee so that the land need not be sold. The land could then be developed for the good of the entire family. A small land trust might be an appropriate vehicle with which to accomplish such cooperation.

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52. The heir in possession thus would not be forced to bid against outsiders at a public auction, and the escrow provision would eliminate the difficulty of locating other heirs and appointing guardians for minor heirs.

53. This would give the heirs an advantage over the speculators who buy shares of heirs' property in order to force partition sale. *See* text accompanying notes 38-41, *supra*.

54. Such a provision, for example, might grant a dispossessed heir minimum compensation which would be administered through an escrow fund.

55. Value at a partition sale is ordinarily determined by a panel of commissioners especially selected for that purpose. For the method of selecting such commissioners, *see, e.g.*, S.C. CODE § 15-61-60 (1976), *supra* note 31.

56. This would avoid prohibitive legal expenses.

57. These provisions should be limited to low or moderate income claimants with small tracts of land. *Heirs' Property, supra* note 42, at 164.

58. Tacking permits the possessor to add on earlier periods of time when the land was adversely possessed by another in order to achieve the statutory time limit required. It has been suggested that the prior occupant should also have been an heir and the present occupant should have acquired the property by inheritance or devise. *See id.* at 165. Without this special provision, the occupancy of the predecessor in title would be presumed to be in favor of all heirs, not just those in occupancy.

C. Uniform Probate Code

A more general approach to the effective distribution of property than that of the Model Heirs' Property Act is that of the Uniform Probate Code (the Code).[59] The Code is a comprehensive treatment of the substantive and procedural law relating to the two principal areas of probate: (1) devolution of property at death, whether by testate or intestate succession, and (2) protection of the property of minors and disabled or incapacitated heirs, including provision for their maintenance.[60] Of particular interest are the mechanisms which the Uniform Probate Code provides for administering intestate estates.

The chief contribution of the Code is a flexible system for the administration of intestate estates and for the probate of wills. The basic premise of the Code is:

> the Court's role in regard to probate and administration, and its relationship to personal representatives who derive their power from public appointment, is wholly passive until some interested person invokes its power to secure resolution of a matter. The state, through the Court, should provide remedies which are suitable and efficient to protect any and all rights regarding succession, but should refrain from intruding into family affairs unless relief is requested and limit its relief to that sought.[61]

The Code provides for three types of procedures: "informal," "formal," and "supervised." "Informal proceedings" do not require notice to affected parties because they are merely administrative actions. "Formal proceedings" are begun by a court petition, and require notice to affected parties and a hearing. "Supervised proceedings" are similar to the procedures utilized in states which have not adopted the Code.[62] The informal proceeding, which is particularly suited to the small estates characteristic of rural southern blacks, will be examined here.

The best way to illustrate the workings of the Code in the case of intestate succession is by using the paradigm at page 130[63] in an altered form. Assume Uncle Cliff is still alive, and he and Cousin Maybel, Cousin Henry, Cousin Peter, Aunt Geneva, and Aunt Barbara are presently farming the fifty acres of land received by inheritance from Grandma and Grandpa. If Uncle Cliff dies, Cliff's heirs, Susan, Henry, and Peter, could simply take possession and wait three years before attempting to assert title to the property. Any proceedings contesting Cliff's heirs' title to his interest not begun within three years of

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59. The Uniform Probate Code has been adopted in 14 states. 8 UNIFORM LAWS ANN. 99 (Supp. 1980).

60. Robertson, *The Uniform Probate Code: An Opportunity for Mississippi Lawyers to Better Serve the Weak and the Grieving*, 45 MISS. L.J. 1, 1 (1974).

61. UNIFORM PROBATE CODE Article 3, General Comment (1977).

62. *See generally* UNIFORM PROBATE CODE Article 3 (1977).

63. *See* text accompanying notes 14-18, *supra*.

Cliff's death would be ineffective to divest his heirs of the property.[64] This procedure would be advisable only if Cliff's heirs were reasonably certain that no one was likely to contest their right to the property.

A safer procedure, and one which would allow Cliff's heirs to assert title to the property more quickly, would be the informal appointment of a personal representative. Section 3-1203 provides that when the value of the estate, less liens and encumbrances, does not exceed the amounts the Code sets aside for protection of the family, burial of the deceased, and payment of medical bills associated with the terminal illness of the decedent, the administrator can distribute the estate to the heirs immediately, without notice to creditors.[65]

When the value of the estate, less liens and encumbrances, exceeds the amount the Code sets aside for family, burial, and medical expenses, section 3-801 requires that the personal representative must give notice to creditors, in order to avoid liability under section 3-1004. Such notice would also seem advisable where disharmony among the heirs is possible. The personal representative also should apply for a formal termination of the administration of the estate pursuant to section 3-1001, thereby cutting off the rights of disappointed heirs. The general comment to Part 12 of Article 3 of the Code, which covers the procedures for small estates, observes that a study has shown that more than one-half the estates in probate in Cleveland, Ohio had a gross value of less than $15,000. "This means that the principal measure of the relevance of any legislation dealing with probate procedures is to be found in its impact on very small and moderate sized estates. Here is the area where probate affects most people."[66]

The informal proceedings of the Code require minimal court supervision and provide an efficient method for the administration of uncontested estates. Where the heirs, creditors, and other interested parties do not disagree among themselves, the informal, summary proceedings provided under section 3-1203 offer an efficient, inexpensive way to resolve the problems of a small intestate estate involving real property.

The Code's informal proceedings can be criticized, however, primarily because these streamlined procedures can easily be abused by dishonest or incompetent representatives.[67] This abuse would primarily affect those heirs, particularly widows and minors, who have neither the knowledge nor ability to protect their own interests.[68] In this light, the fact that proceedings can begin with only limited notice,[69] that the personal representative need not be

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64. UNIFORM PROBATE CODE § 3-108 (1977).

65. The administrator would then file a closing statement pursuant to § 3-1204. "Since the probate of many decedents will not exceed the amount specified in the statute, this section will prove useful in many estates." UNIFORM PROBATE CODE § 3-1203, Comment (1977).

66. UNIFORM PROBATE CODE Article 3, Part 12, General Comment (1977).

67. *See generally* Gother, *The Impending Probate Reform*, 48 CAL. ST. B.J. 417, 418 (1973).

68. *Id.*

69. UNIFORM PROBATE CODE § 3-306 (1977). *See also* Gother, *supra* note 67.

bonded,[70] and that the personal representative has broad powers to sell property and distribute the proceeds without court supervision[71] give cause for some hesitation.

The California Independent Administration of Estates Act,[72] which was adopted by California in lieu of the Code, attempted to match the flexibility of the Code while protecting unsophisticated devisees and heirs. For example, proceedings, while informal and flexible, can only be begun by a formal opening in court[73] and the appointment of a personal representative under court supervision.[74] Similarly, the estate is closed by a formal court decree.[75] During the proceedings the personal representative has many of the same broad powers he enjoys under the Code.[76] Given the experience of most rural black people with Southern courts, and probate courts in particular, it is questionable whether this limited judicial intervention is sufficient to protect the heirs' interests. If abused, it could permit the local bar to impress upon the heirs its choice of a personal representative, and to siphon off some of the estate's value through expensive days in court. Some lawyers who opposed adoption of the Code in California and proposed the Independent Administration of Estates Act as a substitute seemed primarily concerned with loss of fees.[77] Nonetheless, the other criticisms of the Code are valid and, consequently, the Model Heirs' Property Act seems to be the most effective remedy.

III
TAX SALES

Another cause for the loss of black land is related to administration of the local property tax. The property tax is one of the principal methods by which municipalities and counties finance their operations,[78] and is characteristically a flat-rate, regressive levy on the value of both real and personal property. Conceptually and functionally, a regressive property tax is the most cumbersome and inequitable of American taxes.[79] It falls most heavily on those who are least able to pay, embodies no clear policy in relation to the raising of

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70. UNIFORM PROBATE CODE § 3-603 (1977). *See also* Gother, *supra* note 67.

71. UNIFORM PROBATE CODE § 3-704 (1977). *See also* Gother, *supra* note 67; text accompanying note 65, *supra*.

72. CAL. PROB. CODE §§ 591-591.7 (West Supp. 1979).

73. CAL. PROB. CODE § 591.1 (West Supp. 1979).

74. *Id.*

75. CAL. PROB. CODE § 591.2 (West Supp. 1979).

76. *See* Gother, *supra* note 67, and text accompanying note 65, *supra*.

77. *See* ELF REMOTE CLAIMS STUDY, *supra* note 2, at 122.

78. For example, taxes are levied on real property in Alabama. ALA. CODE § 40-11-1 (Supp. 1979). Other means of financing the delivery of public services include state personal income taxes and sales taxes.

79. A graduated income tax, on the other hand, is a progressive tax, because the tax rate increases or decreases as income increases or decreases. The sales tax is a regressive tax because its base is goods and services purchased; purchases of essentials account for a larger portion of the disposable income of poor people than of wealthy people.

revenue, frustrates taxpayers who attempt to compute their own liability, and invites manipulation by local administrators.

The taxing system results in black land loss because if taxes on a parcel remain unpaid for a statutory period, the land may be sold at public auction, after notice to the delinquent taxpayer.[80] These auctions usually take place semi-annually under the supervision of county officials. Although specific procedures vary, statutes usually require that public notice be given several weeks in advance of the sale[81] and that the landowner be notified if possible.[82] At the auction, anyone is permitted to bid on the property, the minimum bid being the amount of taxes due.[83]

Since taxes on rural land in the South tend to be low, it is not unusual for valuable properties to be offered at public real estate auctions for minimal amounts.[84] The successful bidder receives an interest in the land similar to a lien. During a statutory redemption period,[85] the owner[86] continues to hold title to the property. He can regain clear title by reimbursing the purchaser for the price paid and by paying interest, penalties, and other legal costs.[87] Landowners typically delay tax payments until the last minute, redeeming their property at the auction sale or during the redemption period. If the rightful owner fails to redeem the property during the statutory period, he loses his entire interest in the property.

The actual valuation of real property and the collection of taxes is the responsibility of local officials who may have little expertise in assessing property value. Property may be undervalued or overvalued because of official incompetence or through active misconduct.[88]

Under this system of tax sales many black-owned properties are irretrievably lost. Many black landowners have no working understanding of how taxes are assessed, what the consequences of nonpayment are, and what their rights of redemption may be should there be a forced sale for delinquent taxes.[89] In

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80. If the owner is unknown or a nonresident, notice is usually given by publication or posting. *See, e.g.*, ALA. CODE § 40-10-5 (1975).

81. In Alabama, for example, public notice must be given thirty days before the sale. ALA. CODE § 40-10-12 (1975).

82. *See, e.g.*, ALA. CODE § 40-10-4 (1975).

83. *See, e.g.*, ALA. CODE § 40-10-16 (1975).

84. *See, e.g.*, Kenon v. Crenshaw, No. 79-498 (Fla. Cir. Ct. May 31, 1979), discussed *infra* at notes 93-94 and accompanying text.

85. The period usually lasts from one to three years. The redemption period in Alabama, for example, is three years. ALA. CODE § 40-10-120 (1975).

86. "Owner," as defined in Alabama, includes one with equitable or legal title, including a mortgagee or subsequent purchaser, tenant in common, or heir at law. ALA. CODE § 40-10-120 (1975).

87. *See, e.g.*, ALA. CODE § 40-10-121 (1975).

88. A 1973 study, for example, exposed a pattern of undervaluation of property owned by whites in Mississippi. This pattern was uncovered by an elected black tax assessor who investigated the practices and policies of his predecessors. B. PHILLIPS & J. HUTTIE, MISSISSIPPI PROPERTY TAX: SPECIAL BURDEN FOR THE POOR 47-58 (1973).

89. *See* text accompanying notes 86-87, *infra*. *See also* SIX MILLION ACRES, *supra* note 8, at J-8; Kenon v. Crenshaw, No. 79-498, slip op. at 4 (Fla. Cir. Ct. May 31, 1979).

some cases the owner does not know he owes the tax, much less that his property is being sold. He may be elderly and forgetful, he may never have received a tax bill or a notice of the delinquency sale, or he may be illiterate. When a taxpayer, having missed one year's payment, comes to pay taxes for the current year, the clerk may fail to inform him that he must pay the taxes still outstanding from the previous year if he wishes to cure his delinquency. If the missed payment is not made, the land subsequently may be sold to recover this delinquency, although taxes from succeeding years have been paid.

Another pattern by which black-owned land is lost occurs when blacks lease land and the tenant agrees to pay the taxes. Some tenants not only fail to pay the taxes, they actively conceal the tax notices. The tenant can then buy the property when it is auctioned for delinquent taxes.[90] If those who are part of the great exodus of blacks from the South do not sell their land before they leave, they will become absentee owners who are unlikely to have notice of when taxes are due or when their land is about to be sold for delinquent taxes.[91] The county officials are often the only persons who know what land is being sold for taxes, and they sometimes conspire to decide who will be awarded the property. The officials thereby ensure that they, their relatives, or friends can buy the property at bargain prices.[92]

An elderly black couple with unusual luck was recently saved from a tax-related loss of their home in Quincy, Florida. The land and home of Fedo and Hattie Kenon was auctioned at public sale for failure to pay a delinquent tax of $3.05. The house was valued for tax purposes at $7,500, and had been purchased by the Kenons after a lifetime of saving their meager earnings as tobacco pickers.[93] A white real estate speculator purchased the property at the sale, then offered to resell the house to the Kenons for $13,000. After the speculator threatened eviction, Mrs. Kenon took the case to Florida State Circuit Court. The court, in an unreported opinion, cancelled the speculator's tax deed by exercising the court's prerogative that where there is an inadequacy of price "such as to shock the judicial conscience . . . coupled with . . . mistake, accident, surprise, misconduct, fraud, or irregularity, the sale will generally be set aside."[94]

A. Property Tax Reform—Assessment Practices

Black land loss through tax sales results from basic problems in the methods employed to assess real property for taxation. Many state constitutions

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90. *See, e.g.*, N.Y. Times, Dec. 7, 1972, § 1, at 39, col. 4.
91. SIX MILLION ACRES, *supra* note 8, at 1.
92. ELF REMOTE CLAIMS STUDY, *supra* note 2, at 112, 132.
93. *The Guardian*, Apr. 16, 1980, at 10.
94. Kenon v. Crenshaw, No. 79-498, slip op. at 8 (Fla. Cir. Ct. May 31, 1979) (citing Subsaro v. Van Heusden, 191 So. 2d 569 (Dist. Ct. App. 1966); Arlt v. Buchanan, 190 So. 2d 575 (Dist. Ct. App. 1966)).

specify that the basis of real property taxation must be actual market value.[95] Market value does not reflect the income produced annually by the land, but rather its present or potential sale value for residential development, commercial or industrial sites, golf courses, or highways.[96] When land is assessed according to its speculative value rather than its actual use value, farmers pay taxes which are greater than that warranted by the income they derive from their land.[97] This inordinate tax pressure results in the premature conversion of much farm land to nonfarm use, because bearing the tax burden on a farmer's income often means operating at a loss. Black farmers faced with heavy tax burdens often consider themselves fortunate when they are able to sell their property to a land speculator, even at a low price, thereby avoiding a long struggle with tax delinquency and the inevitable tax sale.

Proposals to alleviate this problem ordinarily involve differential tax assessment, *i.e.*, the application of a lower assessment rate to property such as agricultural, forest, or residential land. This would shift a part of the tax burden in order to distribute it more equitably or to encourage a more desirable pattern of land use.

Techniques of differential assessment enacted in the various states can be categorized as preferential taxation, deferred taxation, or restrictive agreements.[98] Preferential assessment bases the taxable value of land which has been in agricultural use for a fixed period of time on the land's estimated value for that use, thereby ignoring more lucrative, speculative uses to which the land could be put, the so-called "higher and better uses."[99]

Deferred taxation gives each piece of farm property two assessed values: market value and use value. Market value is the price the property would bring in an arm's-length transaction.[100] Use value is the capitalized value of the land when used for agriculture. As long as the property remains in agricultural use it is taxed at the lower rate, based on use value.[101] If the land is converted to a more intensive use, the owner is required to pay taxes equal to the difference between the two rates for a specified period of time, called a "roll-back period."[102] The theoretical advantage of this type of assessment is that

95. *See* text accompanying note 108, *infra*. *See also* ALA. CONST. art. XI, § 211; GA. CODE §§ 92-5701-02 (1978).

96. *See* text accompanying notes 104-06, *infra*.

97. *See* text accompanying note 107, *infra*.

98. *See* discussion of the Tennessee statute, TENN. CODE ANN. §§ 67-650-58 (1976), *infra* note 116. Other states which have adopted such provisions include New Jersey (Farmland Assessment Act of 1964, N.J. STAT. ANN. §§ 54:4-23.1-.23 (West Supp. 1979)), and Florida (FLA. STAT. ANN. § 193.461 (West Supp. 1979)); *see* Tyson v. Lanier, 156 So. 2d 833 (1963); *see also* 84 C.J.S. TAXATION § 411, nn. 34-35 (1954 & Supp. 1979).

99. *See* text accompanying note 112, *infra*.

100. *See* Note, *Assessment Of Farmland Under The California Land Conservation Act And The "Breathing Space" Amendment*, 55 CALIF. L. REV. 273 (1967) [hereinafter cited as *Assessment of Farmland*].

101. *See* text accompanying note 116, *infra*.

102. *See* N.J. STAT. ANN. § 54:4-23.8 (West Supp. 1979). *See also* text accompanying notes 115-16, *infra*.

it gives no incentive to speculators who intend to convert farmland to nonfarm uses in the near future. However, it does not prohibit such changes of use as would be prevented by other methods of land use control such as zoning.

Restrictive agreements do not operate through assessment of taxes *per se*. Rather, the state or local government contracts with eligible farmers, or purchases easements from them, allowing their land to be used only for specific purposes such as farming. If the farmer violates the terms of his contract, the tax benefit he has received throughout the contract period becomes payable with interest.

Small farmers receive substantial economic advantages from these systems; however, these advantages should not apply to large farms held by corporations which do not suffer the problems faced by small farmers. To distinguish between small and large farms, an acreage limitation of 160 acres might be set.[103] Further, the owner should be required to live and work on the farm to prevent speculators from abusing the differential tax privilege.

California has experimented more than most states with assessment techniques and is a good model for a discussion of how preferential real property tax rates for farmers operates. California's rapid and extensive development after World War II, when municipalities grew in unchecked urban sprawl, resulted in the conversion of hundreds of thousands of acres of prime agricultural land to residential uses.[104] Agricultural land far from growing municipalities was also placed under development pressure because of the growth of recreational subdivisions.[105] Intense development pressure in an area increases the fair market value of land and, to the extent real property tax valuation reflects market value, also increases taxes. As the property burden of development pressure intensifies, agricultural land is held in ever-smaller parcels and finally is converted to the use demanded by the market.[106] Agriculture and open space are both central to California's economy, and the state has experimented since the 1950's with techniques to preserve agricultural and open space land by relieving tax pressure. The key to most of these techniques has been assessing agricultural and open space land at less than its fair market value.

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103. One hundred sixty acres is a magic number in the history of American land. The original Homestead Act of 1862, 12 Stat. 392 [codified at 43 U.S.C. § 161-302 (1964 & Supp. 1979)], provided for land in 160-acre parcels for settlers who would cultivate it. The Reclamation Act of 1902, 32 Stat. 388 [codified at 43 U.S.C. § 371-669 (1964 & Supp. 1979)], which provided irrigation to farmers at government expense, prohibited any single owner from receiving irrigation benefits for more than 160 acres of land. There appears to be something in the American psyche which frowns on land ownership in parcels larger than 160 acres.

104. Kurtz, *The Dilemma of Preserving Open Space Land–How to Make Californians An Offer They Can't Refuse*, 13 SANTA CLARA LAW. 284, 284-86 (1972). From 1942 to 1955, California's agricultural land was converted at a rate of 60,000 acres per year. In recent years, the rate has climbed to nearly 150,000 acres per year. Land, *Unraveling The Urban Fringe: A Proposal For The Implementation of Proposition Three*, 19 HASTINGS L.J. 421, 422 (1968).

105. Kurtz, *supra* note 100, at 285-86.

106. *Id.* at 286.

The assessment standards defined in Article XIII of the California Constitution require that property be taxed in proportion to its value, the value of the land to be ascertained as provided by law.[107] A 1957 statute provided that all land zoned exclusively for agriculture and not subject to be rezoned in the near future would be assessed at its use value.[108] The statute's requirement that the land not be subject to rezoning for more intensive development led to its nullification by California tax assessors. With the tacit approval of the California Attorney General,[109] assessors disregarded the law on the ground that the land was likely to be rezoned for more intensive use if the owner received an attractive offer.[110] Thus, the assessors continued to value agricultural and open space land at fair market value.

The Open Space Act[111] enabled local governments to purchase a landowner's development rights to preserve open space. Open space is land which has "great natural scenic beauty," or land which, if retained in its present state, would "enhance the . . . value" of the surrounding area.[112] Purchases were limited, however, to voluntary sales, and the Act had no provisions enabling local governments to obtain land by eminent domain. The Open Space Act was a strong first attempt to preserve open space. Unfortunately, particularly in areas of intense development, municipalities could not afford to match the price the farmers were offered by developers.[113] The farmers in turn were reluctant to exchange their development rights for a mere promise of lower property taxes.[114]

In 1962, California voters considered Proposition Four,[115] another attempt to discourage conversion of farmland. Under Proposition Four, landowners who used their property exclusively for agricultural purposes could file for tax relief under "agricultural" status; when the land use changed to a nonagricultural purpose, the county or municipality recaptured the difference between the taxes actually paid (preferential tax) and the tax due had the land been assessed at its most profitable and best use for the last seven years (market rate tax). Although the measure failed to pass in the California referendum, a

107. CAL. CONST. Art. 13, § 1 (West Supp. 1980).

108. 1957 Cal. Stats. ch. 2049, § 1 (repealed 1966). This mechanism was replaced, CAL. REV. & TAX. CODE § 402.1 (West Supp. 1980), two years after the enactment of the "Greenbelt Law" of Santa Clara County, CAL. GOV'T CODE § 35009 (West 1966), to prevent municipalities from annexing county lands zoned for agricultural uses without the landowner's consent. *See* Land, *supra* note 104, at 429.

109. *See* Land, *supra* note 104, at 430 n.44.

110. *Id.* at 429-30.

111. CAL. GOV'T CODE §§ 6950-54 (West 1966).

112. *Id.* at § 6954.

113. *See generally* Land, *supra* note 104, at 431.

114. *Id.* at 431. In addition, few municipalities or counties had sufficient financial resources to purchase development rights on a scale large enough to lighten development pressure on open space. *Id.*

115. Assembly Constitutional Amendment No. 4, offered to the voters as Proposition Four in November 1962, would have added a new § 2.8 to Article XIII of California's State Constitution. *See* Land, *supra* note 104, at 431.

detailed discussion of this type of program is worthwhile because other states may choose to solve tax assessment problems through similar measures.[116]

The major criticism of the Proposition Four proposal was its particular susceptibility to abuse by speculators. The definition of "agricultural use" is often imprecise; the dangers of corrupt or lax administration of the law and consequent loopholes in the statute are very real. The program also may operate as a subsidy to land speculators because the program reduces holding costs for the speculator posing as a farmer. The speculator who wishes to hold land at a reduced tax rate can delay conversion of open space land as easily as the farmer holding the land for agricultural purposes. The program's failure to discriminate adequately between farmers and speculators allows the speculator a seven-year delay before he has to pay his fair share of taxes. The land speculator thus receives an interest-free loan in the form of unpaid taxes; he pays no tax while his land increases in value for potential development. Meanwhile, the taxes which the speculator rightfully should pay are being shifted to other taxpayers such as the developer or, more often, ordinary residential users. Once the initial seven-year period has run, the speculator may either sell the property or develop it. Although the "recapture" provisions require him to pay at that time an amount equal to the difference between the preferential and the market tax rate, he pays with inflated dollars. Development also places an increased burden on the community for roads, schools, power, and sewerage, in contrast to the farmer's less burdensome use of municipal services. The recapture provisions, to be an effective deterrent to speculators, must recoup unpaid taxes at a higher tax rate than the developer would have paid had he paid the higher rate throughout.

A Proposition Four-type program would work well in some Southern states, where there are more farmers in need of assistance than there are speculators seeking a free ride. In a rapidly developing state like Georgia, however, there may be more speculators than farmers and the program would not work as well. If the "Sunbelt" population and development shifts continue, fewer Southern states will benefit from a Proposition Four-type program unless it has a penalty feature to deter speculators.

The California Land Conservation Act of 1965[117] was designed to insure that farmland would be assessed at its value when used for farming. By contractual agreement between the landowner and the government, land use was to be restricted to farming for ten years,[118] and tax assessors were to value farmland at a lower value, reflecting the contractual limitations.[119] Two sections

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116. Tennessee, for example, has a similar statute, the Agricultural, Forest, and Open Space Land Act of 1976, TENN. CODE ANN. §§ 67-650-58 (1976).

117. CAL. GOV'T CODE § 51200 (West Supp. 1980) (popularly known as the Williamson Act). *See* note 127, *infra*.

118. CAL. GOV'T CODE §§ 51243-44 (West Supp. 1980).

119. CAL. REV. & TAX. CODE § 402.6 (West Supp. 1965) (repealed 1966 and replaced by § 402.1 (West Supp. 1980)). *See* note 108, *supra*.

of that Act,[120] however, contained provisos that reduced assessments would not be granted if the land use restrictions were likely to be removed or modified. To ensure that tax assessors would give correct valuations, the legislature created a rebuttable presumption that land use restrictions such as those established by the Land Conservation Act would not be lifted or altered.[121] Thus, the tax assessor bears the burden of proving that the restriction is likely to be changed before he can use the fair market value of the land as a basis for valuation.[122] Further, Proposition Three,[123] which directs the assessor to value property on the basis of its restricted use, seems to have effectively bridled the assessors' discretion.[124] Any state wishing to establish a stable program of preferential tax treatment for farmland would first have to amend its constitution as the California voters did.

Today, legislation passed under California's Proposition Three [125] requires tax assessors to assess property at less than fair market value where open space land is enforceably restricted. Open space land is "restricted" if it is subject to "a contract," "an agreement," "a scenic restriction entered into prior to January 1, 1975," "an open-space easement," or "a wildlife habitat contract." [126] By 1972, 12.5 million acres of California land received favorable valuations under these "Williamson" contracts.[127] While California's tax assessment scheme is not flawless,[128] it is the most advanced attempt to bring farmland taxes in line with the actual value of the land to the farmer.

B. Other Approaches for State Property Tax Reform

The loss of land owned by blacks due to tax sales could also be alleviated by providing tax exemptions for small landowners and for owners who are unable to pay property taxes in full because of physical, mental, or economic incapacity. A statewide tax exemption on the first fifty to one hundred acres of each landowner's agricultural property would provide the necessary benefits for small landowners while preventing large landowners with property in several

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120. CAL. REV. & TAX. CODE §§ 402.5, 402.6 (West 1965) (repealed 1966 and replaced by § 402.1 (West Supp. 1980)).

121. CAL. REV. & TAX. CODE § 402.1 (West Supp. 1980).

122. Land, *supra* note 104, at 434.

123. Senate Constitutional Amendment No. 4, which was offered to the voters in the November 1966 elections as Proposition Three, added Article XXVIII to the California Constitution. It was called the "Breathing Space" Amendment by its proponent, State Senator Farr. *See Assessment of Farmland*, *supra* note 100, at 287-88, 287 nn. 67-68.

124. *See* CAL. REV. & TAX. CODE § 422 (West Supp. 1980).

125. CAL. REV. & TAX. CODE §§ 421-430.5 (West Supp. 1980).

126. *Id.* at § 422 (West Supp. 1980).

127. Kurtz, *supra* note 100, at 291. The Williamson Act, *supra* note 117, generally provides that cities and counties may enter into contracts "with individuals who own property in areas the local government designates as 'agricultural preserves.' The purpose of these contracts is to restrict the use of the land to agricultural or other compatible open space purposes for a minimum period of ten years." Kurtz, *supra* note 104, at 291 (footnotes omitted).

128. *See* Kurtz, *supra* note 104, at 291-96.

counties from receiving multiple exemptions. The acreage limitation would ensure the greatest tax relief to the small landowners who are most in need. Further, if the exemption applied to individuals and not to property, a landowner could not multiply exemptions by subdividing his land.

Other tax reforms could include extending the period for redemption from tax delinquent status, and providing special extensions for the period of time during which a property owner who was previously disabled (due to infancy or incompetence) could, after the removal of his disability, redeem property foreclosed for tax delinquency.

C. The Federal Estate Tax

An increasingly significant tax threat to black-owned land is the federal estate tax. Thousands of American farmers of all races are being driven off their land because federal estate taxes are assessed on the basis of the property's potential sale price rather than its value as farmland. In recent years, the value of agricultural land near metropolitan areas has soared as land speculators have purchased every available tract. The value of this land for farming purposes, however, has remained constant or declined. Many taxpayers who have inherited farms thus have been forced to sell to developers simply to pay the taxes.[129] From 1940 to 1974, farmland, for estate tax purposes, was valued at its fair market value; that value was determined on the basis of the property's highest and best use.[130] This was done even when the valuation could not be justified because of lack of farm profitability;[131] heirs were thereby forced to discontinue farming because they could not meet the high estate taxes. One study found that over 60% of all farm estates in Iowa became either legally or economically fragmented following the death of the owner.[132]

Congress felt it desirable to encourage continued use of property for farming and other small business purposes and in 1976 revised the Internal Revenue Code accordingly.[133] The basic provision, section 2032A, now provides for an election by which a farm can be declared "qualified real property" and valued based on its current use.[134] There are seven tests to be met, four as to

129. Andelman, *Estate Taxes Drive Farmers Off Land*, N.Y. Times, May 14, 1972, at 1, col. 2.

130. I.R.C. § 2031. Section 2032A created a special valuation procedure for certain family farms and other qualified real property in the estates of citizens who died after December 31, 1976. I.R.C. § 2032A, *as enacted by* Tax Reform Act of 1976, Pub. L. No. 94-455, § 2003(e), 90 Stat. 1862 (1976). Property not covered by this section, either because it does not qualify as farm property or because it is part of the estate of a citizen or resident deceased before December 31, 1976, is treated like all other property for estate tax purposes and valued at its potential "highest and best use." *See* 4 J. RABKIN & M. JOHNSON, FEDERAL INCOME, GIFT, AND ESTATE TAXATION § 52.10(3) (1980). *See also* text accompanying notes 133-44, *infra*.

131. 4 J. RABKIN & M. JOHNSON, *supra* note 130.

132. Note, *Contemporary Studies Project: Large Farm Estate Planning and Probate in Iowa*, 59 IOWA L. REV. 794, 935 (1974).

133. H.R. REP. No. 1380, 94th Cong., 2d Sess. 7 (1976).

134. I.R.C. § 2032A. *See* 4 J. RABKIN & M. JOHNSON, *supra* note 130

the property itself, and three as to the decedent and his estate as a whole.[135] In order for real property to qualify, it must:

(1) Be located in the United States;
(2) Be used on the date of decedent's death as a farm or other qualified business;
(3) Pass to a *qualified heir*;
(4) Have been owned by decedent and used for qualified use for five of the eight years preceding death with "material participation by a decedent or a member of the decedent's family in the operation of the farm . . .";
(5) Be owned by a person who was a United States' citizen or resident at the time of death;
(6) Be of such a character that 50% of the value of the gross estate, less debts and expenses, consists of qualifying farm property (real and personal); and
(7) Be in excess of 25% of the value of the gross estate.[136]

In addition, every person with an interest in the property elected under section 2032A must sign an agreement consenting to pay the additional estate tax in the event the property is disqualified.[137]

Section 2032A, however, is not a simple mechanism for the small farmer to use. Owners of farmland will have to plan extensively to meet the percentage requirements and to ensure that beneficiaries are those who will continue farming. The necessity of long-range planning is a great problem, especially for elderly black farmers who hold clouded titles and who are indisposed toward making wills. Although illegitimate children, children "taken in" but not adopted, and even some intestate beneficiaries may well not be "qualified heirs,"[138] they may have been working and living on the farm with the decedent. These are also the people who have the greatest interest in inheriting the land.

In families such as the one described in the "heirs' property" diagram on page 130,[139] all of the heirs would be persons "with an interest in the property" pursuant to section 2032A, but their whereabouts might be uncertain. The Internal Revenue Code, however, requires that these people be located and prevailed upon to agree to pay the taxes in the event the property is disqualified. Problems also could arise in meeting the percentage requirements, be-

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135. I.R.C. § 2032A.
136. I.R.C. § 2032A.
137. I.R.C. § 2032A(c)(6), (d)(2).
138. I.R.C. § 2032A(e)(1) defines a qualified heir as a member of the decedent's family who acquired the property from the decedent. Section 2032A(e)(2) defines "member of the family" as "only . . . such individual's ancestor or lineal descendant, a lineal descendant of a grandparent of such individual, the spouse of such individual, or the spouse of any such descendant." This definition might not include certain classes of beneficiaries under state laws of descent and distribution. *See, e.g.*, GA. CODE § 113-903 (1978), subsection 11, *supra* note 10.
139. *See* text accompanying note 14, *supra*.

cause many small farms are subsistence units and the larger part of the gross estate may consist of insurance policies, pensions, or savings from employment.

Overall, the section 2032A election provision provides more help for large individual farms than for smaller, more marginal operations. In fact, these revisions in the estate tax were motivated by farmers who sought to expand their holdings. According to a public policy specialist for the Extension Service of the United States Department of Agriculture,

> the real size of this apparent half million dollar benefit is directly proportional to the marginal tax bracket of the estate. . . . Moreover, a tax shelter is created in farmland. . . . The primary beneficiaries of the tax shelter created will, in all likelihood, be existing farmers who have family heirs, desirous of continuing the farming operation.[140]

Professor Surrey offers a similar analysis:

> [E]ven at the $60,000 [exemption] level only 7 percent of decedents had net assets sufficient to incur an estate tax, so that the estate tax hardly cut a wide swath in an affluent society. A $150,000 exemption would reduce this 7 percent to less than 2 percent, and would cost about $1.6 billion, or 20 to 30 percent of current estate tax revenues.[141]

Interestingly, the Department of Agriculture did not lobby strenuously for the reforms. Professor Surrey opines that the Department experts apparently felt the reforms would concentrate "farm land holdings in fewer families and thus [put] a barrier in the way of new, young entrants into farming."[142] The more likely explanation, however, is that Department experts recognized that helping farmland remain in the hands of family farmers would impede the absorption of such land by agricultural corporations,[143] which seem to be the only entities able to afford farmland today.[144]

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140. Address by Mr. Woods, Public Policy Specialist, Extension Service, USDA, Property and Estate Taxes—Their Potential for Affecting Land Allocation Decisions (Nov. 16, 1976) (Workshop on Land Use Planning in Rural Areas, Raleigh, N.C.), *reprinted in* Surrey, *Reflections on the Tax Reform Act of 1976*, 1978 TAX NOTES 291, 301 n.35.

141. Surrey, *supra* note 140, at 300.

142. *Id.* at 301.

143. The Department of Agriculture's bias in favor of large corporate farms (agribusiness) and against small family farms has been documented. The bias is acknowledged by the Department itself, which has recently attempted to redirect its emphasis by introducing demonstration projects focused on the small farmer. *See* Finger, Fowler & Hughes, *supra* note 3.

144. "The development of larger, more mechanized farms appears to be a trend which will dominate the agricultural economy of the next decade." *Contemporary Studies Project: Large Farm Estate Planning and Probate in Iowa*, *supra* note 132, at 934.

IV
INSTRUMENTS TO SECURE DEBT

Another factor which leads to the loss of black-owned land in the rural South is black landowners' inability to obtain credit. The few blacks who do succeed in securing credit, however, are often cheated by fraudulent practices.[145]

Banks traditionally charge high interest rates when making loans to blacks. Often the principal amount of the loan is worth considerably less than the property used to secure it.[146] Farmers from Holmes County, Mississippi, for example, complain that white farmers receive preferential treatment from private lending institutions.[147] Institutions such as the Farmer's Home Administration and the Federal Land Bank are notorious for their discriminatory lending practices.[148]

Poor blacks, with little control over their economic lives, are forced to deal with unscrupulous lenders. While poor whites face similar problems, blacks are lower on the socioeconomic ladder. As a result, lenders often exploit the difficulties poor blacks experience in obtaining credit. "The same white man who loans a black man money to purchase farm equipment is usually a co-owner or partner in the farm equipment business";[149] frequently, "the money never leaves the office of the white merchant. The lender controls the mortgage and the equipment; he can't lose. . . . He is also in a position to force the borrower into foreclosure by possibly accelerating payments,"[150] or by unconscionable practices generally. Residents of Bolivar County, Mississippi, also complain that local whites threaten blacks who "assist other blacks in saving their land."[151]

When credit is obtained, from whatever source, poor blacks often must secure the debt with some property of value. Real property is preferred for such security. Furthermore, a number of special clauses and techniques, particularly deeds of trust[152] and mortgages, put inordinate pressure on the rural

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145. ELF REMOTE CLAIMS STUDY, *supra* note 2, at 126.
146. SIX MILLION ACRES, *supra* note 8, at D-1.
147. *Id.* at D-3.
148. ELF REMOTE CLAIMS STUDY, *supra* note 2, at 166-71. *See also* Hudson v. Farmer's Home Administration, No. GC 79-216-K1 (N.D. Miss., filed Dec. 21, 1979), a lawsuit

> challenging various policies and practices of the Farmer's Home Administration . . . in the operation of its farm loan program within and throughout the State of Mississippi which have the purpose and effect of depriving Black and small farmers of fair and equal treatment in the receipt, evaluation, and disposition of their loan applications, and in the supervision and servicing of their loans.

Id.
149. *See* SIX MILLION ACRES, *supra* note 8, at D-2.
150. *Id.*
151. *Id.* at D-1.
152. Although judicial construction depends upon the law of the jurisdiction, a deed of trust will often transfer legal title in property to the grantee until an obligation has been fulfilled,

southern debtor. Poor blacks in this region are especially vulnerable to such clauses.

A. "Vancing"

Unlimited future advance clauses in deeds of trust are a principal means by which black landowners lose their land.[153] Unlimited future advance clauses ("vancing" clauses) permit the debtor to offer his collateral to secure all debts that are owed at the time the agreement is made or arising thereafter. These clauses often function as "dragnet" clauses, in that they force the debtor to secure obligations other than those relating to the actual transaction. In effect, the creditor can acquire good title by purchasing promissory notes made by the debtor to third parties and foreclosing on the property under the "vancing" clause if the debtor defaults. The unlimited future advance clause, however, has been restricted or regulated in some states.[154]

B. Power-of-Sale Clauses

Power-of-sale clauses enable the creditor, in the event of default, to sell the property or buy it himself at a sheriff's sale with no requirement of a judicial proceeding and foreclosure[155] and, in some cases, with no obligation to notify the debtor except by publication.[156] If the sale price exceeds the amount of the debt, the surplus is returned to the debtor, who has no right of redemption. If the debtor owns the property with a number of heirs as tenants in common and can convey only a partial interest, the creditor usually succeeds to the debtor's partial interest at a sheriff's sale and can force a partition

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whereas a mortgage might or might not transfer title. *See, e.g.*, GA. CODE § 67-1301 (1978) which provides:

> *Whenever any person in this State conveys any real property by deed to secure any debt to any person loaning or advancing said grantor any money or to secure any other debt* and shall take a bond for title back to said grantor upon the payment of such debt or debts or shall in like manner convey any personal property by bill of sale and take an obligation binding the person to whom said property is conveyed to reconvey said property upon the payment of said debt or debts, *such conveyance of real or personal property shall pass the title of said property to the grantee until the debt or debts which said conveyance was made to secure shall be fully paid, and shall be held by the courts to be an absolute conveyance, with the right reserved by the grantor to have said property reconveyed to him upon the payment of the debt* or debts intended to be secured agreeably to the terms of the contract, and not a mortgage. No bond for title or to reconvey shall be necessary where such deed shows upon its face that it is given to secure a debt. (Emphasis added).

153. ELF REMOTE CLAIMS STUDY, *supra* note 2, at 126. Such clauses may be found in mortgages, but they are more common in deeds of trust.

154. *E.g.*, GA. CODE § 67-1316 (1978); S.C. CODE § 29-3-50 (1976).

155. Deeds of trust, however, have no power-of-sale provision and hence can only be foreclosed under judicial supervision. G. OSBORNE, G. NELSON & D. WHITMAN, REAL ESTATE FINANCE § 3.18, at 67 (1979) [hereinafter cited as G. OSBORNE].

156. *Id.* at § 7.19, at 476.

sale. Power-of-sale clauses are still permitted in a number of states, including Alabama,[157] Georgia,[158] and Mississippi.[159]

C. Due-on-Sale Clauses

Due-on-sale or due-on-encumbrance acceleration clauses give the mortgagee the option of accelerating payment of the debt if the mortgagor decides to sell or encumber any portion of the mortgaged real estate. The mortgagor suffers when the installment land contract containing a due-on-sale or due-on-encumbrance clause includes a prepayment penalty requiring the mortgagor to pay a penalty for cutting short the loan although he did not choose to do so. In support of the prepayment penalty, mortgagees argue that changes in the interest rate on mortgages constitute a risk against which they must be protected.[160] Change in interest rates, however, is a typical lender's risk and is already computed in the interest charged. The buyer should not be forced to compensate the lender twice for the same risk, especially if the termination of the loan is effected by the lender for his own advantage.

D. Mortgage Foreclosures

Although "vancing" and sheriff's auctions pursuant to power-of-sale clauses are not as frequent as they once were, formal mortgage foreclosures are on the rise.[161]

The struggling small farmer who borrows money for operating capital from the local commercial or savings bank, credit union, or even the federal Farmer's Home Administration, is often required to mortgage, as security, property worth considerably more than the face amount of his loan. The classic case is a person who mortgages fifty acres of land, worth more than $50,000, for an operating loan of $5,000, rather than having a smaller portion of the tract surveyed and mortgaging only that portion. In many jurisdictions, subdivision regulations do not exist or are casually enforced, so that no administrative obstacles exist to such a division of the property.

Two principal theories of law determine the debtor's rights if he defaults on his obligations under a mortgage agreement. States using "title theory" [162]

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157. ALA. CODE § 35-10-1 (1975).

158. GA. CODE § 67-1506 (1978); *see also* Ruff v. Lee, 230 Ga. 426, 197 S.E.2d 376 (1973).

159. *E.g.*, Nat'l Mortgage Co. v. Williams, 357 So. 2d 934 (Miss. 1978).

160. *See* G. OSBORNE, *supra* note 155, § 5.21, at 295.

161. The Agriculture Department reported 3,600 farm mortgage foreclosures for the year ending March 1971, up from 2,800 the year before. *Farm Foreclosures Rise*, N.Y. Times, Aug. 16, 1971, at 40, col. 4. Senator Hubert Humphrey charged in 1971 that the nation's family farmers were the "forgotten Americans," and testified before the Congressional Joint Economic Committee that farm mortgage foreclosures were ten times as frequent as in the past years. Dale, *Unemployment Rate Is Up But Below the Peak of May*, N.Y. Times, Aug. 7, 1971, at 10, col. 6.

162. Title theory states in the South are Alabama, Jones v. Butler, 286 Ala. 69, 237 So. 2d 460 (1979), and North Carolina, Brannock v. Fletcher, 271 N.C. 65, 155 S.E.2d 532 (1967).

operate on the premise that a mortgage places title in the mortgagee as security for payment of the debt. No equity of redemption exists although a statutory period of time may be established for redeeming the security after the sale.[163] The mortgagor loses his interest in the property automatically upon default.[164] In these states, a mortgagee's lien may be foreclosed by sheriff's sale where the mortgagor has executed a "power-of-sale" clause.[165] States using "lien theory" [166] treat a mortgage as a lien on the property rather than as an instrument conveying title. In many of these states, foreclosure is exclusively or most frequently carried out under court supervision.[167] After a mortgagee brings a bill of equity, the court adjudicates all claims and interests involved and holds a judicial sale to satisfy the mortgage debt.[168]

If a mortgagor defaults in Alabama, a title theory state,[169] the mortgagee has the choice of initiating judicial foreclosure proceedings or moving against the collateral pursuant to a power-of-sale clause if such a clause has been executed. Given the option, a mortgagee will proceed by power-of-sale because he or she is more likely to buy the property for a lower price at a sheriff's sale than at a judicial sale.[170]

When the debtor has not signed a power-of-sale clause and the creditor must proceed by judicial foreclosure, title to the property is subject to the mortgagor's right to buy back the property during a statutory redemption period, although the mortgagee's title vests fully after proper foreclosure.[171]

In order to redeem his property, the debtor must initiate a statutory proceeding, furnishing the purchaser with due notice. In addition, the debtor must

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163. Equity of redemption is the debtor's right, accruing after default and before a valid foreclosure sale, to perform his obligation under the mortgage and to regain title to his property, free and clear of the creditor's lien. G. OSBORNE, *supra* note 155, at § 7.1. Statutory redemption is a statutory right of the debtor to regain his or her property which has been sold by paying the purchaser the foreclosure sale price plus a small premium. It exists for a period *after* the foreclosure sale has been completed. *Id.*

164. G. OSBORNE, *supra* note 155, at § 4.2 n.13.

165. *See generally*, G. OSBORNE, *supra* note 155, at § 7.19. Judicial foreclosure is necessary where the mortgage fails to create a power-of-sale. *Id.* at § 7.11.

166. Lien theory states in the South include Louisiana, Fidelity Credit Co. v. Winkle, 251 La. 2, 202 So. 2d 280 (1967), and South Carolina, Ham v. Flowers, 214 S.C. 212, 51 S.E.2d 753 (1949).

167. G. OSBORNE, *supra* note 151, at § 7.11 n.31. In title theory states, power-of-sale foreclosures predominate. *See id.* at § 7.19 n.91.

168. *Id.* § 7.11.

169. Jones v. Butler, 286 Ala. 69, 237 So. 2d 460 (1979).

170. G. OSBORNE, *supra* note 155, § 7.19, at 477. There is an understandable hostility to this maneuver in most jurisdictions. In some situations the mortgagee is not permitted to purchase the subject property at a public sale held pursuant to a power-of-sale clause. *Id.* § 7.21, at 486 & n.50 (citing, *inter alia*, Mills v. Mut. Business & Loan Ass'n, 216 N.C. 664, 6 S.E.2d 549 (1940); Jackson v. Blankenship, 213 Ala. 607, 105 So. 684 (1925); Martin v. McNeeley, 101 N.C. 634, 8 S.E. 23 (1888)). Some courts, however, permit the practice. *Id.* at 486.

171. *See* ALA. CODE § 6-5-230 (1975). Until 1970, the redemption period in Alabama was two years from the date of foreclosure, but has since been reduced to one year. *Id.*

pay to the purchaser the price paid at the foreclosure plus 10% interest. He must also pay the purchaser the value of all necessary improvements made on the property,[172] all taxes due and owing which have been paid by the purchaser, and any balance which may be due on the original debt.[173] The purchaser is entitled to any rents generated by the property, whether paid or merely accrued, through the date of redemption.

E. Reform in Secured Transactions

1. Redemption Periods

Equitable or statutory rights of redemption[174] enable the debtor whose mortgage or deed has been foreclosed to regain his property. However, many rural blacks who are in debt are unaware of their right to redeem and are led to believe that their property has been irretrievably lost. The complexity of the law of redemption exacerbates the problem caused by landowners' ignorance of their rights and responsibilities.[175]

In title theory states there is no equitable redemption, as the mortgagee has title *ab initio,* and the mortgagor is a trustee for the mortgagee. The only period for redemption available in title theory states is that which is provided by statute. Further, the period permitted for statutory redemption may be inadequate; often, little or no notice is required.[176] Lien theory states which maintain equity of redemption permit "equity" after default but only until the time a sale takes place.[177] If the sale occurs quickly, the owner has little chance to recover his property.

Several remedies are available to address these problems. Lien theory states could adopt a statutory redemption period which would exceed that recognized in equity. A mortgagor could thereby redeem his property after a foreclosure sale, while still protected by a requirement of judicial foreclosure.[178] Purchasers at foreclosure sales would be on notice that they purchased subject to the statutory period of redemption by the original mortgagor.[179] The adoption of a statutory minimum redemption period in

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172. *Id.* § 6-5-244.

173. *Id.* § 6-5-235.

174. *See* text accompanying notes 163-73, *supra.*

175. *See, e.g.,* ALA. CODE § 6-5-230 (1975), which permits a mortgagee or a secured creditor, as well as the mortgagor, to redeem.

176. Mississippi, for example, allows power-of-sale clauses to be exercised upon mere notice by publication. MISS. CODE ANN. § 89-1-55 (1972). *See* G. OSBORNE, *supra* note 155, § 7.19, at 476.

177. *E.g.,* Carrington v. Citizen's Bank of Waynesboro, 144 Ga. 52, 85 S.E. 1027 (1915).

178. *See, e.g.,* GA. CODE § 67-115 (1978), which provides that if possession of property is given to the mortgagee, the mortgagor may redeem within ten years from the last recognition by the mortgagee of the mortgagor's right of redemption. *See also* Wynndam Court Apt. Co. v. First Fed. Sav. & Loan Ass'n, 204 Ga. 501, 506-07, 50 S.E.2d 611, 615 (1948).

179. *See* Dedge v. Bennett, 138 Ga. 787, 76 S.E. 52 (1912) (cited for this proposition in Bentley v. Phillips, 171 Ga. 866, 874, 156 S.E. 898, 902 (1930)).

both lien and title theory states would minimize uncertainty and greatly alleviate the loss of black-owned land as a result of foreclosure sales.

2. Power-of-Sale Clauses

Another potential area of reform is the protection of debtors' procedural due process rights from abuse under power-of-sale clauses. The United States Supreme Court presently seems hostile to debtor-oriented developments in the law,[180] abandoning the liberal trend of the 1970's in debtor-creditor relations.[181] The obvious procedural shortcomings of power-of-sale clauses, however, particularly sale conditions which yield low prices and offer defective notice, could provide the impetus for liberal initiatives in state courts and state legislatures.[182]

3. Due-on-Sale Clauses

The judicial decisions on due-on-sale clauses are varied and confusing.[183] The courts have formulated several different standards for the permissible activation of a due-on-sale clause.[184] Some courts have held that changes in the money market interest rate constitute sufficient grounds to activate such acceleration clauses.[185] A better approach that some courts have followed[186] is that mortgagees must demonstrate a threat to their financial security before they are permitted to accelerate.

4. Maximum Collateral Rules

To better protect debtors, the collateral necessary to secure the loan should be limited to the loan's principal amount. This would be an improve-

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180. *See, e.g.*, Flagg Bros. v. Brooks, 436 U.S. 149 (1978), in which the Court took a very restrictive view of the state action sufficient to support a claim of violation of procedural due process within the meaning of the fourteenth amendment. *See also* Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974).

181. *E.g.*, Fuentes v. Shevin, 407 U.S. 67 (1972), *rehearing denied*, 409 U.S. 902 (1972); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

182. A full discussion of the possible legal challenges to power-of-sale clauses is beyond the scope of this article, but for a sketch of the terrain and some suggestions for reform, *see* G. OSBORNE, *supra* note 155, §§ 7.23-.30.

183. *See* Comment, *Judicial Treatment of the Due-on-Sale Clause: The Case for Adopting Standards of Reasonableness and Unconscionability*, 27 STAN. L. REV. 1109, 1117 (1975). *Compare* Note, *Deeds of Trust—Restraints Against Alienation—Due-on Clause is an Unreasonable Restraint on Alienation Absent a Showing of Protection of Mortgagees' Legitimate Interests*, 47 MISS. L.J. 331, 342 (1976) *with* Note, *Mortgages—Use of Due On Clause by a Lender is not a Restraint on Alienation in North Carolina*, 55 N.C.L. REV. 310, 312-13 (1977) (noted in G. OSBORNE, *supra* note 155, § 5.23, at 303).

184. *See* G. OSBORNE, *supra* note 155, § 5.23, at 303-08.

185. *See, e.g.*, Century Fed. Sav. & Loan Ass'n v. Van Glahn, 144 N.J. Super. 48, 55, 364 A.2d 558, 562 (1975).

186. *E.g.*, First S. Fed. Sav. & Loan Ass'n v. Britton, 345 So. 2d 300, 303 (Ala. Civ. App. 1977) (so long as acceleration clause clearly states that it will require payment of increased interest up to current rate, such a clause is permissible); Tucker v. Pulaski Fed. Sav. & Loan Ass'n, 252 Ark. 849, 855-58, 481 S.W.2d 725, 729-31 (1972).

ment over the present system, which ties up more of the borrower's real estate than is actually necessary to secure the loan.

F. Improving Conditions for Black Borrowers

The Secretary of Agriculture should be urged to establish regulations providing relief from Farmer's Home Administration mortgage foreclosures under specified extenuating circumstances. The Farm Security Administration should be revived.[187] New sources of financial assistance to black landowners commensurate with their capabilities and needs should be developed. A heavily capitalized land bank[188] or a local black landowners' cooperative lending institution could be included.[189] Black landowners could contribute funds, land, or interests in land to such a cooperative, and thereby create a "land credit union."[190] The pressing need for the establishment of some independent financial institution might be facilitated by federal or state legislation. A special government-regulated lending institution existed on the federal level in the 1930's. Its provisions included a reasonable payback period, a statutory period of redemption, and a statutory moratorium on foreclosure proceedings.[191] Such an institution may be necessary to protect the interest of the black farmer

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187. The Farm Security Administration, established during the administration of Franklin D. Roosevelt as part of the Department of Agriculture, "was for several years extremely successful in helping poor people stay on the land, getting new farmers started, and setting up [agricultural] cooperatives." P. BARNES, THE PEOPLE'S LAND 17 (1975). *See generally* S. BALDWIN, POVERTY AND POLITICS: THE RISE AND DECLINE OF THE FARM SECURITY ADMINISTRATION (1968).

188. *See* SIX MILLION ACRES, *supra* note 8, at D-3.

189. *See id.*

190. A building and loan association, an entity closely related to a credit union, 13 AM. JUR. 2D *Building & Loan Associations*, § 4, at 146 (1964), is basically an

> organization of people entitled to equal privileges, cooperating by established periodic and equal payments per share in the creation of a common fund which may be loaned to any member for the purpose of building on property purchased therewith or on other property on which the association obtains a lien, and sharing the profits and losses of the association according to their respective interests.
>
> Accordingly, the purpose of such an association is the accumulation of funds for division among the members, investment of such funds until the appointed period of division, and the enablement of its members to obtain by anticipation a loan or advance from the association, on such terms as may be prescribed, of the proportion to which on division it is contemplated they would be entitled to receive (footnotes omitted).

Id. § 1, at 143. The "land credit union" would provide that contributions to the common fund could be made by conveying interests in land (*e.g.*, leaseholds, fees, and life estates) to the union as a substitute for, or in addition to, contributions of capital. The contributed land could be pledged as security for borrowing by the union to obtain funds for relending to the membership.

191. *See* Frazier-Lemke Act, ch. 792, 49 Stat. 942 (1935) (now expired) (constitutionality upheld in Wright v. Vinton Branch, 300 U.S. 440 (1937)).

in the South. In light of the present recession and depression, an outright moratorium on foreclosure proceedings might be appropriate.[192]

V
OTHER CAUSES OF BLACK LAND LOSS

Adverse possession, eminent domain, and fraud also lead to the loss of land owned by blacks. Although not the major causes of such land loss, these factors can operate in an especially devastating way when combined with the confusion caused by heirs' property laws.

A. Adverse Possession

Adverse possession is the extinction of title to property which results when the true owner is dispossessed from his land and fails to eject the dispossessor before the statute of limitations on ejectment actions bars the true owner's claim. The possession must be actual, open, hostile, notorious, exclusive, and continuous.[193] Although adverse possession provides a legal theory whereby an heir in possession may try to gain clear title to jointly owned property,[194] it can also pose a threat to the black landowner.[195] The possibility of a trespasser gaining title to land by adverse possession is one of the more subtle dangers faced by the indigent rural farmer. This danger is especially serious for the absentee owner such as the absentee heir.

The evidentiary requirements[196] and time limits[197] for a showing of adverse possession vary. Many statutes treat adverse possession under claim of right differently from that under color of title. A claim of right may be evidenced by acts or conduct in relation to the property possessed, and may include a verbal transaction.[198] Color of title arises when one's claim is unenforceable, but is evidenced by a defective writing that purports to pass title.[199] In some states, color of title allows a possessor to gain title by adverse possession to all lands described in the writing although not all such lands are

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192. According to one commentator, "[F]alling land prices were a threat to all those who had a mortgage loan on their farms, and many mortgages were foreclosed, especially during the Great Depression of the early 1930's." M. CLAWSON, THE LAND SYSTEM OF THE UNITED STATES 94 (1968).

193. *See, e.g.*, Lay v. Phillips, 276 Ala. 273, 276, 161 So. 2d 477, 480 (1964).

194. The doctrine of "constructive ouster" has enabled some cotenants to gain good title to the land if their other cotenants (competing heirs, in this instance) have not occupied the land or made demands for accounting or partition. *See* note 24, *supra*.

195. ELF REMOTE CLAIMS STUDY, *supra* note 2, at 133-35.

196. *See* 3 AM. JUR. 2D *Adverse Possession* § 6 (1962).

197. *Id.*

198. *See, e.g.*, Ewing v. Tanner, 184 Ga. 773, 780, 193 S.E. 243, 247 (1937) (dictum).

199. Shippen v. Cloer, 213 Ga. 172, 173-74, 97 S.E.2d 563, 565 (1957).

occupied by the possessor.[200] Claim of right, on the contrary, allows the possessor to gain title only to land which he actually occupies.[201]

Adverse possession may occur if a farmer finds himself unable to cultivate some portion of his land, perhaps due to insufficient manpower or finances. An adjacent farm owner may take it upon himself to plant and harvest crops on the uncultivated land. After the statutory period has run, the adjacent farmer may claim that he has dispossessed the former owner. His claim would be supported by the fact that he had raised crops on the land and profited from them during the period he was in possession. Similarly, while a statutory presumption exists against adverse possession by cotenants, a creditor who succeeds to a cotenancy in heirs' property might force a partition of the property. Then, as owner of a discrete interest rather than an interest in cotenancy, he could avoid the statutory presumption.

B. Eminent Domain

The government, pursuant to its sovereign power over all lands within its jurisdiction, can take private property for a public use upon payment of "just compensation," a value determined administratively but subject to judicial review.[202]

A particularly dramatic example of unfairness to black landowners in the administration of the law of eminent domain occurred in Harris Neck, Georgia, during World War II. On July 26, 1942, one hundred black farmers were forcibly removed from 2,681 acres of prime land on Georgia's south coast, ostensibly to make way for the construction of an Army air base.[203] The bulk of the land apparently first came into black hands as a result of Sherman's Special Field Order #15; adjoining parcels were later purchased by black families and the Harris Neck site eventually took shape.[204] Local whites, including the county sheriff, had conspired to take the land away from the black owners long before condemnation.[205] The owners were forced to vacate on the threat that their homes would be torn down and burned, and were paid only ten dollars an acre in compensation.[206] The land, however, was never developed for an airport. It was eventually turned over to the county as surplus

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200. *See, e.g.*, GA. CODE § 85-404 (1978). In addition, written evidence of title, even if defective, permits title through adverse possession in seven years, as opposed to Georgia's normal twenty-year period. GA. CODE § 85-407 (1978).

201. *See, e.g.*, GA. CODE §§ 85-402, 85-403 (1978); *see also* Bennett v. Rewis, 212 Ga. 800, 801, 96 S.E.2d 257, 259-60 (1957).

202. *See* United States v. Jones, 109 U.S. 513 (1883); C. BERGER, LAND OWNERSHIP AND USE 875 (2d ed. 1975).

203. Atlanta Constitution, May 11, 1979, at 1.

204. N.Y. Times, May 5, 1979, § 1, at 28, col. 2.

205. Hopkins, *Harris Neck History, A Bureaucratic Web*, Atlanta Constitution, May 11, 1979, at 1C.

206. *Id.* at 5C.

federal property, subject to restrictions which were generally designed to preserve the property. The county did not abide by these restrictions: local officials cut nearly all the timber off the property and grazed their livestock on it.[207] After fifteen years of misconduct by county officials, including the pirating of building fixtures by county officials (some houses were even removed entirely to the land of the local sheriff), the federal government finally took the property back and turned it over to the United States Fish and Wildlife Division on May 25, 1962.[208]

The former residents of Harris Neck have brought suit in federal court for damages and for return of their land.[209] Although Representative Ginn of Georgia introduced a bill into Congress in 1968 to convey the disputed lands to the original owners, the bill died in committee.[210] Representatives Ginn and Fauntroy of the District of Columbia introduced a similar bill in 1979.[211]

Displacement of rural blacks in the path of the Tennessee-Tombigbee Waterway Project,[212] particularly by unfair condemnation practices,[213] is a new and particularly frightening threat to black landowners. Emergency Land Fund[214] research efforts during 1974 and 1975 identified over 5,000 minority

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207. *Id.*

208. *Id.*

209. United States v. Timmons, No. 279-50 (S.D. Ga., filed June 12, 1979). The petition also charged the Federal Government with discrimination in the eviction. N.Y. Times, June 13, 1979, at A12, col. 6.

210. N.Y. Times, May 1, 1979, at A16, col. 1.

211. H.R. 4018, 96th Cong., 1st Sess., 125 CONG. REC. H2947 (1979).

212. The Tennesse-Tombigbee Waterway ("TTW" or "the Waterway")

> is a $1 billion federal public works project which will link the Tombigbee and Tennessee Rivers. Located principally in Alabama and Mississippi, the Waterway will create a new inland water route connecting the Port of Mobile with Nashville, Pittsburgh, and Chicago, among other places. Once fully developed for navigation, the Waterway will stimulate increased industrial, agribusiness, and related economic growth in the Southwest Alabama and Northeast Mississippi regions through which it passes.
>
> Construction of the 253-mile route, which is scheduled to last until the early 1980s, has already commenced. Development of the project is supervised by the U.S. Army Corps of Engineers, but control will eventually be vested in the Tennessee-Tombigbee Waterway Development Authority (TTWDA), a five state compact whose directors are appointed by the governors of the states of Alabama, Mississippi, Florida, Kentucky, and Tennessee.

THE MINORITY PEOPLE'S COUNCIL ON THE TENNESSEE-TOMBIGBEE WATERWAY, PROPOSAL FOR SUPPORT OF THE COMPREHENSIVE HUMAN RESOURCE AND ECONOMIC DEVELOPMENT PROGRAMS OF THE MINORITY PEOPLE'S COUNCIL 1 (Jan. 1976) [hereinafter cited as MINORITY TTW PROPOSAL.]

213. The MINORITY TTW PROPOSAL includes a budget item in the amount of $237,475 for legal challenges to the manner in which the Corps of Engineers has conducted the TTW project, and includes funds for legal defense against unfair condemnation practices. *Id.* at 163, 170.

214. The Emergency Land Fund is a nonprofit corporation authorized to operate in Georgia and several other Southern states. It was organized in 1972 to stem the loss of black-owned land in the rural South. It implements its program by providing technical advice and assistance in the areas of agricultural management, law, and economics; by direct representation in legal matters and before various administrative bodies; by massive landowner education programs; and by aiding in the organization of landowner self-help groups such as agricultural cooperatives.

landowners in the sixteen-county TTW impact area for two states, Alabama and Mississippi.[215]

C. Fraud

Everyone can be victimized by fraudulent practices, but blacks, at the bottom of the socioeconomic ladder in the rural South, receive the worst treatment.[216] These practices appear as bad faith sales of property in estates at far below market value; as unconscionable house repair contracts with inflated prices and provisions for quick mortgage foreclosure in case of nonpayment; and as seizure of property through adverse possession or simple force. Other practices, while legal, are nonetheless "sharp" and are particularly harsh when inflicted upon the poor. For example, lawyers and others performing services may force the poor to take mortgages in order to secure fees, or developers may purchase property with resort, mineral, or other potential at a fraction of the true value.[217]

VI
CONCLUSION

Although whites have been taking black-owned land for some time, the problem has become more acute as (1) land increases in value because of urban, suburban, and industrial growth in the South; (2) the trend towards larger farming operations becomes more pronounced; (3) blacks become increasingly involved in the developing consumer and credit markets; and (4) the national "tight money" situation worsens, spurring creditors to foreclose even more readily than in the past. The problem of heirs' property and debt-encumbered property, as well as rising property taxes, places great pressure on black landowners.

A number of organizations have already engaged in general litigation programs which seek to remedy the loss of black-owned land resulting from the application (or misapplication) of property law.[218] To be effective, however, a general litigation program must have certain elements, most of which have up to now been missing because of lack of funds.

Such a program would focus on a wide range of areas, and the following would form only a part of the necessary activity: assisting persons who have a legal problem concerning their land; writing wills for landowners; helping to clear or quiet title; explaining the legal and financial implications of various alternatives regarding the land. To establish a prompt and efficient mechanism

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215. Interview with Joseph Adams, Director, Emergency Land Fund, Jackson, Miss. office (Dec. 11, 1979).

216. ELF REMOTE CLAIMS STUDY, *supra* note 2, at 126-28.

217. *Id.*

218. The ACLU and the National Lawyer's Guild have expressed interest in such campaigns.

for serving the day-to-day legal problems of black landowners, a library of model pleadings, forms, and procedures should be developed for use in recurring types of litigation.[219] Guidelines for proper procedure must also be established.[220]

Special efforts would be necessary in a number of areas such as heirs' property and tax sales. A general litigation program would address the heirs' property problem by delivering services to property owners which would encourage them to make wills, to develop forms of ownership other than as tenants in common, and to voluntarily partition their property where partition is advisable or necessary. To address the tax problem, the program would develop mechanisms to apprise people of their property rights and litigate to compel strict compliance with statutory requirements limiting the amount of land sold at a tax sale to an amount sufficient to satisfy the tax debt.

Many procedures affecting land are open to attack on constitutional grounds. Laws which allow the condemnor in eminent domain actions to use condemned property pending the landowner-condemnee's appeal are arguably unconstitutional, because even if the landowner's appeal prevails, the land may be irreparably damaged by the condemnor's intervening use. Furthermore, condemnation proceedings often use special hand-picked "clerk's juries," which do not reflect a cross-section of the community and are themselves open to constitutional attack. In the area of heirs' property, it has been suggested that blacks threatened with divestiture by way of forced partition suits and other tactics may protect themselves with arguments based on the thirteenth amendment.[221]

This Article has surveyed the historical, social, and economic reasons for loss of black-owned land, and the failure of existing statutes to address those reasons. Indeed, many laws, such as those governing descent and distribution, tax sales, land-secured debts, and adverse possession, are themselves a significant cause of such loss of ownership. It was suggested that a partial solution to the problem is adoption of a model act such as the Model Heirs' Property Act or the Uniform Probate Code, and that statutory reform in other areas is also necessary to counter the trend of black land loss.

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219. *E.g.*, partition, title clearing, and ejectment actions.

220. *E.g.*, how to buy in at a foreclosure sale; how to perfect an equity of redemption.

221. *See generally* Balbus, *Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law*, 11 LAW AND SOC'Y REV. 571 (1977). Such an argument would rest on the rights of blacks as a group, rather than as individuals. The thirteenth amendment was passed to counter the effects of the *Dred Scott* decision, Scott v. Sanford, 60 U.S. (19 How.) 393 (1856), and was intended to eliminate the "badges and incidents" of slavery, The Civil Rights Cases, 109 U.S. 3, 21 (1883), for blacks as a *group*, not merely as individuals. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). Blacks' individual rights can be used against them by whites alleging abuse of the same rights as a result of affirmative action programs aimed at improving conditions for blacks. *See* Brief of the Board of Governors of Rutgers, amici curiae, at 21, Regents of the Univ. of Cal. v. Bakke, 436 U.S. 265 (1978).

It may be that the ultimate solution for the black land-loss problem lies in recognition of the thirteenth amendment as a source of rights and opportunities for blacks as a group. This concept is the subject of a separate work in progress, tentatively entitled *Individual Rights or Collective Rights? Blacks and the Thirteenth Amendment.*