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Informal Homeownership in the United States and the Law

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**INFORMAL HOMEOWNERSHIP IN THE UNITED STATES AND
THE LAW**

HEATHER K. WAY*

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“Imagine a country where nobody can identify who owns what . . . and the rules that govern property vary from neighborhood to neighborhood or even from street to street.”¹

I. INTRODUCTION

America has long been a land of homeowners, from the 19th century homesteaders moving west to the 21st century families moving to the exurbs, all striving to stake claim to the American dream and own their own home. A critical component of homeownership in the United States has been the ability to hold and transfer secure title. In recognition of the centrality of title to ownership, states have developed laws and formal legal systems to provide secure, marketable title to homebuyers and to facilitate the transfer of that title to future owners.

These formal legal systems—while so critical to providing secure and alienable title to one’s home—are inaccessible to many in the United States. Income, educational, cultural, and language barriers push many individuals outside these formal legal systems, where they can easily end up in a home with clouded title (if they end up with title at all) and with more limited legal rights and protections. For example:

- An unsophisticated homebuyer may not understand the differences between a contract for deed and a warranty deed and thus unknowingly enter into a real estate transaction that does not provide him with legal title to the home until completion of the contract term.
- A low-income couple may be unable to afford an attorney to complete a will, and, after they die, their heirs may not have the means to formalize the transfer of title to their home. Consequently, one of the heirs living in the home finds she is unable to secure a home repair loan to fix the roof.
- A homebuyer who speaks only Spanish may not understand the importance of obtaining title insurance in a seller-financed transaction, and when someone else lays claim to her home, she then has no means to defend her interest in the property.

The United States has ended up with two different pathways to homeownership, and two unequal tiers of legal protections: First, a formal pathway in which the law, access to legal resources, and third party oversight provide families with secure, marketable title to their homes.² Second, an informal pathway to homeownership in which the law, limited access to legal

1. HERNANDO DE SOTO, MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 15 (2000).

2. *See infra* Part III.

resources, and little third party oversight leave many of the nation's most vulnerable homeowners—largely poor Black, Latino, and immigrant families—with reduced legal protections and insecure, unmarketable title to their homes.³ Knowingly or unknowingly, these more vulnerable homeowners buy or inherit into a form of homeownership riddled with title issues and related challenges.⁴

Historically, perhaps because informal homeownership is not tracked by outside financial markets, or because of the socioeconomic status of the impacted homeowners, little attention has been paid to informal homeownership in the United States outside of heirship property issues in the rural Southeastern United States⁵ and on Indian reservations.⁶ Informal homeownership, however, is pervasive and systemic in low-income communities across many parts of the United States, both urban and rural.⁷ Millions of low-income Americans—in pursuit of the American dream—acquire their homes informally.⁸

The succession of devastating hurricanes in the southern United States from 2003-2008 has recently raised more awareness of the prevalence of

3. See *infra* Part IV.A–E.

4. See *infra* Part IV.C–D.

5. See generally Jess Gilbert et al., *Who Owns the Land? Agricultural Land Ownership by Race and Ethnicity*, 17 RURAL AM. 55 (2002) (discussing the amount of land owned by minorities, including American Indians and southern blacks), available at <http://www.ers.usda.gov/publications/ruralamerica/ra174/>; Thomas W. Mitchell, *Destabilizing the Normalization of Black Land Loss: A Critical Role for Legal Empiricism*, 2005 WIS. L. REV. 557 (introducing a study on black land loss in the south) [hereinafter Mitchell, *Destabilizing the Normalization*]; Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505 (2001) [hereinafter Mitchell, *From Reconstruction to Deconstruction*] (describing how partition actions have divested black farmers, mainly located in the south, of their land).

6. See Jessica A. Shoemaker, *Like Snow in the Spring Time: Allotment, Fractionation, and the Indian Land*, 2003 WIS. L. REV. 729 (discussing how inheritance of Indian land results in extremely fractionated ownership interests).

7. See *infra* Part IV.B. See generally Jane Larson, *Informality, Illegality, and Inequality*, 20 YALE L. & POL'Y REV. 137, 158 (2002) (concluding that informality disproportionately affects non-whites, immigrant non-English speakers, and females and, by its very nature, informality is “covert” and hidden from the mainstream).

8. No precise data exists on the number of homeowners who have acquired their home informally. Some data is available through the U.S. Census Bureau, which collects information on the number of owner-occupied units with a seller-financed mortgage or a “land contract,” (defined to include installment contracts and lease-to-own purchases). In 2007, more than 3.7 million owner-occupied units had these more informal types of financing. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, AMERICAN HOUSING SURVEY FOR THE UNITED STATES: 2007 162 (2008), <http://www.census.gov/prod/2008pubs/h150-07.pdf>.

informal homeownership and lack of secure title in low-income communities.⁹ When families with damaged homes sought to obtain government housing assistance, thousands ran into roadblocks when they were unable to show varying levels of proof of title to their homes.¹⁰

In Louisiana, for example, an estimated 15% of the homeowners who applied for federal housing assistance after Hurricane Katrina—approximately 20,000 homeowners—had clouded title, including many homeowners concentrated in the low-income neighborhoods of New Orleans Parish.¹¹ Housing providers and advocates working to help families obtain hurricane assistance in Mississippi report as well that title issues have been a chronic and extensive problem for low-income homeowners in areas impacted by Hurricane Katrina.¹²

Low-income households in areas of Texas impacted by Hurricanes Rita and Dolly have likewise faced numerous problems with clouded title issues. According to one recent analysis in Texas, approximately one out of five low-income households applying for hurricane recovery assistance had at least one title issue impeding the family's ability to access assistance.¹³ According to another analysis in a low-income area of the state, approximately 90% of the

9. See, e.g., Malcolm A. Meyer, *Louisiana Heirship Property: Solutions for Establishing Record Title*, 55 LA. B. J. 328, 329 (2008); David Hammer, *Road Home Deadlines Are Rescinded: Thousands of Applicants Have Encountered Technical Obstacles*, TIMES-PICAYUNE (New Orleans), Aug. 28, 2008, at A1 (discussing recent notice that government agencies have taken of resident's title problems); *All Things Considered: No Title? No Easy Access to Post-Katrina Aid*, (NPR radio broadcast Apr. 28, 2008), available at <http://www.npr.org/templates/story/story.php?storyId=90005954> [hereinafter *All Things Considered*]. Hurricanes Rita, Wilma, and Katrina caused widespread damage along the Gulf Coast in 2005, followed three years later by hurricanes Ike, Gustav, and Dolly. The 2005 hurricanes damaged 1,197,499 occupied housing units. OFFICE OF POLICY DEV. & RESEARCH, U.S. DEPT. OF HOUS. & URBAN DEV., CURRENT HOUSING UNIT DAMAGE ESTIMATES: HURRICANES KATRINA, RITA, WILMA 8 (2006), www.huduser.org/publications/pdf/GulfCoast_HsngDmgEst.pdf. In 2007, Hurricane Ike alone caused an estimated \$3.4 billion damage to housing in Texas. FED. EMERGENCY MGMT. AGENCY, U.S. DEP'T OF HOMELAND SEC., HURRICANE IKE IMPACT REPORT 17 (2008), http://www.fema.gov/pdf/hazard/hurricane/2008/ike/impact_report.pdf.

10. Ariella Cohen, *Hurdles to Heirship: Heirship Property Prevents Many New Orleans Residents From Receiving Grants*, NEW ORLEANS CITYBUS., Aug. 4, 2008, at 1; Hammer, *supra* note 9, at 1; *All Things Considered*, *supra* note 9.

11. See Meyer, *supra* note 9, at 329; E-mail from Paul Tuttle, Managing Attorney for Southeast Louisiana Legal Services, to Heather K. Way, Director, Community Development Clinic, University of Texas School of Law (Jan. 12, 2009) (on file with author).

12. Telephone Interview with Reilly Morse, Mississippi Center for Justice (Nov. 21, 2008); Telephone Interview with Jason MacKinsey, North Gulfport Community Land Trust (Nov. 2008).

13. E-mail from Craig A. Beebe, Government Services Management Consulting, Reznip Group, P.C., to Heather K. Way, Director, Community Development Clinic, University of Texas School of Law (Apr. 30, 2009) (on file with author).

applicants had some type of problem with the title to their homes.¹⁴ The consequences of holding clouded title could be severe: If applicants could not prove clear title, they faced long delays in receiving assistance. In the worst cases—when the chains of title could not be adequately established over time—the applicants were ineligible to receive assistance for rebuilding their homes.

What role should the law play, if any, in eliminating these pervasive disparities? With the recent collapse of the home mortgage market and the widespread problems generated by subprime loans and declining home values,¹⁵ the major policy discussions have focused on increased safeguards in the formal market and the reformulation of national policies that have supported homeownership opportunities for lower- and middle-income families.¹⁶ This policy focus, however, ignores the disparities facing the large subset of the most vulnerable homeowners who do not participate in the formal homeownership market.

This Article examines the different formal and informal paths to homeownership and explores how the law provides inferior protections to low-income families acquiring homes informally, outside of the mortgage market and state probate systems. The first two parts of this Article provide an overview of the importance of title and the role of American property law in providing secure and alienable title. Part Three then outlines the legal systems and protections in the formal paths to homeownership and how they assist homeowners in obtaining secure and alienable title to their homes.

Part Four explores the informal paths to homeownership: the different ways in which many low-income families acquire homes informally; the benefits of informality; and finally, the pitfalls and flawed title that result from the limited legal protections extended to these lower-income families. Part Five examines the potential opportunities for reform and ways in which policymakers and lawyers can help ensure that American laws and property systems better protect all homeowners.

In closing, I argue that national and state homeownership policies need to do a better job of addressing problems in the informal market and closing the legal disparities in the two tiers of homeownership. Policymakers concerned

14. Telephone Interview with Mike Foster, Director of Community Development for the Southeast Regional Planning Commission (Dec. 12, 2008).

15. See, e.g., Al Yoon, *About Half of U.S. Mortgages Seen Underwater by 2001*, REUTERS, Aug. 5, 2009, <http://www.reuters.com/article/newsOne/idUSTRE5745JP20090805> (drop in home prices is creating a “vicious cycle” of foreclosures; percentage of homeowners who owe more on their home than the home is worth will almost double to 48% in 2011).

16. See, e.g., Kenneth R. Harney, *Congress Takes a Serious Look at Reforming the Mortgage Market*, WASH. POST, Apr. 4, 2009, at F1; *Fed Statement on Mortgage Reform*, BUS. WK., Dec. 18, 2007, http://www.businessweek.com/bwdaily/dnflash/content/dec2007/db20071218_145260.htm.

about improving the benefits of homeownership should focus not only on the mortgage finance market, but also on the informal market, by seeking to eliminate the disparities in the character of ownership and form of title that many lower-income families hold to their homes.

II. THE IMPORTANCE OF TITLE

Title is a legal construct that defines the ownership interest someone holds in an asset.¹⁷ In the context of homeownership, title allows one to determine who owns what property interests in a home, and then determine who has legal authority to use, enjoy, encumber, and transfer the property.¹⁸

American property law has long supported the creation of clear title interests through the adaptation of wide-ranging legal rules and systems.¹⁹ When confronted in the past with widespread informal land holdings that lacked clear title, the country has responded by changing the law to legitimize these more informal property arrangements.²⁰ For example, when settlers moved west into newly acquired states and territories, tens of thousands laid claim to land that was not legally theirs.²¹ This led to legal turmoil, threatened the security of the settlers' investments, and reduced the personal security of the settlers, who were constantly subject to ejectment proceedings.²² Eventually, federal and state laws responded, giving rise to laws such as preemption and adverse possession. Through preemption, squatters could recover improvements and any taxes they had paid for real property.²³ The government then gave settlers the option to buy any state land that they had improved before the government offered the land for public sale.²⁴ Through new adverse possession laws, the government provided legal title to squatters

17. See WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1238 (Frederick C. Mish et al. eds., 1988) (title is "all the elements constituting legal ownership"); see also RUFFORD G. PATTON & CARROLL G. PATTON, PATTON ON LAND TITLES § 1, at 2 (1st ed. 1938) ("[T]itle' means the right to or ownership of property.').

18. A.B.A., FAMILY LEGAL GUIDE ch. 4, at 31 (3d ed. 2004), http://www.abanet.org/publiced/practical/books/family_legal_guide/chapter_4.pdf.

19. See 14 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 82.01(1)(b) (Michael Allan Wolf ed., 2000) (discussing history of American recording laws dating back to colonial times).

20. DE SOTO, *supra* note 1, at 107–08.

21. *Id.* at 122, 128. See also 14 POWELL, *supra* note 19, § 82.01(1)(b) (discussing how state and federal governments adopted requirements for recording of interests in real property following settlement of new territories and states).

22. DE SOTO, *supra* note 1, at 128–29.

23. Eduardo Moisés Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095, 1109–13 (2007).

24. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 167–70 (3d ed. 2005); Peñalver & Katyal, *supra* note 23, at 1113 n.68.

who had made an “open and notorious” claim to private land for a minimum length of time without any opposition from the record owner.²⁵

American property laws supporting clear title and more formal landholdings have historically promoted two key values: security and alienability.²⁶ Security in ownership—the principle that an owner’s property rights cannot be taken away, except by the government with just compensation—is a fundamental attribute of American property ownership.²⁷ One of the touchstones of real property security in the United States has been the creation of extensive title recording systems at the state level which create a written record of the chain of title.²⁸ These public recording systems, along with quiet title actions, laws that extinguish ancient claims, and other property laws, favor the creation of clear and reliable property interests, while disfavoring ambiguous or contested ownership interests.²⁹ Title insurance further facilitates the creation of secure title interests by insuring a property owner from third party claims to the property.³⁰

American laws supporting the alienability of property—the ability to freely sell property for market value or to otherwise transfer property—have evolved as a means to promote the economic development of property and support a free market economy.³¹ Laws promoting the alienability of property have their origins in English common law and in the founding of the American legal system.³² From the abolition of fee tails to restrictions on the possibilities of reverter and limits on property subdivision, American property laws have

25. FRIEDMAN, *supra* note 24, at 310.

26. See U.S. CONST. amend. V; PATTON & PATTON, *supra* note 17, § 6, at 15–16.

27. See, e.g., *id.*; see also Robert MacCulloch, *Income Inequality and the Taste for Revolution*, 48 J.L. & ECON. 93, 93 (2005) (“A fundamental requirement of market economies is the security of ownership claims to property.”).

28. PATTON & PATTON, *supra* note 17, § 6, at 15–16.

29. *Id.* (U.S. title recording systems allow for anyone to rely on records to “ascertain in whom the title is vested and the incumbrances against it”); Hugh A. Brodkey, *Land Title Issues for Countries in Transition: The American Experience*, 29 J. MARSHALL L. REV. 799, 805–07 (discussing history of U.S. title recording systems and how they promote security).

30. See generally 16 POWELL, *supra* note 19, § 92.01 (providing general characteristics of title insurance).

31. See 3 JOHN A. BORRON, JR. ET AL., *THE LAW OF FUTURE INTERESTS* § 1117 (3d ed. 2004); FRIEDMAN, *supra* note 24, at 309 (“The dominant theme of American land law was that land should be freely bought and sold.”); Gerald Korngold, *Resolving the Intergenerational Conflicts of Real Property Law: Preserving Free Markets and Personal Autonomy for Future Generations*, 56 AM. U. L. REV. 1525, 1549–50 (2007). Alienability represents “the right to both the wealth represented by an asset and the ability to transmit the asset to another.” Lee Anne Fennell, *Adjusting Alienability*, 122 HARV. L. REV. 1403, 1405 n.5 (2009).

32. See, e.g., Korngold, *supra* note 31, at 1549–50 (discussing American courts’ “historical preference for free alienability”); Charles J. Reid, Jr., *The Seventeenth-Century Revolution in the English Land Law*, 43 CLEV. ST. L. REV. 221, 262 (1995) (exploring seventeenth century expansions of alienability in English law).

historically advanced and secured the ability of property rights to be sold and transferred—and limited the ability of people to impose restrictions that circumvent the transfer of property.³³

Property laws that produce clear title interests make it easier to move property in the market in several ways.³⁴ They allow the market to determine who owns what interests in an asset and thus facilitate free trade of the asset on the open market.³⁵ Clear title also facilitates outside investments in property by allowing creditors to have faith in the property interest they are securing. When title interests are insecure or unclear, creditors will either refuse to invest in the property or, alternatively, devalue the asset to take into account the higher risk of the investment or the transactional costs of making the title interests more secure.³⁶

III. THE FORMAL PATH TO HOMEOWNERSHIP

Today, whether someone is acquiring a home through purchase or inheritance, a complex web of laws and systems supports the creation and transfer of clear title interests—at least to those with the information and resources to access these systems.

A. *First Generation Owners: The Purchase of a Home*

The most common means of purchasing a home in the United States is through participation in the institutionalized home mortgage market.³⁷ Each step of this mortgage process involves different layers of oversight and legal safeguards that guide and protect the conduct of the different parties involved

33. See Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 664–65 (1998); see also GREGORY S. ALEXANDER, *COMMODITY & PROPERTY* 143–44 (1997). Gregory Alexander also asserts that, throughout American legal history, property law has not only served to promote a market commodity, but has also and continues to promote the “propriety” of property—the theory that property is the foundation for creating and maintaining social order and furthering the public good. *Id.* at 17.

34. DE SOTO, *supra* note 1, at 47.

35. ALEXANDER, *supra* note 33, at 151; DE SOTO, *supra* note 1, at 173.

36. DE SOTO, *supra* note 1, at 219. This is a lesson learned in the current mortgage crisis, where the market (belatedly) lost faith in mortgage security derivatives given the difficulty in identifying and locating the assets that were supposed to be securing the derivatives. Hernando de Soto, *Toxic Assets Were Hidden Assets*, WALL ST. J., Mar. 25, 2009, at A13.

37. In 2008, there were \$1,485 billion in single-family home mortgage loan originations. *Securitization Rate Drifts Lower in 2009 as Conforming Pipeline Swells*, INSIDE MBS & ABS, May 29, 2009, at 26. According to estimates from the Chief Economist with Freddie Mac, \$12 billion of these originations were made by individuals instead of institutions. E-mail from Frank E. Nothaft, Chief Economist, Freddie Mac, to Heather K. Way, Director, Community Development Clinic, University of Texas School of Law (Aug. 18, 2009) (on file with author).

in the transaction and ensure that the buyer ends up with marketable and secure title to the home.

When a person buys a home in the formal market, the buyer typically retains a real estate agent, who is regulated and licensed by the state, to assist with the purchase and guide the buyer through the acquisition process.³⁸ The lender, as a condition of investing in the transaction, protects its financial stake by requiring a mortgagee's title insurance policy.³⁹ The title insurer provides an independent examination of the land title records and insures against defects in the title to the property with the help of state laws that create property recording systems and rules for establishing proof of ownership. States likewise regulate the title insurer through different means such as regulation of the disclosures, rates, and policies utilized by the insurer.⁴⁰

A licensed attorney then oversees preparation of the transfer of title documents, and an escrow agent (who may or may not be a licensed attorney) oversees the closing.⁴¹ Finally, at the closing, the seller executes a deed over to the buyer,⁴² and the buyer executes a secured financing instrument, typically a mortgage or deed of trust. These documents are then recorded in the local property records, pursuant to state laws governing the recording of real estate records.⁴³ These laws protect the buyer from prior unrecorded interests against the property.⁴⁴

Homeowners participating in the mortgage market also benefit from a series of laws that help homeowners retain title or the equity in their homes after their home purchases are finalized. Foreclosure laws, for example, provide the means by which lenders can collect on mortgage liens but also provide a range of protections to homeowners in the event of default, such as notice rights, rights to cure, limits on acceleration for minor defaults, rights of

38. GEORGE LEFCOE, REAL ESTATE TRANSACTIONS 1 (2d ed. 1997). See TEX. OCC. CODE ANN. § 1101 (Vernon 2009) (concerning the regulation and licensing of real estate brokers and agents).

39. See John Mixon, *Installment Land Contracts: A Study of Low Income Transactions, with Proposals for Reform and a New Program to Provide Home Ownership in the Inner City*, 7 HOUS. L. REV. 523, 545–46 (1970) (explaining how buyers in the formal mortgage market end up with good title to land as a result of title insurance policies required by the lender).

40. See, e.g., TEX. INS. CODE ANN. § 11 (Vernon 2009).

41. LEFCOE, *supra* note 38, at 1–2.

42. *Id.* at 2. In a handful of states, called “title” states, the lender holds the legal title to the property upon execution of a mortgage or deed of trust until the loan agreement is satisfied, and the borrower retains only equitable title. The bulk of states are “modified lien theory” or “lien theory” states in which the execution of a mortgage or deed of trust does not transfer title to the lender; either the trustee or borrower holds the title. Escrowhelp.com, What is the Difference between a Title Theory State and a Lien Theory State?, <http://www.escrowhelp.com/articles/20000317.html> (last visited Nov. 14, 2009).

43. See, e.g., TEX. PROP. CODE ANN. §§ 12.001–13.002 (Vernon 2009).

44. *Id.* § 13.001 (Vernon 2009).

reinstatement, limits on deficiency judgments, and rights of redemption.⁴⁵ One of the key protections extended to homeowners is the right to a public sale upon foreclosure, which allows for the market to establish the value to the foreclosed home and allows the owner to claim any excess of the proceeds from the sale.⁴⁶

B. Second Generation Owners: The Inheritance of a Home

A second path to homeownership is through inheritance from a family member. When a homeowner dies, states foster the passage of title through laws that provide a clear set of rules governing how to transfer title interests in real property. With access to the necessary information along with financial and legal resources, homeowners are able to navigate these laws and transfer secure title to future generations of owners.

In order to facilitate the transfer of title, a homeowner can write a will, often with the assistance of a lawyer, and engage in other estate planning strategies that will govern the disposition of the home upon the homeowner's death, such as the utilization of a living trust or joint tenancy with a right of survivorship.⁴⁷ After the homeowner dies, the law imposes a formal process for title to pass to the beneficiaries named in the will. In Texas, for example, the executor or administrator of the owner's estate must go to probate court to administer the estate, or alternatively in certain situations, a representative of

45. 15 POWELL, *supra* note 19, § 84D.01(4). The levels of protections vary broadly across states. See Prentiss Cox, *Foreclosure Reform Amid Mortgage Lending Turmoil: A Public Purpose Approach*, 45 HOUS. L. REV. 683, 698 (2008) (summarizing the variety of state rights available to homeowners facing foreclosure). See also <http://www.foreclosurelaw.org> (listing foreclosure laws by state). About half the states provide for a statutory right of redemption after a foreclosure sale, whereby a homeowner has the right for a certain time period after a foreclosure sale to redeem the home by paying off the mortgage and other costs. 4 POWELL, *supra* note 19, § 37.46. Even states with more limited protections, such as Texas (where no right of post-sale redemption is allowed), provide a baseline of rights to homeowners. See, e.g., TEX. PROP. CODE ANN. § 51.002(b) (Vernon 2009) (providing for a 21-day notice of foreclosure sale); see also *id.* § 51.002(d) (providing for a 20-day opportunity to cure before notice of foreclosure sale can be sent).

46. 15 POWELL, *supra* note 19, § 84D.01(4). As another example, states like Texas provide additional protections once a mortgage has been paid off to ensure the mortgage lien no longer encumbers the property. Texas law provides a title insurance company officer with authority to execute an affidavit concerning pay off of the mortgage after the mortgage has been paid off and the mortgage company fails to release the lien. TEX. PROP. CODE ANN. § 12.017 (Vernon 2009).

47. See Karen J. Sneddon, *Beyond the Personal Representative: The Potential of Succession Without Administration*, 50 S. TEX. L. REV. 449, 451–52 (2009) (discussing strategies to avoid court-supervised administration of an estate).

the estate can probate the will through a muniment of title.⁴⁸ Both proceedings serve to transfer title to the beneficiaries in the will.⁴⁹

If a homeowner dies without a will, state laws provide for a series of alternative legal processes to enable the heirs to facilitate the transfer of secure, recorded title.⁵⁰ In Texas, for example, the most formal process is called a “determination of heirship,” which requires that an action be filed in court and requires the appointment of an attorney ad litem to protect the interests of the unknown heirs.⁵¹ At the end of the action, a certified copy of the judgment is filed in the deed records.⁵² Alternatively, for smaller estates in Texas, the heirs can file a small estate affidavit in the real property records, which requires court review but not a formal court proceeding.⁵³ Finally—although much less formal and not always accepted by title companies as proof of title in Texas—an heir can file in the local real property records an affidavit of heirship delineating the different heirship interests. After the affidavit has been on record for at least five years, the affidavit will be admissible as prima facie proof of the facts stated in the affidavit.⁵⁴

In summary, whether the home is acquired through purchase in the mortgage market or inheritance, the law and related formal systems play an important role in enabling homeowners to obtain and transfer secure, alienable title to their homes—as long as homeowners have the necessary tools to access these systems. As discussed in Part Four, many lower-income households inherit homes outside these formal systems and, as a result, face significant barriers to obtaining clear title to their homes.

48. *See generally* TEX. PROB. CODE ANN. ch. V (Vernon 2009).

49. If a homeowner desires for more than one beneficiary of the will to own the home, then a trust or other legal entity such as a limited liability company may be created to facilitate the co-ownership, with formal delineated rules governing the use and maintenance of the home. *See* GEORGIA APPLESEED, UNIV. OF GA. SCH. OF LAW, HEIR PROPERTY IN GEORGIA 24 (2009), <http://www.gaappleseed.org/docs/heirproperty.pdf> (providing an overview of how land trusts and limited liability properties can be used to facilitate co-ownership of real property).

50. *See, e.g.*, LEGAL HOTLINE FOR TEXANS, TEX. LEGAL SERV. CTR, HOW TO SELECT THE APPROPRIATE PROBATE PROCEDURE (2005), <http://www.tlsc.org/lhot%20pubs/How%20to%20Select%20the%20Appropriate%20Probate%20Procedure.pdf> (providing an overview of Texas probate law and the different procedures to transfer property from a decedent to his or her heirs).

51. TEX. PROB. CODE ANN. § 48 (Vernon 2009).

52. *Id.* § 56.

53. *Id.* § 137(c).

54. *Id.* § 52(a). For a summary of Texas law concerning options to transfer the title to property owned by someone who is now deceased, see RICHARD L. BLACK, TRICKS OF THE TRADE: LAND TITLE & TITLE TRANSFER PROBLEM-SOLVING TECHNIQUES (2010), http://www.texasbar.org/content/legal_library/real_estate/downloads/titleproblems.pdf.

IV. THE INFORMAL PATH TO HOMEOWNERSHIP

A. *The Call to Ownership*

Since the founding of the American colonies, homeownership has been a predominant feature of the national psyche.⁵⁵ Owning a home is the American Dream, the predominant symbol of family prosperity and success.⁵⁶ The vast majority of Americans aspire to be homeowners, and in 2008, 67.8% of American households attained this goal.⁵⁷ Low-income families share this strong American desire to be homeowners: 50% of low-income households own their own home.⁵⁸ Even the poorest families strive to be homeowners. Of those households living below the poverty line (\$18,104 for a family of four), 35% are homeowners.⁵⁹ For American families, the desire to own a home is “almost a genetic yearning . . . to claim and fence and demarcate our dwellings, physically and legally, from others.”⁶⁰

In today’s market, with declining home values, skyrocketing foreclosure rates, and the collapse of the mortgage lending industry, some are calling into question the government’s long-standing promotion of homeownership and asserting that homeownership for many is no longer a viable policy goal.⁶¹

55. See KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 7, 117–18 (1985); J. Paul Mitchell, *Historical Overview of Federal Policy: Encouraging Homeownership*, in FEDERAL HOUSING POLICY & PROGRAMS PAST AND PRESENT 39, 39 (J. Paul Mitchell ed., 1985). Property ownership also was a prerequisite to holding office and voting in federal elections. Peter Dreier, *Status of Tenants in the United States*, 30 SOC. PROBS. 179, 181–82 (1982).

56. MICHELLE MILLER-ADAMS, OWNING UP: POVERTY, ASSETS, AND THE AMERICAN DREAM 23 (2002).

57. *Id.*; U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY/HOUSING VACANCY SURVEY tbl. 14 (2008). In a 1994 survey, 86% of respondents said that people are better off owning versus renting a home, and 74% said that people should purchase a home as soon as they can afford to purchase one. William M. Rohe et al., *Social Benefits and Costs of Homeownership*, in LOW-INCOME HOMEOWNERSHIP: EXAMINING THE UNEXAMINED GOAL 381, 381 (Nicolas P. Restinas & Eric S. Belsky eds., 2002) (citing a 1994 Fannie Mae study).

58. Nicolas P. Restinas & Eric S. Belsky, *Examining the Unexamined Goal*, in LOW-INCOME HOMEOWNERSHIP: EXAMINING THE UNEXAMINED GOAL 1, 11 (2002); see also Thomas P. Boehm & Alan M. Schlottmann, *Housing and Wealth Accumulation: Intergenerational Impacts*, in LOW-INCOME HOMEOWNERSHIP: EXAMINING THE UNEXAMINED GOAL 407, 408 (2002) (low-income families have a strong demand to own even despite the financial risks).

59. Peter M. Ward, *Colonias, Informal Homestead Subdivisions, and Self-Help Care for the Elderly Among Mexican Populations in the United States*, in THE HEALTH OF AGING HISPANICS: THE MEXICAN-ORIGIN POPULATION 141, 149 (Jacqueline L. Angel & Keith E. Whitfield eds., 2007).

60. Restinas & Belsky, *supra* note 58, at 11.

61. See, e.g., Rebecca Tuhus-Dubrow, *Rethinking rent: Maybe we should stop trying to be a nation of homeowners*, BOSTON GLOBE, Mar. 22, 2009, at K1; A. Mechele Dickerson, *The Myth*

These challenges have led to many calls for reform, including proposals to redirect financial incentives from homeownership to the rental housing market and to tighten lending standards.⁶²

Yet, even with the adoption of these policies, homeownership will surely remain a predominant feature of the American landscape, including for lower-income families.⁶³ Many lower-income families have bought homes in spite of the fact that they receive little or no benefit from government homeownership subsidies, such as the federal income tax deduction for mortgage interest and property taxes.⁶⁴ In 2003, the average tax savings from this tax deduction for homeowners making less than \$40,000 was only \$190 a year.⁶⁵

Although the precise number of low-income families buying a home outside the formal mortgage market is unknown, informal acquisitions happen with regularity wherever there are low-income persons seeking to own a home who are locked out of the formal market because of their income or credit.⁶⁶ With the tightening of the housing mortgage market in 2008 and 2009, the informal market will likely serve a growing number of low-income and credit-

of Homeownership and Why Homeownership is Not Always a Good Thing, 84 IND. L. J. 189 (2009); Paul Krugman, Op-Ed., *Home Not-So-Sweet Home*, NY TIMES, June 23, 2008, at A21.

62. See Dickerson, *supra* note 61, at 189 (advocating for shifting federal incentives from homeownership to rental housing); Cassandra Jones Havard, "Goin' Round in Circles" ... and Letting the Bad Loans Win: When Subprime Lending Fails Borrowers: The Need for Uniform Broker Regulation, 86 NEB. L. REV. 737 (2008) (advocating for regulation of mortgage brokers); Alan M. White, *The Case for Banning Subprime Mortgages*, 77 U. CIN. L. REV. 617 (2008) (advocating for a ban on subprime mortgages).

63. In the culture of many working class Mexican immigrants, for example, "the most critical step in their journey toward some semblance of middle class security is owning a piece of land and building a home." Kristin Carlisle et al., *Housing and Colonia Communities in Texas*, in THE COLONIAS READER (forthcoming 2010) (on file with author).

64. See ADAM CARASSO ET AL., URBAN-BROOKINGS TAX POLICY CENTER, HOW TO BETTER ENCOURAGE HOMEOWNERSHIP 2 (2005), http://www.urban.org/UploadedPDF/311193_IssuesOptions_12.pdf (discussing how government subsidies provide more incentives for low-income households to rent over owning a home); EDGAR OLSEN, URBAN INSTITUTE, PROMOTING HOMEOWNERSHIP AMONG LOW-INCOME HOUSEHOLDS 2 (2007), http://www.urban.org/UploadedPDF/411523_promoting_homeownership.pdf (amongst the lowest 20% income bracket of households, renters are more likely than homeowners to receive government subsidies).

65. James Poterba & Todd Sinai, *Tax Expenditures for Owner-Occupied Housing: Deductions for Property Taxes and Mortgage Interest and the Exclusion of Imputed Rental Income*, 98 AM. ECON. REV. 84, 85 (2008); see also Adam Carasso, *Who Receives Homeownership Tax Deductions and How Much?* TAX NOTES (Tax Policy Center), Aug. 1, 2005, at 591.

66. Cf. Cecilia Giusti et al., *Land Titling in Starr County Colonias Along the Texas-Mexico Border: Planning and Stability Issues*, 6 PROJECTIONS: MIT STUDENT J. OF PLAN. 36, 51 (Fall 2007) (discussing how informal homeownership through colonias-type developments will occur as long as affordable land is available and regulations are not clearly defined or enforced).

burdened households and provide them with the only access they have to become homeowners.⁶⁷

The next section examines some of the legal challenges facing informal homeowners, particularly the obstacles they face in obtaining clear title to their homes.

B. Buying a Home Informally: Three Different Types of Informal Transactions

The three most predominant methods of purchasing a home⁶⁸ outside the formal mortgage market are: installment contracts, lease-to-own purchases, and seller-financed transactions. The sellers of these homes range from sophisticated real estate investors represented by lawyers to extremely unsophisticated owners scribbling out the terms of the transaction on a piece of paper. The following are general summaries of these three forms of informal transactions:

1. Installment Contracts

In installment contract transactions, also referred to as a “poor man’s mortgage,”⁶⁹ a contract for deed, bond for deed, land contract, or executory contract for conveyance, the home purchaser enters into a contract with the seller whereby the seller promises to issue a deed to the purchaser upon payment of the entire purchase price.⁷⁰ In a typical transaction, the buyer makes a down payment up front towards the purchase price and promises to make regular monthly payments with interest towards the sales price over a set

67. According to one industry professional, rent-to-own is “really hot now” for buyers who cannot get financing “due to the tightening of the credit market.” *Rent-to-own Becomes the Way to Buy for Many*, DALLAS MORNING NEWS ONLINE, Nov. 17, 2008, http://www.dallasnews.com/sharedcontent/dws/classifieds/news/homecenter/realestate/stories/DN-rent2ownhomes_17bus.State.Edition1.df897c.html. Legal aid lawyers from around the country report a spike in problems arising out of informal transactions.

68. For purposes of this article, the discussions on homebuyers and the use of the term “home,” do not refer to transactions in which a family buys only a trailer or manufactured home, and then leases the land for the trailer under a more traditional leasehold arrangement with no rights given in the lease agreement to purchase the land. Instead, this article is focused on informal homeowners who are seeking to acquire title to land on which to live. The land may have a preexisting house or mobile home on it, or the buyer may purchase a vacant property with the intent of building a home on the land or moving a housing structure such as a mobile home onto the land. Alternatively, a combination of the above may occur.

69. *Ellis v. Butterfield*, 570 P.2d 1334, 1336 (Idaho 1977).

70. See generally 15 POWELL, *supra* note 19, § 84D.01(1); Eric T. Freyfogle, *The Installment Land Contract as Lease: Habitability Protections and the Low-Income Purchaser*, 62 N.Y.U. L. REV. 293, 294–95 (1987).

contract term.⁷¹ The seller does not transfer legal title to the home, via a deed, until a completion of all the payments owed under the contract.⁷² The contract term typically runs for 15 to 30 years.⁷³

During the contract term, the buyer is typically responsible for property maintenance, taxes, and insurance.⁷⁴ The buyer is also typically responsible for interest on the sales price. The interest rates in installment transactions involving low-income buyers are significantly higher than the rates of conventional financing. For installment contract buyers in communities along the Texas border with Mexico, for example, interest rates of 12% to 14% have been typical.⁷⁵

Once the contract term is completed and the buyer finishes making the payments on the home, the seller is supposed to execute a deed, and either the seller or buyer files the deed in the property records. The “heart and soul” of an installment contract is the forfeiture clause—which provides that if a buyer defaults under the contract, the seller can declare the contract terminated, regain possession, and retain the buyer’s prior payments as liquidated damages.⁷⁶

Installment contracts have a long and widespread history in the United States⁷⁷ and have been common in many places where there has been an ample supply of affordable land or homes (often in substandard condition) and a pool of interested buyers ineligible for bank financing.⁷⁸ Thus, in Chicago in the 1950s and 1960s, a credit gap in neighborhoods as a result of bank redlining and white flight led to the extensive use of installment contracts in

71. GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW § 3.26 (3d ed. 1994).

72. CARYL A. YZENBAARD, RESIDENTIAL REAL ESTATE TRANSACTIONS § 4:43 (1991 & Supp. 2006).

73. Mixon, *supra* note 39, at 528.

74. 15 POWELL, *supra* note 19, § 84D.01(2); YZENBAARD, *supra* note 72, § 4:39.

75. Shelayne Clemmer, *Texas’s Attempt to Mitigate the Risks of Contracts for Deed—Too Much for Sellers—Too Little for Buyers*, 38 ST. MARY’S L.J. 755, 768, 799 (2007). The maximum legal interest rate for installment contracts in Texas is 18%. *Id.* at 768 n.72, 799 (citing TEX. FIN. CODE ANN. § 303.009 (Vernon 2006)).

76. RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 3.4 cmt. a (1997); Grant S. Nelson, *The Contract for Deed as a Mortgage: The Case for the Restatement Approach*, 1998 BYU L. REV. 1111, 1113, 1117.

77. Nelson, *supra* note 76, at 1112.

78. See LEFCOE, *supra* note 38, at 537 (installment contracts have been used most often by buyers who are unable to qualify for bank financing); Eric T. Freyfogle, *Vagueness and the Rule of Law: Reconsidering Installment Land Contract Forfeitures*, 1988 DUKE L.J. 609, 611 (“Installment contracts are commonly signed by purchasers who lack the equity and the credit rating to obtain traditional mortgage financing.”).

neighborhoods with a growing concentration of black families.⁷⁹ Installment contracts were also traditionally common in the transfer of farm land. In 1958, for example, about a fifth of all farm sales were conducted through installment contracts.⁸⁰

Today, installment contracts are still used in many parts of the United States in low-income home purchases.⁸¹ In East St. Louis, Illinois, for example, where houses are older, in more substandard condition, and mortgage credit is hard to come by, the use of installment contracts is widespread.⁸² Installment contracts are also common in low-income immigrant communities.⁸³ For example, in Texas, installment contract purchases are common in Latino immigrant communities in places such as Houston, peri-urban neighborhoods outside of Austin, and in unincorporated “colonias”—neighborhoods along the border with Mexico.⁸⁴ Installment contract purchases

79. Lynne Beyer Sagalyn, *Mortgage Lending in Older Neighborhoods: Lessons from Past Experiences*, 465 ANNALS of AAPSS, 98, 99–101 (1983). See also R. Vern Elefson, *The Rediscount Market for Land Contracts* 36 LAND ECON. 391, 394 (1960) (discussing a study of installment contracts in urban areas of Minnesota).

80. Elefson, *supra* note 79, at 391.

81. 6 POWELL, *supra* note 19, § 84D.01(2) (Installment contracts “often cover homes and lots of relatively modest cost that are purchased by people of modest income and little legal or financial experience.”); Freyfogle, *supra* note 78, at 611, 613.

82. See generally David Migoya, *Home Buyers’ Dreams Fade*, BELLEVILLE NEWS-DEMOCRAT (Illinois), May 16, 1993, at 1A [hereinafter Migoya, *Home Buyer’s Dreams*]; David Migoya, *Buyers Pay Taxes Twice or Risk Losing Homes*, BELLEVILLE NEWS-DEMOCRAT (Illinois), May 17, 1993, at 1A [hereinafter Migoya, *Buyers Pay Taxes Twice*]; David Migoya, *Denied Loan at Bank, Buyers Have Few Options: Many Applicants Not ‘Credit-Worthy.’* BELLEVILLE NEWS-DEMOCRAT (Illinois), May 18, 1993, at 1A [hereinafter Migoya, *Denied Loan at Bank*]; E-mails from Sheila S. Burton, Land of Lincoln Legal Assistance Foundation, to Heather Way, Director, Community Development Clinic, University of Texas School of Law (Jan. 8, 2009 & Feb. 23, 2009) (on file with author).

83. See ALVARO CORTES ET AL., U.S. DEP’T OF HOUS. AND URBAN DEV., EFFORTS TO IMPROVE HOMEOWNERSHIP OPPORTUNITIES FOR HISPANICS 50 (2006), http://www.huduser.org/Publications/PDF/hisp_homeown2.pdf (“Often times [sic] the only way for an undocumented immigrant to purchase a home is through seller financed agreements, such as a contract for deed”); see also E-mail from Shamaine Daniels, Community Justice Project, Harrisburg, PA, to Heather Way, Director, Community Development Clinic, University of Texas School of Law (Jan. 7, 2009) (reporting on prevalence of installment contracts amongst immigrants in low-income neighborhoods).

84. PETER M. WARD, COLONIAS AND PUBLIC POLICY IN TEXAS AND MEXICO: URBANIZATION BY STEALTH 91 (1999) (discussing widespread use of installment contracts, or contracts for deed, in Texas colonias); Pamela Brown, *Lawyers Team up to Help Colonias*, 63 TEX. B.J. 462, 462–63 (2000) (discussing prevalent use of installment contracts in the Las Lomas colonia along the Texas-Mexico border); Texas Secretary of State, Colonias FAQ’s, <http://www.sos.state.tx.us/border/colonias/faqs.shtml> (last visited Nov. 14, 2009) (discussing the frequent use of installment contracts in colonias). For an example of how one typical colonia in Texas was developed and the informality of the land sales, see Carlisle et al., *supra* note 63.

are popular in other states as well, including West Virginia,⁸⁵ South Dakota,⁸⁶ Ohio,⁸⁷ South Carolina,⁸⁸ and Florida.⁸⁹

Installment contracts are likely increasing in popularity with the spread of informal, low-income settlements in the United States beyond the colonias along the U.S.-Mexico border into other regions of the country, such as peri-urban areas (communities located outside but within close proximity to incorporated cities), as low-income families expand their geographic search for affordable homeownership opportunities.⁹⁰ For residents making less than \$25,000 a year, these informal settlements “remain[] the only mechanism of entering homeownership.”⁹¹

For a variety of reasons, many of these informal settlements are shut off to traditional mortgage lending, and so the installment contract or other types of

85. E-mail from Bob Baker, Staff Attorney, Legal Aid of West Virginia, to Heather Way, Director, Community Development Clinic, University of Texas School of Law (Jan. 7, 2009) (on file with author).

86. E-mail from Daniel Jongeling, Staff Attorney, Dakota Plains Legal Services, to Heather Way, Director, Community Development Clinic, The University of Texas School of Law (Jan. 7, 2009) (on file with author).

87. E-mail from Toby Fey, Staff Attorney, Advocates for Basic Legal Equality, Toledo, OH, to Heather Way, Director, Community Development Clinic, University of Texas School of Law (Jan. 7, 2009) (on file with author).

88. E-mail from Clanitra Stewart, South Carolina Appleseed Legal Justice Center, to Heather Way, Director, Community Development Clinic, University of Texas School of Law (Jan. 7, 2009) (on file with author).

89. Gretchen Parker & Michael Messano, *Contracts for Deed Full of Hidden Pitfalls: Many Buyers Pay and Never Get the Payoff*, TAMPA TRIBUNE, Aug. 31, 2007, at 1.

90. See WARD, *supra* note 84, at 1–31 (discussing spread of informal settlements); Peter Ward & Paul A. Peters, *Self-help Housing and Informal Homesteading in Peri-Urban America: Settlement Identification Using Digital Imagery and GIS*, 31 HABITAT INT’L 205, 206 (2007) (discussing spread of informal settlements). Ward and Peters have termed these informal settlements “Informal Homestead Subdivisions,” or IFHS’s, and have developed a typology of the different types of settlements. *Id.* at 207–209 (citing Peter Ward & M. Koerner, *Informal Housing Options for the Urban Poor in the US: A Typology of Colonias and Other Homestead Subdivisions* (2005) (unpublished paper)).

91. PETER M. WARD, *Colonias, Informal Homestead Subdivisions, and Self-Help Care for the Elderly Among Mexican Populations in the United States*, in THE HEALTH OF AGING HISPANICS: THE MEXICAN-ORIGIN POPULATION 150–51 (2007). These informal settlements are typically created on cheaply-acquired land with limited or no infrastructure such as water, wastewater, and electrical services, and are typically developed without formal approval from a local governmental entity. FED. RESERVE BANK OF DALLAS, TEXAS COLONIAS: A THUMBNAIL SKETCH OF CONDITIONS, ISSUES, CHALLENGES, AND OPPORTUNITIES 3, 8–11, <http://www.dallasfed.org/ca/pubs/colonias.pdf>. For their housing, residents in informal settlements typically use variations of trailers, manufactured homes, and self-built housing. Ward & Peters, *supra* note 90, at 206, 216–17.

informal transactions are commonly used to sell land in these communities.⁹² Through the use of GIS analysis, Professor Peter Ward and his colleagues estimate that roughly three to five million people live in rural and peri-urban informal settlements across the United States.⁹³

2. Lease-to-Own Agreements

A closely-related cousin of the installment contract is the lease-to-own agreement. In a typical lease-to-own agreement, the homebuyer pays a nonrefundable option fee up front, similar to a down payment.⁹⁴ The homebuyer then makes monthly payments under a lease for a set term. This term is usually shorter than an installment contract term, typically ranging from two to three years.⁹⁵

At the end of the lease term, as long as the homebuyer has followed the terms of the lease, the homebuyer is eligible to purchase the home and obtain title from the seller. The price may be set at the outset of the transaction or determined at the time the buyer seeks to exercise the option, based on the newly appraised value of the home. Depending on the terms of the contract, to exercise the purchase option the buyer must obtain either third-party financing or seller-financing. If the buyer is able to secure the financing, the seller then executes a deed transferring title to the buyer.

Lease-to-own purchases, also known as lease-options, are currently being aggressively marketed around the country to consumers with lower assets and credit scores who are unable to access the traditional mortgage market.⁹⁶ “Get-quick-rich”⁹⁷ real estate mavens regularly tout lease-to-own programs on the

92. See, e.g., SENATE COMMITTEE ON INT’L RELATIONS, TRADE & TECH., Bill Analysis, S. 74-336, Reg. Sess. (Tex. 1995) (discussing how residents in Texas colonias almost always acquire their land through installment contracts).

93. Ward & Peters, *supra* note 90, at 215.

94. Aissaton Sidime, *Lease to Own*, SAN ANTONIO EXPRESS-NEWS, June 14, 2008, at 16; Katy Stech, *A New Lease; Rent-to-own home deals surge in popularity*, THE POST AND COURIER (Charleston, S.C.), Nov. 12, 2007, at E20 (typical option fees range from \$3,000 to \$5,000).

95. Lesley Mitchell, *A Lease-option?: That kind of deal is growing more popular around Utah*, THE SALT LAKE TRIBUNE, Nov. 3, 2007, <http://www.utahhousing.org/documents/TribLeaseOption.pdf>.

96. See Kenneth R. Harney, *Danger Lurks in Lease-Option Deals*, WASH. POST, Dec. 17, 2005, at F01. Legal aid attorneys report that lease-to-own purchases are “alive and well” and creating many problems for low-income homebuyers. See, e.g., E-mail from Jennifer Schultz, Community Legal Services, Inc., Philadelphia, PA, to Heather Way, Director, Community Development Clinic, University of Texas School of Law (Jan. 7, 2009) (on file with author); E-mail from Kate Woome-Deters, Eastern Carolina Immigrants’ Rights Project, North Carolina Justice Center, Raleigh, NC, to Heather Way, Director, Community Development Clinic, University of Texas School of Law (Jan. 6, 2009) (on file with author).

97. See Harney, *supra* note 96, at F01.

internet and in real estate seminars.⁹⁸ Lease-options are also being aggressively marketed to homebuyers undergoing foreclosure, as a mechanism to allow the foreclosed owners to stay in their homes.⁹⁹

3. Seller-Financed Purchases

As a third alternative in the informal market, a low-income homebuyer can enter into a loan agreement directly with the seller, agreeing to make principal and interest payments to the seller. The buyer signs a loan agreement and financing documents which secure the loan, in exchange for receiving title through a deed. Both the financing documents and deed are then recorded in the real property records. Unlike installment contract and lease-to-own purchases, a homebuyer in a seller-financed purchase receives title to the home at the outset of the purchase, although the title is not necessarily recorded in the real property records. The levels of informality in seller-financed transactions can vary widely, from more formal transactions where a title search is conducted and the buyer obtains a title policy, to the most informal transactions involving handwritten agreements and no examination of the title.

C. *Benefits of Buying a Home Informally*

Informal transactions can offer important benefits to homebuyers in the form of low entry costs and open access.¹⁰⁰ Because an institutional lender is not involved, passing a credit check is typically not a barrier to entry, and completing the transaction can be as simple as obtaining the buyer's and seller's signatures.¹⁰¹ There are typically no closing costs such as appraisals, property inspections, tax certificates, title insurance, lawyers' fees, and loan origination fees.¹⁰² There is also typically no title search and no lag time waiting for the closing to take place.¹⁰³ Moreover, the sellers in informal transactions typically require a much smaller, if any, down payment, in

98. See, e.g., *Lease options help agents sell difficult homes*, THE NEWS-PRESS (Fort Myers, FL), May 29, 2007, at G21 (real estate professional touting how lease-options work to sell "difficult houses"). A quick search on YouTube in December 2008 brought up at least ten videos of real estate professionals pitching lease-to-own transactions to real estate investors. See, e.g., *How To Make Money in Rent To Own / Lease Options Real Estate Investing*, <http://www.youtube.com/watch?v=PIFCUS-oGdg> (last visited Nov. 14, 2009); *Lease Options: A Great Way To Make Money In Real Estate*, http://www.youtube.com/watch?v=7_iCQuX2VZQ (last visited Nov. 14, 2009); *Subject-To and Lease Options*, http://www.youtube.com/watch?v=_oJ0GtIwTlc (last visited Nov. 14, 2009).

99. See, e.g., John Stucke, *Vulnerable Woman Fighting to Keep Home; 'Lease-option' Targets Likely Foreclosures*, SPOKESMAN-REV. (Spokane, Wa.), Mar 11, 2007, at A1.

100. Mixon, *supra* note 39, at 530–35; Freyfogle, *supra* note 78, at 613–14.

101. 6 POWELL, *supra* note 19, § 84D.01(2).

102. *Id.*

103. Freyfogle, *supra* note 78, at 611.

contrast to home purchases in the formal market. As a result, the buyer in an informal transaction can generally close on the sale very quickly and cheaply.¹⁰⁴

In the informal market, it is also typically easier for a household to terminate a transaction. In many of the most informal arrangements, where the deed or contract is never recorded, the buyer can easily walk away from the deal and wipe the slate clean, without worrying about being party to a foreclosure action.¹⁰⁵

Just as importantly, absent these alternative transactions, many buyers would be completely shut out of the homeownership market or forced into even more extra-legal arrangements.¹⁰⁶ For numerous informal homebuyers, including many of the families I have worked with through the Community Development Clinic at the University of Texas School of Law, the informal market has provided families with an affordable opportunity to own a home, has allowed families to go into retirement without a monthly house payment, has provided families with stable, long-term occupancy of a home, and has given families important social capital benefits such as the opportunity to live with and near family members.

In talking to informal homeowners that the Community Development Clinic has worked with in Rancho Vista, Texas—largely first- and second-generation immigrants who purchased land via an installment contract—here are summaries of the benefits they report are important to them as homeowners:

- “I put money in the property that I believed would be mine someday. When renting a home the money is just down the drain and I would be at the mercy of the landlord. The land deal was easy with no credit check and payments I could afford.”¹⁰⁷
- “The work we done all our lives is janitorial work. So you see we didn’t make much money and we did not want to live with family or

104. 6 POWELL, *supra* note 19, § 84D.01(2).

105. *Id.* §§ 84D.03(4), 84D.01(2); Mixon, *supra* note 39, at 534.

106. Nelson, *supra* note 77, at 1164 (“The availability of [installment contracts] probably encourages the extension of credit to individuals whose credit-worthiness is so poor that institutional or other third party financing would be unavailable.”). *De la Cruz v. Brown*, 109 S.W.3d 73 (Tex. Ct. App. 2003) (low-income families in Texas colonias have no other alternatives to installment contracts because few, if any, financial institutions will provide mortgages, and few insurers provide coverage). Now that installment contracts are more heavily regulated in Texas, at least one developer of colonias has recently switched to requiring the buyers to sign over a deed in lieu of foreclosure to the developer at the outset of the purchase, giving the developer an easy remedy to take back title to the home in the event the family defaults on payments. *Id.* Potentially thousands may have signed these documents. Bendix Anderson, *The New Colonias*, AFFORDABLE HOUSING FIN., Mar. 2009, at 42.

107. Interview by Ruby Roa with Josephina Lehman, in Rancho Vista, Tex. (May 2009).

pay rent. I believe paying rent is a waste of money, so I talked to my husband about the risk of buying this land. Our children were small and they needed a place to run and play and the lot at Rancho Vista was the perfect size for my five children. Now that the land and mobile home is paid for, we just have to pay the taxes. We work hard all these years to have this land and mobile home and even though the mobile home is not in good condition it is our home and we feel secure and safe.”¹⁰⁸

- “My husband and me believe that buying property, land, mobile home or house is much better than renting. We were struggling to pay rent anyway, so we figured if we struggle to pay for something that will be ours someday it [is] worth the hard work and struggle. We feel safe and our place at Rancho Vista is good for my grandchildren. They can play outside with no worries. We can have a garden, flowers, and trees on our land—and at an apartment we cannot have these things to make a home better. We also live close to my husband’s two brothers and their families.”¹⁰⁹
- “As a child of migrant workers we traveled all around the country working, moving from state to state, not ever having a place to really call home. So as a child, my wish was always to have a place to call home, an address that would be permanent. The greatest benefit in owning my home is for my sons and me to have a stable and secure place.”¹¹⁰
- “We rented a mobile home and property. We paid \$359 a month, and the conditions of that rental property were very, very bad—no hot water and a septic tank that was leaking. When we complained of the living conditions, the owner evicted us. The landlord said he did not want my husband working on cars on the property. We [then bought land for] \$1,000 down and \$250 a month for 5 years and we paid it off. The title transfer process is almost complete. We will soon be proud land and homeowners and one of our dreams in coming to this country will come true.”¹¹¹

D. Pitfalls of Buying Informally: The Role of the Law and Title

Even though informal transactions offer benefits to buyers, these transactions—especially installment contracts and lease-to-own agreements—

108. Interview by Ruby Roa with Rosa Martinez, in Rancho Vista, Tex. (May 2009).

109. Interview by Ruby Roa with Raymunda Maria Bolanos, in Rancho Vista, Tex. (May 2009).

110. Interview by Ruby Roa with Marina Vallejo, in Rancho Vista, Tex. (May 2009).

111. Interview by Ruby Roa with Antonia Sosa-Lozano, in Rancho Vista, Tex. (May 2009).

also produce a series of pitfalls. In stark contrast to the formal market, the informal market provides buyers with weaker legal protections and little in the way of oversight to police the transfer of clear legal title. As a result, a buyer in the informal market is “left to his own devices, and quite often fails to do what is necessary to protect himself.”¹¹² The following are some of the specific perils and challenges facing homebuyers in the informal market.

1. Lack of Protections When Entering the Market

The first set of problems has to do with the lack of third-party scrutiny of the title. In a formal purchase, a lending institution will typically require that the title record be examined and that the buyer purchase a title insurance policy protecting the lender’s financial interest in the home.¹¹³ A title company will scrutinize the title and issue a report listing any problems with the title. The lender will not proceed with the financing until any major defects are cleared. The homebuyer in the formal market will also typically buy title insurance protection so that, if a problem does arise, the buyer’s interests are protected as well. Finally, the lender will insist that the deed to the buyer be promptly recorded to protect the lender’s interest in the property.¹¹⁴

On the other hand, many lower-income buyers in the informal market purchase homes without the benefit of title insurance, title disclosures, or any type of scrutiny of the title by a bank or lawyer.¹¹⁵ Many of these buyers lack awareness of the necessary steps to formalize the transfer of title.¹¹⁶ The lack of third-party scrutiny of the title increases the chances that the buyer will acquire property with title defects.¹¹⁷ This risk is amplified in the majority of states where the seller has no obligation to establish marketable title to the property until the deed is delivered to the buyer at the end of an installment or lease-to-own contract term.¹¹⁸

112. 6 POWELL, *supra* note 19, § 84D.01(4) (discussing pitfalls with the informality of installment contracts).

113. Freyfogle, *supra* note 70, at 305; Nelson, *supra* note 76, at 1142–43.

114. Nelson, *supra* note 76, at 1144.

115. *Id.* at 1142–43; Mixon, *supra* note 39, at 546. *See also* NELSON & WHITMAN, *supra* note 71, at 106–12.

116. Mixon, *supra* note 39, at 546; YZENBAARD, *supra* note 72, § 4:43 n.96 (most installment contract buyers do not examine the title to the property they are purchasing).

117. Nelson, *supra* note 76, at 1143. *See also* De la Cruz v. Brown, 109 S.W.3d 73 (Tex. Ct. App. 2003) (discussing some of the title problems and other problems that informal buyers in Texas colonias have confronted).

118. Nelson, *supra* note 76, at 1143–44; 6 POWELL, *supra* note 19, § 84D.06(1); YZENBAARD, *supra* note 72, § 4:43; LEFCOE, *supra* note 38, at 159 (seller is not obligated to maintain marketable title during the lease term in lease-to-own transactions, leading to instances in which the seller ends up being unable to transfer marketable title at the time the purchase option is exercised).

Buying a home with title defects can result in loss of security and eventual loss of the home to those with superior claims of title. A family who enters the market informally and purchases a home with pre-existing liens or third-party claims is at risk of being foreclosed upon or evicted off the land. Lease-to-own buyers are especially subject to less security in their homes, not only because of title defects, but also because their agreements often allow for termination for minor infractions.¹¹⁹

In the Texas colonias, some of the most common title defects in these widely used informal transactions have included:

- Acquisition of a home with pre-existing tax liens and other liens on the property that are unknown to the buyer.¹²⁰
- Discrepancies between the property description contained in the legal documents conveying title and the actual location of the property.¹²¹
- Conveyance of an illegal lot: a lot that has not been legally subdivided and may not meet the legal residential subdivision standards in the local jurisdiction because of issues such as lot size, location in a flood plain, and lack of access to wastewater services.¹²²

Buyers entering the informal market are also more vulnerable because of the failure of state and federal consumer protection laws, such as the federal Truth in Lending Act and the Real Estate Settlement Procedures Act (RESPA), to extend to many of these transactions.¹²³ For example, the protections provided to buyers by RESPA, such as bars on kick-backs and mandatory disclosures of the finance charge and annual percentage rate, do not extend to

119. Kenneth Harney, *Rent-to-Own has Unfortunate Dark Side*, BALTIMORE SUN, Dec. 18, 2005, at 1L; Sidime, *supra* note 94, at 1G (“In the past [lease-to-own] deals were plagued by sellers who cancelled contracts for minor lease infractions.”).

120. Email from Rebecca Lightsey, Executive Director, Texas Appleseed Project, to Heather Way, Director, Community Development Clinic, University of Texas School of Law (Dec. 1, 2008) (on file with author). Lots sold by unscrupulous developers with pre-existing liens have been a rampant problem in the Texas colonias. *See, e.g.*, Plan of Reorganization/Liquidation of Debtor, *In re* Starr County Colonia Assistance Corp., No. 99-BX-13090 (Bankr. W.D. Tex. 1999). One of the reasons sellers use the installment contract is so that they can delay clearing up title problems such as paying off liens on the property. 6 POWELL, *supra* note 19, § 84D.01(2).

121. Temporary Receiver’s Rep. and Proposal for Conversion of Contract for Deed and Application for Interim Partial Payment of Expenses of Admin. of Receivership Est. at 3–4, *Texas v. Chapa*, No. 93-11258 (Travis Co. Tex. Dist. Ct. Jan. 27, 1999).

122. *Id.*; SENATE COMMITTEE ON INT’L RELATIONS, TRADE & TECH., Bill Analysis, S. 74-336, Reg. Sess. (Tex. 1995).

123. FILLMORE W. GALATY ET AL., MODERN REAL ESTATE PRACTICE 420–22 (17th ed. 2006).

seller-financed transactions, lease-to-own agreements, or installment contracts.¹²⁴

When low-income buyers finally become aware of problems, they are generally unable to afford to hire attorneys to enforce whatever protections are available under the law and must rely on whatever limited pro bono or legal aid resources are available.¹²⁵

2. Post-Contract Title Problems

Another key set of problems in the informal market has to do with the ability of a third-party lien to be placed on the property after an installment contract or lease-to-own agreement has been executed, and the impact the lien has on the buyer's rights.¹²⁶ For mortgages, after the deed has been executed and recorded, the law provides clear protections to the buyer from the seller's creditors.¹²⁷ In contrast, the law extends far inferior protections to buyers in installment contracts:¹²⁸ In roughly half the states, the property is not protected from judgment liens issued by the seller's creditors during the installment contract term.¹²⁹ The property may also be unprotected from federal tax liens and other involuntary liens.¹³⁰

Because so many installment contracts are never recorded, informal buyers are particularly vulnerable to title defects arising after the transaction is initiated. In some cases, sellers actively attempt to prevent the buyer from recording installment contracts, even going as far as making recording a ground for default under the terms of the contract.¹³¹ Post-contract liens are especially a problem in jurisdictions where the buyer's possession of the premises is insufficient to qualify as constructive notice against subsequent lienholders and purchasers.¹³²

124. *Id.* For relevant provisions of the RESPA regulations, see 24 C.F.R. §§ 3500.2, 3500.5 (2009).

125. The limited legal aid resources available in the United States have been stretched even more thinly during the current economic recession as the number of low-income clients in need of legal services has grown while traditional funding sources have shrunk. For a list of news articles tracking this trend, see Brennan Center for Justice, *The Economy and Legal Services*, Feb. 1, 2009, http://www.brennancenter.org/content/resource/the_economy_and_civil_legal_services/.

126. For example, one common problem with installment contracts in Texas colonias has been the tendency of sellers to place liens on lots subsequent to sale without informing the purchaser. SENATE COMMITTEE ON INT'L RELATIONS, TRADE & TECH., Bill Analysis, S. 74-336, Reg. Sess. (Tex. 1995).

127. 6 POWELL, *supra* note 19, § 84D.06(3).

128. *Id.*

129. 6 POWELL, *supra* note 19, § 84D.06(3); NELSON & WHITMAN, *supra* note 71, at 118; JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW § 22.08[B] (2d ed. 2007).

130. NELSON & WHITMAN, *supra* note 71, at 111-12.

131. *Id.* at 1145-46.

132. Nelson, *supra* note 76, at 1144.

Even when a third-party lienholder takes subject to the installment contract, some courts have not allowed the buyer to complete the contract according to its original terms.¹³³ The only right of the buyers in these cases was to receive payment for any amount the buyer had paid under the contract—the buyer had no right to maintain possession or to complete the contract.¹³⁴ In some cases, the buyer has also lost the right to recover any payments the buyer made after the buyer received notice of the third-party lien interest in the property.¹³⁵

The interests of buyers in residential lease-to-own transactions are even more insecure and uncertain than those in installment contracts. Traditionally, state courts have not considered purchase options to be an interest in real estate, and thus buyers with purchase options did not hold legal or equitable title to the property prior to exercise of the option.¹³⁶ Courts have since issued a divergent set of rulings in regards to when and whether a residential buyer with a purchase option holds a legal or equitable interest.¹³⁷ The buyers in many states still lack protections, and the law lacks clarity.¹³⁸

3. Lack of Protections Upon Default

The law also generates disparities in the way it treats buyers in the informal market upon default.¹³⁹ In the formal market, state foreclosure laws provide extensive protections to a homebuyer as mortgagor when the homebuyer has defaulted under the terms of a home loan agreement.¹⁴⁰ The most fundamental right that state law extends to mortgagors is the right to a

133. 6 POWELL, *supra* note 19, § 84D.06(3). *See also* Mixon, *supra* note 39, at 547–48 (discussing how the common failure to record installment contracts makes the buyer’s interest vulnerable to future purchasers or lienholders).

134. 6 POWELL, *supra* note 19, § 84D.06(3).

135. *Id.*

136. Gregory G. Gosfield, *A Primer on Real Estate Options*, 35 REAL PROP. PROB. & TR. J. 129, 138–39 (2000-01). *See also* 49 AM. JUR. 2D *Landlord & Tenant* § 298 (2006) (“the inclusion of an option clause in the lease does not create a special equitable relationship between the landlord and the tenant”).

137. *Compare* Old Port Cove Holdings, Inc. v. Old Port Cove Condo. Assoc. One, Inc., 986 So. 2d 1279, 1287 (Fla. 2008) (discussing case law in Florida that an option contract does not create a legal or equitable interest in property), *with* M.L. Gordon Sash & Door Co. v. Mormann, 271 N.W.2d 436, 441 (Minn. 1978) (holding a tenant with an option to purchase holds an equitable interest superior to a judgment creditor), *and* Spokane Sch. Dist. No. 81 v. Parzybok, 633 P.2d 1324 (Wash. 1981) (en banc) (tenant with option to purchase was entitled to portion of condemnation award given circumstances of case and relationship of parties; lease was in good standing, property had increased in value, and tenant was likely to exercise option).

138. Gosfield, *supra* note 136, at 138 (the law lacks clarity as to whether and when an option is to be treated as realty or personalty).

139. Freyfogle, *supra* note 79, at 614.

140. 15 POWELL, *supra* note 19, § 84D.01(4).

foreclosure sale and receipt of any surplus funds generated by the sale.¹⁴¹ Many states also provide homeowners in the formal market with a mortgagor's right of redemption, which gives the defaulting buyer the ability to redeem his property by some fixed date.¹⁴² The law has looked down on lenders' attempts to bypass these rights contractually through such mechanisms as absolute deeds and conditional sales.¹⁴³

In contrast, with a few exceptions, state legislatures and courts have failed to extend the full benefit of these basic protections to homebuyers in installment and lease-to-own contracts.¹⁴⁴ Under the harshest laws, if the buyer defaults and does not redeem the property by paying the seller for the amounts owing, the seller in an installment contract transaction has been able to declare a forfeiture without conducting a foreclosure sale, and without returning to the buyer any of the buyer's remaining equity in the home. The buyer forfeits legal and possessory interests in the land and all payments made on the contract.¹⁴⁵

In recognition of the one-sided nature of the installment contract, the trend over the past 20 years has been for state courts and legislatures to extend a range of mortgage law protections to installment contract buyers, although typically in weakened form.¹⁴⁶ Only a few states, such as Florida¹⁴⁷ and Oklahoma,¹⁴⁸ have since extended the complete or near-complete protections enjoyed by defaulting mortgagors to buyers with installment contracts.¹⁴⁹ Depending on the jurisdiction, protections like the right to redeem the property, the right to receive restitution of the buyer's installment payments and improvements to the property, and the right to a foreclosure sale may not

141. *Id.*

142. RESTATEMENT (THIRD) OF PROP.: MORTGAGES, introductory cmt. (1997).

143. *Id.* §§ 3.2–3.4.

144. SPRANKLING, *supra* note 129, at 373 (calling the installment contract a “legal dinosaur” with inferior legal protections).

145. *See, e.g.*, IOWA CODE ANN. §§ 656.1–656.7 (2008); MINN. STAT. ANN. § 559.21 (2008); OHIO REV. CODE ANN. § 5313.05 (2008); *see also* Gay v. Tompkins, 385 So. 2d 973, 981–82 (Ala. 1980); Burgess v. Shiple, 750 P.2d 460, 462 (Mont. 1988). In Texas, until the Texas Legislature passed a series of contract for deed reform statutes in the 2000s, a family could be kicked out of their home and lose their equity for minor infractions. Brown, *supra* note 84, at 462.

146. 6 POWELL, *supra* note 19, §§ 84D.01(4), 84D.04(1).

147. FLA. STAT. ANN. § 697.01 (West 2008); White v. Brousseau, 566 So.2d 832 (Fla. Dist. Ct. App. 1990) (holding that under section 697.01, installment contract buyer holds equitable title to land and, to terminate the contract, the seller must foreclose on the contract in the same manner as a mortgage).

148. OKLA. STAT. ANN. tit. 16, § 11A (West 2008).

149. 6 POWELL, *supra* note 19, § 84D.04(1); Freyfogle, *supra* note 78, at 610–11. *See also* Skendzel v. Marshall, 301 N.E.2d 641, 646 (Ind. 1973); Sebastian v. Floyd, 585 S.W.2d 381, 382–83 (Ky. 1979).

extend to installment contract buyers.¹⁵⁰ Alternatively, some state laws provide that certain rights arise only after the buyer has paid off a certain amount of the contract.¹⁵¹

Many of the protections accorded to installment contract buyers have been instituted by courts via judicial rulings on a case-by-case basis. Through the doctrine of equitable mortgages, a court can act through its powers of equity to treat a lease-to-own agreement as a mortgage. The haphazard evolution of the common law in this area has resulted in vague and uncertain standards, and, consequently, elusive and unreliable protections for the buyer as well as the seller.¹⁵²

Sellers in lease-to-own and installment contracts often try to contract around this uncertainty by writing into their contracts a provision whereby the buyers waive their right to equitable mortgage protections. In the mortgage arena, courts have traditionally held that any attempt to waive the legal protections extended to mortgagors is void as against public policy.¹⁵³ In contrast, in at least one recent case, the court held that by signing an installment contract with a waiver provision, the buyer had waived her legal right to claim that the installment contract should be treated by the court as an equitable mortgage.¹⁵⁴

Even in states where extensive legal rights extend to installment contract buyers, sellers “may well use the [installment] contract format out of a belief that purchasers often will forego exercising the rights.”¹⁵⁵ In states that do not require a judicial foreclosure action in order for the seller to regain possession

150. 6 POWELL, *supra* note 19, §§ 84D.01(2)–(4). *See, e.g.*, Stonebraker v. Zinn, 286 S.E.2d 911, 915 (W. Va. 1982). For a more extensive discussion on the different state laws and court rulings in this area, see 6 POWELL, *supra* note 19, §§ 84D.03–04.

151. *See, e.g.*, 735 ILL. COMP. STAT. ANN. § 5/9-102 (2009). *See also* MD. CODE ANN., [REAL PROP.] § 10-105 (West 2008) (buyer has right to convert when 40% or more of the purchase price has been paid). In Maryland, the courts have provided additional foreclosure protections to installment contract buyers regardless of the amount of payments made. *Id.* § 10-101-108.

152. RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 3.4 & cmt. a (1997) (“Predictability in this area is noticeably lacking.”); JOHN C. WATKINSON, LAND SALE CONTRACTS AND THEIR FORECLOSURE, FORECLOSING SECURITY INTERESTS § 3.1, at 3–4 (Oregon State Bar CLE 1984) (“[L]and sale contracts can befuddle the most experienced of attorneys The courts acting in equity have based their decrees on the peculiar facts of each case, which can lead to diverse remedies and solutions.”); Freyfogle, *supra* note 78, at 615–627, 656; Nelson, *supra* note 76, at 1122.

153. 6 POWELL, *supra* note 19, § 84D.01(4); John C. Murray, *Mortgage Workouts: Deeds in Escrow*, 41 REAL PROP. PROB. & TR. J. 185, 187 (2006); John C. Murray, *Clogging Revisited*, 33 REAL PROP. PROB. & TR. J. 279, 280 (1998); *see also* RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 3.3(a) & cmt. d (1997).

154. *Wilkinson v. Ordway Group, LLC*, No. 07-2678, 2007 U.S. Dist. LEXIS 76857, at *6–*8 (D. Minn. Oct. 12, 2007).

155. 6 POWELL, *supra* note 19, § 84D.01(4).

of the premises in an installment contract transaction, many of the protections arise only if the buyer raises a legal challenge to the seller's actions, and sellers can safely presume that their lower-income buyers will be unaware of their rights or otherwise lack the means to enforce them.¹⁵⁶ Legal aid attorneys report that sellers are easily able to evade state laws governing installment contracts by bringing landlord-tenant eviction actions to regain possession of the premises, with increased likelihood of success in regions where judges are not attorneys, buyers are undocumented immigrants, or buyers have limited English skills.¹⁵⁷

Homebuyers in lease-to-own agreements typically have even less protections upon default.¹⁵⁸ The seller is able to saddle the buyer with all of the burdens of homeownership (e.g., the duty to make repairs, pay taxes), without any of the primary benefits extended to mortgagors (e.g., right of redemption, right to foreclosure sale). The lease-to-own contract can therefore provide an easy mechanism for sellers to short circuit any of the legal limits that apply to installment contract transactions.

With lease-to-own contracts, sellers in many areas of the country can also rely on eviction courts to treat the buyer as a tenant and thus quickly evict the buyer from the premises with minimal notice, while the buyer then loses his option fee and any equity built up in the property. This reliance on eviction procedures exists even in states where the legislature has explicitly extended mortgagor protections to lease-to-own agreements, such as Pennsylvania, when

156. *Id.* See also Nelson, *supra* note 77, at 1163 (many sellers may use installment contracts “in low down payment settings and take their chances that their purchasers will be unsophisticated to record or otherwise protect their interests”). If a buyer is undocumented, obtaining legal representation is even more challenging because undocumented immigrants are ineligible for services from federally-funded legal aid services.

157. E-mail from Ardis Agosto, New Orleans Legal Assistance Corporation, to Heather Way, Director, Community Development Clinic, University of Texas School of Law (Jan. 7, 2007) (on file with author); E-mail from Shamaine Daniels, Community Justice Project, Harrisburg, PA, to Heather Way, Director, Community Development Clinic, University of Texas School of Law (Jan. 7, 2009) (on file with author); E-mail from Jeff Kastner, Community Legal Services, to Heather Way, Director, Community Development Clinic, University of Texas School of Law (Jan. 6, 2009) (on file with author); E-mail from Amy Propps, New Mexico Legal Aid, to Heather Way, Director, Community Development Clinic, University of Texas School of Law (Jan. 6, 2009) (on file with author); E-mail from Clanitra Stewart, South Carolina Appleseed Legal Justice Center, to Heather Way, Director, Community Development Clinic, University of Texas School of Law (Jan. 7, 2009) (on file with author).

158. See, e.g., RESTATEMENT (THIRD) OF PROP.: MORTGAGES (1997). The Restatement treats installment contracts the same as mortgages, but does not extend mortgagor protections to a buyer in a lease with a purchase option. See *id.* § 3.4 (“This section is inapplicable to a lease with an option to purchase.”).

sellers have been able to convince individual eviction courts to treat a lease-to-own agreement as a traditional residential lease.¹⁵⁹

Except in the few states where the state legislature has extended clear statutory protections to lease-to-own buyers,¹⁶⁰ the lease-to-own buyer's primary avenue for securing additional protections is to persuade the court to treat the lease-to-own contract as an equitable mortgage, and thus extend to the contract buyer the same protections available to mortgagors.¹⁶¹ The courts apply the equitable mortgage doctrine on a case-by-case basis, after considering whether the specific facts in a case warrant treating a lease-to-own contract as a loan that would thus trigger protections such as state usury limits, the right to a foreclosure sale, and the right to receive the surplus proceeds from the sale.¹⁶² The buyer faces a heightened burden in persuading the court to apply the doctrine.¹⁶³ Courts appear most likely to treat a lease-option as an equitable mortgage in instances involving leasebacks, where a homeowner in financial distress sells the property to the lender or third party in exchange for a leaseback with option to purchase.¹⁶⁴

4. Inability to Secure Home Improvement Assistance

The title defects prevalent in many informal transactions make it very difficult for the informal buyers to secure financial assistance from banks or

159. See, e.g., E-mail from Jennifer Schultz, Community Legal Services, Inc., Philadelphia, PA, to Heather Way, Director, Community Development Clinic, University of Texas School of Law (Jan. 7, 2009) (on file with author).

160. See, e.g., CAL. CIV. CODE § 1695.12 (1985) (shifts burden to seller in a foreclosure rescue sale to prove that the transaction is not a loan); TEX. PROP. CODE ANN. § 5.062 (Vernon 2009) (lease-to-own contracts are treated as installment contracts and thus receive the same protections that the legislature has accorded to installment contract buyers (such as right to foreclosure action) when buyer has paid more than 40% of the amount due under the contract). For a list of states extending protections to lease-option buyers in the specific context of foreclosure rescue operations, see JOHN RAO ET AL., FORECLOSURES: DEFENSES, WORKOUTS, AND MORTGAGE SERVICING § 11.4.5.1 (rev. 2d ed. 2007).

161. RAO ET AL., *supra* note 160, § 11.4.1.2.

162. *Id.* § 11.4.1.1 (listing factors considered by the courts in foreclosure rescue leasebacks).

163. Anderson v. Spreiter, 2008 U.S. Dist LEXIS 70066, at *7 (D. Minn. Sept. 16, 2008).

164. See, e.g., *In re Kassuba*, 562 F.2d 511 (7th Cir. 1977); *Browner v. Dist. of Columbia*, 549 A.2d 1107 (D.C. 1988) (court found lease with option to purchase was a loan and subject to the District's loan shark law); *McGill v. Biggs*, 434 N.E.2d 772 (Ill. App. Ct. 1982); *Tullis v. Weeks*, No. 7-600/06-1744, 2007 Iowa App. LEXIS 1095 (Iowa Ct. App., Oct. 12, 2007), *amended by* No. 7-600/06-1744, 2007 Iowa App. LEXIS 1810 (Iowa Ct. App., Oct. 12, 2007); *Swenson v. Mills*, 108 P.3d 77 (Or. Ct. App. 2005). *But see* *Clemons v. Home Savers*, 530 F. Supp. 2d 803 (E.D. Va. 2008), *aff'd*, No. 08-1230, 2008 U.S. App. LEXIS 8055 (4th Cir. 2008) (equitable mortgage did not exist in leaseback case because there was no debt owed by the buyer that was secured by title to the property, so buyer could not claim protections of Truth in Lending Act). For a list of cases where courts have found an equitable mortgage involving foreclosure rescue leasebacks, see RAO ET AL., *supra* note 160, § 11.4.1.1.

governmental entities to improve their homes. Buyers in the informal market frequently buy homes with substandard living conditions and other repair needs.¹⁶⁵ In a typical informal transaction, the seller shifts onto the buyer all responsibilities concerning the property, including repairs, property taxes, and insurance.¹⁶⁶

Informal owners already face hurdles obtaining loans from financial institutions; with clouded title these hurdles become even more difficult to surmount.¹⁶⁷ Even for government home improvement programs, holding clouded title creates roadblocks for informal buyers.¹⁶⁸ When homebuyers attempt to obtain funding for significant home improvements, government repair programs often require insurable title so that the government can create a lien interest secured by the property.¹⁶⁹ Until the buyers can receive legal assistance to clear up their title, many must resort to self-financing any repairs or improvements they make to their homes, or absent these funds, watch their homes fall into even further disrepair.¹⁷⁰

In Toledo, Ohio, for example, a family purchased a home through an installment contract and, after making several repairs to the home, the family's youngest son developed lead poisoning.¹⁷¹ The city required the seller's consent to engage in free lead paint abatement, but the seller refused to give consent and the client was forced to leave the home, losing all of the investments they had made in the home.¹⁷²

As another example, our Community Development Clinic at the University of Texas School of Law represented a client who was buying a home outside of Austin through an installment contract. The client was seeking assistance in

165. Freyfogle, *supra* note 70, at 295; E-mail from Sheila S. Burton, Land of Lincoln Legal Assistance Foundation, to Heather K. Way, Director, Community Development Clinic, University of Texas School of Law (Jan. 8, 2009) (on file with author).

166. Freyfogle, *supra* note 71, at 296.

167. See, e.g., *A DASH of Hope, and then Some, for Bayou La Batre*, MOBILE PRESS-REG., Dec. 29, 2006, at 14A [hereinafter *A DASH of Hope*]; Hammer, *supra* note 9, at 1; *All Things Considered*, *supra* note 9.

168. See Brown, *supra* note 84, at 463 (discussing how a project helping low-income families with installment contracts and obtaining clear title has enabled the residents to secure financing for home improvements).

169. See GALATY, *supra* note 123, at 231–32; *All Things Considered*, *supra* note 9.

170. As one comprehensive study of land titling efforts in Texas confirmed, however, holding clear title is not the only prerequisite to low-income families obtaining home improvement loans from the private market. Giusti et al., *supra* note 66, at 49. The study, which studied the land titling efforts arising out of litigation in Starr County, found that the families receiving clear title were still unwilling or unable to use their homes as collateral to secure loans. *Id.*

171. E-mail from Toby Fey, Staff Attorney, Advocates for Basic Legal Equality, Toledo, OH, to Heather K. Way, Director, Community Development Clinic, University of Texas School of Law (Jan. 7, 2009) (on file with author).

172. *Id.*

obtaining a septic tank because the property did not have any wastewater infrastructure and the client was using an outhouse for a bathroom. We discovered that the seller had sold the property to our client via a handwritten, undated contract for deed which included a very poor legal description of the land. Furthermore, the land had not been legally subdivided. The client was unable to qualify for a government grant to build a septic tank on her property until the title situation was cleared up.

Some of the most tragic issues have arisen after natural disasters destroyed homes, and, because of clouded title issues, the homeowners have not met the government's disaster assistance requirements to rebuild their homes.¹⁷³ Installment contract and lease-to-own buyers have faced special challenges when, as a condition of receiving financial rebuilding assistance, they have had to obtain permission of the seller or receive legal title to their property through completion or conversion of their installment contract, or through execution of their purchase option.¹⁷⁴

5. Limited Ability to Build Equity

The legal nature of title in the informal market, particularly in installment contracts and lease-to-own agreements, limits the ability of buyers to build equity in their home in several regards. The loss of equity can include not only all installment payments made on the contract, but also the down payment or option fee that the buyer paid for the property, any improvements the buyer made to the property, and any appreciation in the property value—even if the buyer has lived in the home for twenty years.¹⁷⁵ While homeowners in the formal market today are also losing equity as a result of depreciating home values in a recession economy, low-income households purchasing homes face not only the challenges of declining home values, but also more limited legal protections, which create even greater hurdles to building equity. For example:

- Liens and other title defects. First, certain types of title defects in informal purchases, such as liens, can completely wipe out any equity built up in a home.¹⁷⁶ For example, if there are pre-existing liens that were never paid off by the seller, these secured interests trump the

173. For a further discussion on rebuilding challenges for hurricane disaster victims as a result of clouded title, see *infra* notes 251–56 and accompanying text.

174. In Louisiana, buyers who had not completed their installment contracts were ineligible for hurricane rebuilding assistance following Hurricane Katrina. E-mail from Paul Tuttle, Managing Attorney, Southeast Louisiana Legal Services, to Heather K. Way, Director, Community Development Clinic, University of Texas School of Law (Jan. 12, 2009) (on file with author).

175. 15 POWELL, *supra* note 19, § 84D.01(4).

176. See GALATY ET AL., *supra* note 123, at 174.

buyer's interest.¹⁷⁷ A buyer in Tennessee, for example, had paid close to \$20,000 and also made several improvements on his lease-to-own home when he learned that the home was going to be foreclosed upon by a third-party lender. Unbeknownst to the buyer, there was a pre-existing mortgage on the home and the seller was not making timely payments on the mortgage.¹⁷⁸

One of our clients at the Community Development Clinic faced a similar problem after he purchased a home through an installment contract without the benefit of a title search. Our client discovered several years after purchasing the home that there were property tax liens and a home equity lien clouding the title that had been recorded prior to his purchase of the property. When the discovery was made, our client had already paid more than the property was worth after taking these liens into account. At any time, the home equity lender could have instituted foreclosure proceedings against the home since the sellers were in violation of their due-on-sale clause in the home equity loan, which prohibited them from selling the property to our client. Our client was at constant risk of losing all of the money he had invested in the home.

6. Termination Issues

In the formal market, if the homeowner needs to move and terminate a loan agreement, the homeowner can sell the home as long as the remaining loan amount can be paid off from the sale proceeds.¹⁷⁹ The buyer gets to retain any excess proceeds from the sale, absent any prepayment penalties allowed under the law.¹⁸⁰

In contrast, with installment contracts and lease-to-own agreements, if the informal homebuyer needs to move during the contract term or otherwise must terminate the contract, the buyer can easily end up forfeiting any equity in the home. Many installment contracts bar assignment;¹⁸¹ the buyer is protected only if the state offers additional legal protections such as a right to assignment or restitution.¹⁸² While states like Ohio and Illinois protect the buyer's equity,

177. *Id.* at 176 (discussing the general rule for priority of lien interests as first come, first served).

178. Brian Mosely, *Fraud Claimed in Home Deals*, SHELBYVILLE TIMES-GAZETTE (TENN.), Jan. 24, 2008, at 1.

179. See *Mixon*, *supra* note 39, at 527–28.

180. *Id.*

181. YZENBAARD, *supra* note 72, § 4:40.

182. See *Mixon*, *supra* note 39, at 548. Even when a state law provides the buyer with a right to restitution of all or part of the buyer's equity, state rights in this area are generally vague. Freyfogle, *supra* note 78, at 627. The buyer must also have the means to bring a court action for restitution against a recalcitrant seller. As for the ability to assign an installment contract, the majority of courts will enforce installment contract provisions prohibiting assignment, but “they are prone to view the clauses with suspicion and often construe them narrowly.” 15 POWELL,

the protections apply only after a certain amount of time has passed or number of payments have been made. During the initial years of the contract (which can be five years or longer), the buyer stands to lose any increase in the market value of the home as well as the buyer's improvements to the property.¹⁸³

Lease-to-own buyers are particularly vulnerable to losing equity.¹⁸⁴ At the end of the lease term, absent a state right to restitution, a lease-to-own purchaser loses all of his prior investment in the home unless the purchaser is able to qualify for financing to purchase the home.¹⁸⁵ Since these sales are specifically marketed towards buyers with weak credit scores, a high number of lease-to-own sales are never finalized.¹⁸⁶ Many of these transactions are deliberately set up so that the buyer will be unable to complete the purchase.¹⁸⁷

supra note 19, § 84D.02(5). *See, e.g.*, *Clemons v. American Cas. Co.*, 841 F. Supp. 160 (D. Md. 1993). When the law allows for assignment of the contract, the informal buyer faces the additional challenge of finding a new buyer with cash on hand to pay for the original buyer's equity, or alternatively, finding a lender willing to provide financing against the assigned interest. *See* *Mixon, supra* note 39, at 548.

183. Freyfogle, *supra* note 78, at 633–35.

184. For examples of problems faced by lease-to-own purchasers, see Jack Guttentag, *Balloon Loans, Lease-Options Prove Riskier in Today's Market*, WASH. POST, Sept. 20, 2008, at F13; Harney, *supra* note 119, at 1L; Byron Harris, *Lease-to-Own—Sounds Like a Great Way to Buy a Home* (WFAA-TV television broadcast Mar. 21, 2006); Violet Hassler, *Family Finds Fixing up Rent-to-Own Home Challenge Bringing House up to Code*, ENID NEWS & EAGLE (Okla.), Feb. 8, 2009, available at http://www.enidnews.com/archivesearch/local_story_038235028.html/resources_printstory; Craig Malisow, *The Specialist: Scott Wizig's Bread and Butter Is First-Time Home Buyers with Bad Credit. He Says He's Making Dreams Come True, but Many Say Dealing with Him Has Been a Nightmare*, HOUS. PRESS, Sept. 2, 2004, available at <http://www.houstonpress.com/2004-09-02/news/the-specialist/1>; Lesley Mitchell, *Lease-to-own Scam Brings Felony Charges*, SALT LAKE TRIBUNE, Sept. 8, 2007, at A1; Mosely, *supra* note 178; Mike Snyder, *Protestors Seek Loan Answers: Lease-to-Own Contracts Called "Shady,"* HOUST. CHRON., Jan. 31, 2004, at A32; Stucke, *supra* note 99, at A1; Press Release, Att'y Gen. of Cal., *Brown Obtains Restitution for Lease2OwnHomes Renter Rip-Off* (Jul. 18, 2008), available at <http://ag.ca.gov/newsalerts/release.php?id=1589> [hereinafter *Brown Obtains Restitution*]; Jeff Swiatek, *Broken Promises*, INDIANAPOLIS STAR, Dec. 14, 2008, at A1; Julie Tripp, *Managing Your Money: Scammers Feed on Rise in Foreclosures*, THE SUNDAY OREGONIAN, July 8, 2007, at D01.

185. *See* *Mixon, supra* note 39, at 528–29; Freyfogle, *supra* note 78, at 620–21.

186. *See* *Mixon, supra* note 39, at 553 (suggesting that purchases through installment sales are a "remote possibility").

187. Investigations into the dubious lease-to-own practices of one Florida real estate investor revealed that lease-option contracts for as many as 700 homes allowed buyers to be evicted with just 3-day's notice on minor grounds such as late payment and failure to make repairs. The buyers were responsible for repairs under \$3,000. At least two dozen had been evicted, and many lost thousands in investments. Bob Mahlburg, *Renters Say Venice Man Dashed Their Home Dreams*, SARASOTA HERALD TRIB., Oct. 2, 2005, at A1; Bob Mahlburg, *State Investigates Venice Man's Lease-to-Buy Arrangements*, SARASOTA HERALD TRIB., Oct. 19, 2005, at BV1. *See also* *Brown Obtains Restitution, supra* note 184 (California Attorney General reached settlement in case where sellers were accused of setting up lease-option purchase terms that seller knew the

7. Seller Abuses

Unsavory real estate practices and unscrupulous sellers in the informal market, along with the lack of consumer protections and regulatory oversight, create additional challenges for buyers in the informal market. Even when states extend legal protections to consumers in informal transactions, sellers can more easily evade these laws because of the lack of third-party scrutiny and policing of violations.¹⁸⁸ In the worst cases, informal sales are scams—the seller has no intention of ever handing title of the property to the buyer.¹⁸⁹

Immeasurable numbers of low-income homebuyers have been the victims of abusive practices in the informal market. These practices range from real estate investors selling land that they did not own or that was encumbered with undisclosed liens,¹⁹⁰ to investors in lease-option deals charging high option fees and then terminating the transaction on false pretexts.¹⁹¹ Low-income immigrants can be particularly vulnerable to scams and other abuses by sellers.¹⁹² When low-income buyers finally become aware of problems, they are generally unable to afford to hire attorneys to enforce whatever protections are available under the law and instead must rely on whatever limited pro bono or legal aid resources are available.

A series of investigations in the 1990s of installment contracts in East St. Louis, Illinois, uncovered a host of problems arising out of the informal nature of the transactions. Buyers lacked the benefit of consumer protections, regulatory oversight, and third party review of the transactions.¹⁹³ Two of the three largest landowners in the community, who owned more than 1,000 homes, regularly used installment contracts with terms that made it next to impossible for a buyer to end up with title to the home.¹⁹⁴ For example, one of

buyers could not meet); Stucke, *supra* note 99, at A1 (citing experts who state that most lease-option transactions targeting owners in foreclosure fail).

188. See Freyfogle, *supra* note 78, at 649.

189. See, e.g., Harney, *supra* note 16, at F1; Parker & Messano, *supra* note 89, at 1; Mosely, *supra* note 178; Snyder, *supra* note 184, at A32; Harney, *supra* note 119, at 1L; Swiatek, *supra* note 184, at A1; Stucke, *supra* note 99, at A1; Brown Obtains Restitution, *supra* note 184; Mitchell, *supra* note 184, at A1; Tripp, *supra* note 184, at D01.

190. Scott F. Davis, *Local Residents Learning that Contract for Deed a Risky Way to Purchase Home*, NORTHWEST ARK. TIMES, Dec. 15, 2008, at A1, A5; Harney, *supra* note 119, at 1L.

191. Harney, *supra* note 119, at 1L.

192. Snyder, *supra* note 184, at A32.

193. Migoya, *Home Buyers' Dreams*, *supra* note 82, at 1A, 8A; Migoya, *Buyers Pay Taxes Twice*, *supra* note 82, at 1A, 8A; Migoya, *Denied Loan at Bank*, *supra* note 82, at 1A, 10A; E-mails from Sheila S. Burton, Managing Attorney, Land of Lincoln Legal Assistance Found., to Heather K. Way, Director, Community Development Clinic, University of Texas School of Law (Jan. 8, 2009 & Feb. 23, 2009) (on file with author).

194. David Migoya, *Bond for Deed: Buying a house in East St. Louis*, BELLEVILLE NEWS-DEMOCRAT (Illinois), May 16, 1993, at 1A.

the sellers would routinely fail to disclose the cost of interest, taxes, and insurance; at the same time, the seller set the buyer's monthly payments so that they were insufficient to cover these expenses, which were then added back onto the principal.¹⁹⁵ As a result of these practices, one resident entered into a contract to buy a home for \$19,037 that, at the end of the day, would end up costing the resident more than \$106,230 to buy.¹⁹⁶ Other abusive practices, included:

- Sellers never provided buyers with written copies of their contracts.
- Sellers charged interest rates as high as 25%.
- Investors sold homes with substandard conditions, sellers failed to keep their promises to repair homes, and sellers added any repair expenses onto the principal balance.
- Sellers failed to keep proper escrow accounts and would take funds from the escrow account to pay for repairs and sewer bills, resulting in shortfalls for buyers and eventual tax sales of the properties.¹⁹⁷

Foreclosure leaseback schemes present some of the worst abuses in the informal market. In the worst cases, a homeowner in financial distress sells his property to a foreclosure rescue company for far below market value. The homeowner's property is then leased back to the owner with the option to purchase in one to three years, under conditions the owner cannot meet, resulting in the homeowner losing significant amounts of equity.¹⁹⁸ In one case, for example, a homeowner conveyed a home worth \$38,185 for just \$6,988 in a foreclosure sale-leaseback scheme.¹⁹⁹

8. Manufactured Homebuyers

Buyers of manufactured homes²⁰⁰ face additional challenges given the incongruous nature of laws governing their title as compared to other

195. Editorial, *Breaking the Cycle*, BELLEVILLE NEWS-DEMOCRAT (Illinois), May 19, 1993, at 4A.

196. *Id.*

197. Migoya, *Home Buyers' Dreams*, *supra* note 82, at A1, 8A; Migoya, *Buyers Pay Taxes Twice*, *supra* note 82, at 1A, 8A; Migoya, *Denied Loan at Bank*, *supra* note 82, at 10A; E-mails from Sheila S. Burton, Managing Attorney, Land of Lincoln Legal Assistance Found., to Heather K. Way, Director, Community Development Clinic, University of Texas School of Law (Jan. 8, 2009 & Feb. 23, 2009) (on file with author).

198. RAO ET AL., *supra* note 160, § 15.2.2.

199. *Id.*

200. "Manufactured homes" are legally defined to be "[f]actory built to meet the [national] performance standards or the HUD code." In contrast, the term "mobile home" "[t]ypically refers to units built before 1976 and most similar to a trailer." In every day language, however, the term "mobile home" is often used synonymously with "manufactured home." WILLIAM C. APGAR ET AL., REPORT TO THE FORD FOUNDATION BY NEIGHBORHOOD REINVESTMENT CORPORATION,

homebuyers. Manufactured housing is a major source of affordable homeownership for low-income households. In 1999, 6.7 million people owned a manufactured home, and in the 1990s, at its peak, manufactured homes constituted between one-fourth and one-third of all production of single-family detached homes.²⁰¹ Between 1993 and 1999, purchasers of manufactured homes accounted for 23% of the national growth in homeownership among households earning less than 50% of the median family income—with a high of 63% in the rural South.²⁰²

Several states do not treat the title to manufactured homes as real estate, even when a mobile home buyer owns the land. This means that mobile home buyers in these states can never qualify for financing in the mainstream housing finance market for federally-insured mortgage programs.²⁰³ The law treats mobile homeownership inequitably in other regards as well. For example, when people finance homes through personal property financing, the Real Estate Settlement Procedures Act does not cover the transaction. This means that the seller can legally engage in more dubious practices that make the purchase price more costly to the buyer, such as charging the buyer for dealer kickbacks, referral fees to lenders, and credit life insurance.²⁰⁴ Certain states such as Florida and Mississippi also provide more limited constitutional protections to the homestead interests of manufactured homeowners when the home is on leased land, making it easier for these owners to lose their homes after declaring bankruptcy.²⁰⁵

Manufactured homeowners face additional challenges obtaining clear title to their homes. In Texas, for example, when a family purchases a manufactured home that is moved onto land, it is first treated as personal property and title is tracked by a state agency instead of through local property records. The passage of clear title to the home requires the issuance of a

AN EXAMINATION OF MANUFACTURED HOUSING AS A COMMUNITY AND ASSET-BUILDING STRATEGY 2 (2002), <http://www.nw.or/network/pubs/studies/documents/manufactHsgRpt.2002.pdf>.

201. *Id.* at 3.

202. *Id.*

203. *Id.* at 14.

204. *Id.* at 11–12. On the other hand, the legal treatment of manufactured homes as personal property and the separate financing of the homes—apart from the land—may actually be beneficial for buyers who do not have clear title to their land and would thus be unable to qualify for a mortgage secured by the land.

205. For example, see *In re Richard Lisowski*, 395 B.R. 771, 781 (*Bankr. M.D. Fla.* 2008) (Florida's constitutional homestead protections in bankruptcy do not apply to owners of mobile homes on leased land); *In re Vanessa Ann Cobbins*, 227 F.3d 302, 306–08 (5th Cir. 2000) (in a bankruptcy proceeding, manufactured homeowner was not entitled to claim her mobile home as exempt homestead property or exempt person property under Mississippi's homestead exemption law since owner was leasing the land).

signed “Statement of Ownership and Location”²⁰⁶ and a separate form completed by any lienholders of record—requirements that have been easily disregarded by unscrupulous used manufactured home dealers and in consumer-to-consumer transactions.²⁰⁷

E. Inheriting a Home Informally through Tenancy-in-Common Ownership

A second path to homeownership is through inheritance. When a property owner dies, the formal transfer of the property’s title to the next generation of owners requires access to financial resources and information to navigate a state’s estate planning and inheritance laws.²⁰⁸ For a variety of reasons, low-income families frequently forego following these formal probate and non-probate systems. Instead, many low-income families transfer their property interests informally from generation to generation through the laws of intestacy without recording their interests in the real property records.

Through the intestate laws of most jurisdictions, when a deceased person does not have a will, the title to the person’s home passes to his closest living relatives. This is usually the deceased’s spouse, children, and their descendants.²⁰⁹ When there is more than one heir—as in the case of a widower who dies leaving four adult children—the heirs become “tenants in common.” Tenancy-in-common property is also referred to as “heirs’ property.”²¹⁰

Through tenancy-in-common ownership, each co-tenant holds an undivided interest in the entire property.²¹¹ In the case of the four heirs in the widower example above, each heir becomes a co-tenant holding a one-fourth undivided interest in the property. Each co-tenant has the equal right to use, possess, and enjoy the entire property. Upon a co-tenant’s death, his one-fourth interest then passes to his heirs. After multiple generations of title passing in this manner, dozens and even hundreds of heirs dispersed throughout the country can all become co-tenants of the same home.²¹² If

206. See generally TEX. LICENSING & ADMINISTRATIVE PROCEDURES, COMMITTEE REP. OF THE TEX. MANUFACTURED HOUSING STANDARDS ACT, C.S.H.B. 2238, at 1–2 (2009), <http://state.tx.us/tldocs/81R/analysis/pdf/HB02238H.pdf>.

207. See Press Release, Att’y Gen. of Tex., Attorney General Abbott Enforces Industry-Wide Law Protecting Owners of Manufactured Homes (Sept. 18, 2007), available at <http://www.oag.State.tx.us/oagNews/release.php?print=1&id=2186>.

208. Sneddon, *supra* note 47, at 461–62 (discussing the costs and time involved in both probate and nonprobate transfers).

209. Although, in Alabama, a child born out of wedlock does not inherit from his or her father via intestate succession unless paternity is established within ten years and the father “has openly treated the child as his, and has not refused to support the child.” Brandon C. Stone, *Children Born out of Wedlock Generally Do not Inherit from Their Father*, THE ALA. LAW., 206, 209–10 (May 2009) (quoting ALA. CODE § 43-8-48(b) (1975) & ALA. CODE § 6-2-33 (1975)).

210. SPANKLING, *supra* note 129, at 129.

211. *Id.* at 128.

212. *Id.* at 129.

someone wanted to find out who the current owners of heirs' property were, the local deed records would be unhelpful. Unless there has been a formal or informal administration of the estate or the filing of an affidavit of heirship, the intestate heirs' interests will not be recorded in the deed records. In instances of multiple generations of unrecorded interests, it can be extremely difficult, if not impossible, to discern who currently owns what interest in the property.

Today, heirs' property is a common form of ownership, comprising millions of acres of land across the United States.²¹³ Because low-income persons are much more likely than higher-income persons to die without a will, a large percentage of real property owned by the poor likely passes through intestate succession.²¹⁴ According to one finding, "where pockets of poverty and low education persist, the economic and social effects of the laws of intestacy are likely to be relatively widespread and intense."²¹⁵ Thus, heirs' property frequently crops up in less socio-economically advantaged areas such as New Orleans Parish,²¹⁶ Letcher County, Kentucky,²¹⁷ East St. Louis, Illinois,²¹⁸ the Gullah Coast in South Carolina and other regions of the rural South,²¹⁹ and the Sisseton-Wahpeton Lake Traverse Sioux Reservation in South Dakota.²²⁰

The widespread dispersion of heirs' property has been best documented on Indian reservations and black-owned land in the southeastern United States. More than one-quarter of black-owned land in the southeastern United States is owned through tenancy-in-common ownership, with an average of eight co-

213. A.B.A. PROP. PRESERVATION TASK FORCE, PRELIMINARY REPORT 7 (2004), <http://meetings.abanet.org/webupload/commupload/RP018700/relatedresources/PPTFReportFinal041205.pdf>; see also A.B.A. PROP. PRESERVATION TASK FORCE, USING LIMITED LIABILITY COMPANIES TO AVOID LAND LOSS 2 (2005), available at <http://www.abanet.org/dch/committee/cfm?com=RP018700> [hereinafter A.B.A., USING LIMITED LIABILITY COMPANIES].

214. James Deaton, *Intestate Succession and Heir Property: Implications for Future Research on the Persistence of Poverty in Central Appalachia*, 41 J. ECON. ISSUES 927, 927–28 (2007).

215. *Id.* at 929–30 (citing AARP RESEARCH GROUP, WHERE THERE IS A WILL: LEGAL DOCUMENTS AMONG THE 50+ POPULATION 1–2 (2000), <http://assets.aarp.org/rgcenter/econ/will.pdf>).

216. E-mail from Paul Tuttle, Managing Attorney, Southeast Louisiana Legal Services, to Heather K. Way, Director, Community Development Clinic, University of Texas School of Law (Jan. 12, 2009) (on file with author).

217. Deaton, *supra* note 214, at 928.

218. See, e.g., Ryan Chittum, *Eminent Domain: Is it Only Hope for Inner Cities?*, WALL ST. J., Oct. 5, 2005, at B1.

219. C. Scott Graber, *Heirs Property: The Problems and Possible Solutions*, 12 CLEARINGHOUSE REV. 273, 276–77 (Sept. 1978) (surveying prevalence of heirs' property amongst black-owned land in specific areas across the rural South); Faith R. Rivers, *The Public Trust Debate: Implications for Heirs' Property Along the Gullah Coast*, 15 S.E. ENVTL. L.J. 147, 148 (2006) (citing a South Carolina study that identified approximately 3,300 properties owned by heirs in two South Carolina counties).

220. *Hodel v. Irving*, 481 U.S. 704, 712–13 (1987).

owners per property.²²¹ On Indian reservations, fractionated ownership of land is even more pervasive: A U.S. government report covering just over 180,000 tracts of Indian land found that the typical tract had an average of 17.4 co-owners.²²² In one infamous example, reported in a U.S. Supreme Court case, a tract of land on a reservation in North and South Dakota had 439 owners, with one-third receiving \$.05 in annual rent and the remaining two-thirds receiving less than \$1.²²³

1. Problems with Tenancy-in-Common Ownership

Tenancy in common is generally a substandard and unstable form of homeownership.²²⁴ A homeowner who holds only a fractional title interest in her home faces diminished security and a host of other issues.

a. Property Management Challenges

In contrast to other forms of collective ownership such as LLCs, corporations, and condominium associations, tenancy-in-common laws do not create well-facilitated mechanisms for property management decisions. Through tenancy-in-common ownership, it is up to all the co-tenants to reach an agreement as to how their property will be managed and to divvy up responsibilities for paying taxes and maintenance costs. A co-tenant is not entitled to a contribution from the other co-tenants for maintenance or improvements to the property, absent a prior agreement amongst the co-tenants.²²⁵

In an ideal world, absent the benefit of an LLC or another business entity with a decision-making structure for managing the property, co-tenants would enter into a written agreement with all the heirs outlining the parties' different rights and responsibilities, such as who will be responsible for repairs and who

221. HELLER, *THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES* 123–26 (2008). See EMERGENCY LAND FUND, *THE IMPACT OF HEIR PROPERTY ON BLACK RURAL LAND TENURE IN THE SOUTHEASTERN REGION OF THE UNITED STATES* 62, 64 (1984); see generally Mitchell, *From Reconstruction to Deconstruction*, *supra* note 5, at 505–11 (describing tenancy in common as a common form of ownership amongst poor, rural black landowners).

222. Shoemaker, *supra* note 6, at 747 (citing U.S. GEN. ACCOUNTING OFFICE, *PROFILE OF LAND OWNERSHIP AT TWELVE RESERVATIONS*, REP. GAO/RCED 92-96BR 1–2 (1992) (Briefing Rep. to the Chairman, Select Senate Comm. on Indian Affairs)). The GAO study reported that 67% of American Indian ownership interests recorded in the Bureau of Indian Affairs were so fractionated that they were the equivalent of less than 62% of the total tract size. Shoemaker, *supra* note 6, at 748.

223. *Hodel*, 481 U.S. at 713.

224. See Mitchell, *From Reconstruction to Deconstruction*, *supra* note 5, at 579; Mitchell, *Destabilizing the Normalization*, *supra* note 5, at 583; Anna Stolley Persky, *In the Cross-Heirs*, A.B.A. J. 45, 46 (May 2009).

225. SPRANKLING, *supra* note 129, at 128.

will pay the taxes.²²⁶ Low-income heirs, however, are unlikely to have access to lawyers who can craft these agreements, and thus “[d]isputes over heirs’ property occur more frequently among the poor.”²²⁷ Even when low-income heirs attempt to reach an agreement over the management of the property, they face enormous barriers in actually reaching an agreement given the multitude of divergent ownership interests. It can be especially difficult to obtain contributions from co-tenants for ongoing costs given issues with free riders and other barriers.²²⁸ Heirs’ property is thus “particularly vulnerable to loss by tax sale.”²²⁹

To avoid these problems, a homeowner should consolidate as many interests in the homestead property as possible. The low-income homeowner, however, frequently faces insurmountable transaction costs that prevent this from happening, including the costs of locating heirs, hiring an attorney to draft the transfer documents, and buying out the other owners’ interests, which the other owners may overvalue.²³⁰ As a result, attempts to voluntarily consolidate ownership interests rarely work.²³¹

The complexities created by tenancy-in-common ownership are exacerbated with the passage of time. Over time, through each intergenerational transfer, the property ownership becomes more fragmented: the number of owners grows, and the owners become more dispersed across the country.²³² The owners are more and more difficult to locate and identify, the owners have less connections to each other, and the owners’ interests in the property increasingly diverge, all increasing the likelihood of conflict.²³³

b. The Problem of Partition

With tenancy-in-common ownership, there are no laws or rules governing how to resolve disagreements other than partition actions, which force the dissolution of the tenancy-in-common ownership and can lead to harsh outcomes.²³⁴ In a partition action, a court orders that the property either be

226. Mitchell, *From Reconstruction to Deconstruction*, *supra* note 5, at 512.

227. Persky, *supra* note 224, at 46.

228. See Mitchell, *From Reconstruction to Deconstruction*, *supra* note 5, at 508, 512–13; see also Mitchell, *Destabilizing the Normalization*, *supra* note 5, at 583.

229. Graber, *supra* note 219, at 277 (“Tax sales can be an equally serious consequence of multiple ownership.”); Rivers, *supra* note 219, at 153.

230. Heller, *supra* note 33, at 652–53. See, e.g., Chittum, *supra* note 208, at B6 (discussing city condemnation of blighted lot valued at \$7,000; the lot was owned by six heirs, one of whom wanted \$50,000 for his interest).

231. HELLER, *supra* note 221, at 113.

232. Of the black-owned heirship property in the southeastern United States, an average of five out of the eight co-owners live outside the region. *Id.* at 123.

233. Mitchell, *From Reconstruction to Deconstruction*, *supra* note 5, at 518.

234. *Id.* at 513–516.

sold (partition by sale) or divided into smaller sections (partition in kind).²³⁵ If a partition by sale occurs, the proceeds from the sale are disbursed to the heirs according to their interests.²³⁶ States allow for varying types of sales, ranging from public auctions to private sales. Partition in kind is generally only available on larger tracts in which the land can be physically divided in proportion to the co-tenants' interests.²³⁷

Every co-tenant has an unconditional right to compel partition of the property, regardless of how small and remote the co-tenant's interest.²³⁸ An outside investor is thus able to purchase a single interest in the property and then request a court to partition the property by sale, forcing a homeowner living in the homestead to move off the property. The most frequently reported instances of partition actions involve land in the southeastern United States, where outside investors have been able to acquire prime real estate through partition actions, divesting long-time rural African-American landholders of property that has been in their families for generations.²³⁹

Many issues arise for a low-income homeowner-occupant opposing a partition action. First, in valuing the heir's interest, the court's analysis usually fails to take into account the heir's strong personal ties to the home and other non-economic interests in the home.²⁴⁰ Second, a homeowner who wishes to stay in the home must have cash in hand or be able to secure financing to purchase the other heirs' interests—an often insurmountable barrier.²⁴¹ Third, given the nature of the forced sale, the property may end up being sold for less than fair market value, which hurts the homeowner who is unable to bid on the property and, thus, is relying on his share of the equity to secure alternative housing elsewhere.²⁴² Finally, in many states, the party opposing the partition action may end up having to pay a portion of the petitioner's attorney fees.²⁴³

On the other hand, as a proactive tool, a partition action rarely provides low-income homeowner-occupants who occupy the property with the means to secure their possession interests and consolidate title to the home. For a low-income homeowner, who may be land rich but cash poor, the transaction costs of bringing a partition action can be formidable. As a petitioner in a partition action, the low-income homeowner must be able to afford the court costs and at least a portion of the legal costs of bringing the partition action, and then be

235. *Id.* at 513.

236. 7 POWELL, *supra* note 19, § 50.07(5).

237. *Id.* § 50.07(4)(a).

238. A.B.A., USING LIMITED LIABILITY COMPANIES, *supra* note 213, at 3.

239. Persky, *supra* note 224, at 46; Mitchell, *From Reconstruction to Deconstruction*, *supra* note 5, at 508.

240. Mitchell, *From Reconstruction to Deconstruction*, *supra* note 5, at 515.

241. Persky, *supra* note 224, at 46.

242. *Id.* at 48.

243. *Id.*

able to pay for the purchase of the property at the partition sale,²⁴⁴ assuming the state law gives the petitioning homeowner the right to purchase the property at the sale and that the homeowner has the winning bid. In a few states, the non-petitioning co-tenants have a right of first refusal to buy the interests of the co-tenant bringing the partition action.²⁴⁵

c. Dead Capital

Tenancy-in-common ownership can trap low-income families in deplorable living conditions. Unless all the other co-tenants agree to use the home as security, a bank is very unlikely to extend credit secured by the home.²⁴⁶ Government assistance for renovations is also harder to come by.²⁴⁷ The owners must then forego repairs or resort to self-financing. Consequently, “[h]eirs property is rarely improved or developed” and often falls into disrepair.²⁴⁸ The property becomes, in the words of international economist Hernando De Soto, “dead capital.”²⁴⁹ Throughout the United States, thousands of acres of fractionated land cannot be used in any productive way as a result of fractionated ownership interests.²⁵⁰

244. Deaton, *supra* note 214, at 936–37.

245. See, e.g., S.C. CODE ANN. § 15-61-25 (Supp. 2007) (providing non-petitioning co-tenant with right of first refusal to buy petitioner’s interest); GA. CODE ANN. §§ 44-6-166.1(c)–(d) (2007) (providing non-petitioning co-tenants with right to buy out their pro rata share of the petitioner’s interest); LA. REV. STAT. ANN. § 9:1113 (2007) (allowing non-petitioning co-tenants to buy out their pro rata share of a petitioner who holds less than a 15% interest in the property). For a complete list of partition sale statutes, see John Pollock, *Summary of All State Partition Sale Statutes*, Nov. 20, 2008 (on file with author).

246. Mitchell, *From Reconstruction to Deconstruction*, *supra* note 5, at 561.

247. Persky, *supra* note 224, at 47 (“Co-owners of heirs’ property . . . are often not eligible for government housing rehabilitation assistance programs, and often can’t use their property to obtain mortgages or as collateral for business loans.”); Graber, *supra* note 219, at 278–79 (historically heirship interests had to be consolidated in order to qualify for Section 502 loans through the Farmers Home Administration, which meant that the “poor housing which often shelters black rural families cannot be restored or replaced, and blacks will be encouraged to abandon the property.”).

248. HELLER, *supra* note 221, at 124; Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549, 602–09 (2001) (writing about African-American farm ownership). See also Mitchell, *From Reconstruction to Deconstruction*, *supra* note 5, at 563; Heller, *supra* note 33, at 639; Shoemaker, *supra* note 6, at 750–51 (discussing how the fractionation of Indian lands has been destructive to the economic development and prosperity of individual members of tribes and tribal communities).

249. DE SOTO, *supra* note 1, at 32; Mitchell, *From Reconstruction to Deconstruction*, *supra* note 5, at 565.

250. HELLER, *supra* note 221, at 109, 124–25. Compared to non-heirship property, one-third more heirs’ property is not being put to any productive use. *Id.* at 124. Much of the land on Indian reservations also “sits idle” today as a result of fractionated ownership. Shoemaker, *supra* note 6, at 753–54.

These problems are amplified when a natural disaster hits and the owner's home is suddenly damaged or destroyed. After hurricanes Katrina, Rita, and Dolly hit Texas, Louisiana, Alabama, and Mississippi in 2003, thousands of homeowners faced long delays and denials of government assistance to repair or rebuild their homes as a result of their heirship status.²⁵¹ As many as 20,000 residents in New Orleans alone who were trying to rebuild following Hurricane Katrina faced an array of title problems, including problems with heirs' property, which prevented many of the residents from accessing government housing assistance until they had the resources or means to clear the title.²⁵²

One eighty-year-old homeowner, for example, lived in a house her parents bought in the 1940s that was destroyed in the aftermath of Hurricane Katrina.²⁵³ Her parents died without a will and the title in the deed records remained in her parents' names.²⁵⁴ The homeowner shared title to the home with a dozen or so nieces and nephews under Louisiana's intestate laws.²⁵⁵ In order to obtain government assistance to fix her home, she had to show that title was solely in her name (which she could not do) or obtain a power of attorney from all the other heirs.²⁵⁶

Informal homeowners with co-tenant interests face numerous difficulties in not only improving their homes but also selling their homes on the market. If the heirship issues are not cleared up and title is not consolidated in the homeowner, a homeowner can sell only his fractional co-tenant interest in the title to the home. If there is any market at all for the fractionated interest—and oftentimes there is not—the interest is typically sold at a significant discount, with the amount of the discount depending on the nature of the heirship issues.²⁵⁷ Full legal title to the property cannot be sold unless the homeowner secures the approval of all the other heirs, who can number in the hundreds or even thousands.²⁵⁸ One heirs' property tract in Mississippi, for example, reportedly required 1,000 signatures to transfer the interests in the land.²⁵⁹

251. See, e.g., *A DASH of Hope*, *supra* note 167, at 14A (clouded titles to property passed through intestacy have prevented Alabama residents from accessing federal hurricane assistance to repair or rebuild their homes).

252. Cohen, *supra* note 10, at 25, 27; *All Things Considered*, *supra* note 9; Hammer, *supra* note 9, at A1, A8.

253. *All Things Considered*, *supra* note 9.

254. *Id.*

255. *Id.*

256. *Id.*

257. Real estate investors regularly tout the ability to buy property with clouded title at a discount. See, e.g., THOMAS J. LUCIER, *HOW TO MAKE MONEY WITH REAL ESTATE OPTIONS* (2005); James Kimmons, *Title Problems & Clouded Title for Real Estate Investors*, http://real-estate.about.com/od/realstateinvesting/a/title_problems.htm (last visited January 15, 2009).

258. HELLER, *supra* note 221, at 1–2 (tenancy in common ownership results in market inefficiencies and destroys the wealth generating potential of homeownership); Graber, *supra* note 219, at 273 (heirs' property is "held at greatly diminished value" and often "cannot be

To the extent multigenerational heirship issues can be cleared up short of a partition action, clearing up the title typically requires the assistance of an attorney, much time, extraordinary patience, and often a dose of good luck. The chain of title must be developed through examination of different government records such as birth records, death records, and marriage records.²⁶⁰ All of the heirs must be located.²⁶¹ Affidavits of heirship and other legal documents have to then be prepared to prove the chain of title.²⁶² Each and all of the heirs must then agree to relinquish or sell their interests in the home.²⁶³ These complex title clearing efforts are oftentimes hurdles that no low-income homeowner or any other party for that matter is able to overcome.²⁶⁴

2. The Tension between Property Law and Probate Law

The problems arising out of heirs' property highlight the tensions between American property law and probate law. On the one hand, probate laws value fairness first. When a deceased property owner has failed to leave a will delineating the owner's intentions regarding a home, a state's probate laws decide what is the fairest apportionment of the owner's interests in the home.²⁶⁵ Thus, rather than favor the interests of one offspring over another, intestate laws grant uniform interests in the title to all of a deceased homeowner's offspring, regardless of their connections to the property.

On the other hand, property law values the alienability of property and, through laws like adverse possession, promotes a property's highest and best use. Property law thus "favors the establishment of titles in persons who have long possessed real property under a claim of ownership, and looks askance upon the indefinite assertion of rights by a record titleholder not in possession."²⁶⁶

bought, sold or traded away"). See also Heller, *supra* note 33, at 668 (discussing how tenancy in common ownership is an example of "anticommons" property, in which "multiple owners hold effective rights of exclusion in a scarce resource").

259. Graber, *supra* note 219, at 277 (citing an interview with a local attorney).

260. See Cohen, *supra* note 10, at 1.

261. *Id.*

262. See *id.*

263. *Id.*

264. See Meyer, *supra* note 9, at 329; S. Con. Res. 2, 2008 Leg., 1st Extraordinary Sess. (La. 2008) (finding that "many co-owners of heirship property do not have the funds to complete the title curative work which would restore their titles to a merchantable status").

265. SPRANKLING, *supra* note 129, at 479 ("[I]ntestate succession rules seek to do what the decedent would have done if he or she had considered the matter.").

266. Comment, *Enhancing the Marketability of Land: The Suit to Quiet Title*, 68 YALE L.J. 1245, 1256 n.61 (1959).

By furthering the fragmentation of property and limiting the ability of heirs' property to be put to its highest and best use, probate laws work against the values of economic efficiency promoted by property laws.²⁶⁷ Probate laws give the same weight to the interests of an heir who has lived in the home for 50 years and has continually paid taxes and maintained the property, as to the interests of an heir who lives across the country, has never visited the property, and may not even know she has inherited an interest in the property. While a well-functioning property system has numerous safeguards to ensure that property rights can be rebundled and that property can be put to its highest and best use within a reasonable time,²⁶⁸ this system breaks down when property falls under the purview of probate laws which act to fractionate and reduce the alienability of property passing through intestacy. While the partition action is property law's solution to the fractionated interests created by probate laws, from the interest of the low-income homeowner, this is a crude solution at best.

F. Larger Impacts

The widespread reliance in the United States on informal pathways to homeownership and the law's limited protections for informal owners has broader policy implications.

1. The American Property Divide

The first policy impact is an equitable one. The American legal system extends a profoundly different set of legal protections to homebuyers that exacerbate race and class divisions in the way people hold title to their homes. The more interaction someone has with the formal market, the more protections the law provides; the less interaction someone has with the formal market, the less it provides.

The families who purchase or inherit homes informally are largely lower-income, immigrant, and minority families.²⁶⁹ The inability to qualify for mortgage credit, the inability to afford to pay for lawyers to assist with probate and title clearing issues, the different laws defining and securing title interests, and the lack of knowledge about how to protect their property interests places these families on uneven footing in terms of how the title to their homes is held and transferred.

The lack of attention to correct these disparities is especially troubling in the context of the vast wealth gap in the United States, where black and Hispanic households have a net worth that is less than one-tenth that of white

267. BORRON, *supra* note 31, § 1117 (property law prioritizes the values of free alienability of land over the values of maintaining family ownership).

268. Heller, *supra* note 33, at 688.

269. *See* Larson, *supra* note 6, at 150.

households.²⁷⁰ Wealth is the “realm in which the greatest degree of racial inequality lies in contemporary America.”²⁷¹ The accumulation of wealth is critical to a family improving its economic well-being, as “wealth begets wealth.”²⁷² With only limited access to wealth building opportunities, low-income minority households are much less likely to rise to the middle class and are more vulnerable in economic downturns.²⁷³ To help close the race and class divide, policymakers need to take note of the ways that low-income, minority families become homeowners outside the formal market and seek to place these more vulnerable families on more even footing.

2. Community Deterioration

The second broader policy implication is the destabilizing impact that the informal market can impose on communities.²⁷⁴ By failing to address issues of clouded title, the law creates a paralysis in the market that, absent further government involvement to clear the title, eventually leads to an array of larger problems, including property disinvestment, abandonment, and blight.²⁷⁵

As discussed earlier, when a homeowner does not hold marketable title to a property, the homeowner is unable to get a loan or government assistance for home improvements, and thus faces enormous hurdles in making larger repairs or improvements to the property, especially in urban areas with stricter building standards. The owners are caught in a Catch-22, where they cannot sell the property, cannot obtain funding to improve the property, and may not even be able to live on the property.

When a home reaches a certain point of disrepair, the government will likely issue code enforcement liens against the property. Heirs' property also

270. Editorial, *Study Says White Families' Wealth Advantage Has Grown*, N.Y. TIMES, Oct. 18, 2004, at A13. In 2002, the net worth of white, non-Hispanic households was \$79,400, while the net worth of Hispanics was \$9,750 and the wealth of Blacks was \$7,500. U.S. CENSUS BUREAU, NET WORTH & ASSET OWNERSHIP OF HOUSEHOLDS: 1998 & 2000 12 (2003).

271. DALTON CONLEY, BEING BLACK, LIVING IN THE RED: RACE, WEALTH, AND SOCIAL POLICY IN AMERICA 152 (1999). See also *Wealth Gap Widens Between Whites and Hispanics*, THE PEW CHARITABLE TRUSTS, Oct. 18, 2004, <http://www.c3.ucla.edu/newsstand/national/wealth-gap-widens-between-whites-and-hispanics/> (finding significant wealth disparities between Hispanic and non-Hispanic white households).

272. CONLEY, *supra* note 271, at 45–46.

273. *Id.* at 41.

274. HELLER, *supra* note 221, at 7 (“Everyone suffers a hidden cost when legal rights diverge too much from the scale of efficient use and when simple tools to reassemble ownership do not exist.”).

275. See, e.g., *Shoemaker*, *supra* note 6, at 753 (discussing how fractionation of Indian land has barred Indians from “reaping any real economic benefit from the land”); HELLER, *supra* note 221, at 123 (citing a report by the EMERGENCY LAND FUND, *supra* note 221). See also ALLAN MALLACH, BRINGING BUILDINGS BACK: FROM ABANDONED PROPERTIES TO COMMUNITY ASSETS 6–8 (2006).

often fosters disagreement about the payment of ad valorem taxes,²⁷⁶ leading ultimately to government tax liens against the property and potential tax foreclosure. When the costs to consolidate ownership and pay off the liens exceed the value of the property, these properties enter the legal equivalent of a black hole, resulting in permanent disuse.²⁷⁷ The owners may then have no choice but to abandon the property.²⁷⁸

Abandoned properties have a ripple effect on surrounding properties in the neighborhood, bringing down their property values and imposing considerable social and economic burdens on the larger urban community.²⁷⁹ Large and small cities across the country have all struggled with the problems of abandoned properties, including St. Louis; Philadelphia; Houston; Camden; New Jersey; and Durham, North Carolina.²⁸⁰

Heirs' property and other clouded title issues also impose significant barriers to city rebuilding and revitalization efforts. In New Orleans, for example, where clouded title issues have impacted approximately 20,000 residents, title issues have contributed to long delays in hurricane rebuilding efforts.²⁸¹ Likewise, in Dallas, the city has found that clouded title issues

276. See Meyer, *supra* note 9, at 328–29.

277. Thomas Gunton, *Coping with the Specter of Urban Malaise in a Post-Modern Landscape: The Need for a Detroit Land Bank Authority*, 84 U. DET. MERCY L. REV. 521, 528 (2007). See also MALLACH, *supra* note 275, at 6–9. See generally Deaton, *supra* note 214 (discussing the economic consequences of heirs' property and how heirs' property may be a factor constraining economic development and contributing to poverty).

278. Empirical research is badly needed in this field to examine the long-term causes of property abandonment and the exact extent that clouded title is a trigger for property abandonment.

279. See Joseph Schilling, *Code Enforcement and Community Stabilization: The Forgotten First Responders to Vacant and Foreclosed Homes*, 2 ALB. GOV'T. L. REV. 101, 110–11 (2009); MALLACH, *supra* note 275, at 8–9; FRANK S. ALEXANDER, BROOKINGS METRO. POL'Y PROGRAM, LAND BANKING AS METROPOLITAN POLICY 10–12 (2008); NIGEL G. GRISWOLD & PATRICIA E. NORRIS, MSU LAND POL'Y INST., ECONOMIC IMPACTS OF RESIDENTIAL PROPERTY ABANDONMENT AND THE GENESEE COUNTY LAND BANK IN FLINT, MICHIGAN 23–24 (2007). See generally NAT'L VACANT PROPERTIES CAMPAIGN, VACANT PROPERTIES: THE TRUE COSTS TO COMMUNITIES (2005).

280. See MALLACH, *supra* note 275, at 3–4. Abandoned properties are a key contributor of endemic blight, crime, and the general destabilization of neighborhoods. *Id.* at 8–9. They result in the loss of property tax revenues, the depreciation of neighboring property values, the loss of private investment, and increased maintenance and crime fighting costs. *Id.* See, e.g., Edward G. Goetz et al., *Pay Now or Pay More Later: St. Paul's Experience in Rehabilitating Vacant Housing*, CURA REPORTER 13–14 (1998) (abandoned properties cause loss of tax revenue, decline in neighboring property values, loss of private investment, increased maintenance and security costs). In Dallas, for example, a recent study showed that abandoned and vacant properties cost the city an estimated \$4.3 million annually in lost property tax revenues. Jim Murdoch & Judy Mays, UT Dallas, *Social and Economic Impacts* (Sept. 20, 2008), <http://cdac.files.wordpress.com/2009/06/socialandeconomicimpacts.pdf>.

281. Cohen, *supra* note 10, at 1.

create delays and costs in getting abandoned residential properties through the city's land bank program for redevelopment as new affordable homes.²⁸² Clouded titles have also been a significant barrier to Detroit's attempts to redevelop abandoned properties.²⁸³

At some point, even nonprofit community development corporations focused on rehabilitating abandoned properties find that they cannot get around the clouded title issues. Until the government takes all the necessary steps to foreclose on the properties and clear the title, these properties remain perpetually blighted and abandoned.

V. OPPORTUNITIES FOR REFORM

A. *Policy Considerations*

Policy reforms focused on homeownership opportunities for low-income families in the United States need to take better account of the informal market and the disparities in the way low-income families hold title to their homes. Simply focusing on addressing the existing deficiencies in the formal market and problems with the third party financing of homes will fail to address the issues facing many of the most vulnerable homeowners in America. There will always be families who, for different reasons, are unable to access the formal market and will find alternative and more informal ways to buy into the American dream of homeownership—notwithstanding the risks and tenuous nature of these informal paths to ownership.²⁸⁴

Homeownership policies need to shift from a primary focus on increasing the number of homeowners to enhancing homeowners' ability to be secure in their homes and to build wealth. For families in the informal market, this means the government must be much more proactive in adopting reforms to the American legal system through which potentially millions of the lowest-income Americans hold insecure and inferior title to their homes. Government institutions need to ensure that its "efficient legal institutions are available to

282. Telephone Interview with Terry Williams, Assistant Dir., Housing/Community Services Dep't, City of Dallas (Jan. 13, 2008).

283. Jennifer Dixon, *State to Help City Clear Up Land Titles*, DETROIT FREE PRESS, Jan. 17, 2001, at 1B; Robert Ankeny, *Detroit Sorts Out Titles; City Tries to Resolve Clouded Land Ownership*, CRAIN'S DETROIT BUS., Nov. 15, 1999, at 1 (noting that title problems in Detroit likely exist on 60 to 70% of tax reversion properties, or 25,000 properties); Gunton, *supra* note 277, at 526.

284. See Harney, *supra* note 16, at F1. See also Peter M. Ward, *Colonias, Informal Homestead Subdivisions, and Self-Help Care for the Elderly Among Mexican Populations in the United States*, in THE HEALTH OF AGING HISPANICS: THE MEXICAN-ORIGIN POPULATION 149 (Jacqueline L. Angel & Keith E. Whitfield, eds., 2007) (discussing the strong culture of homeownership among Hispanics and especially Mexican-Americans, including the poor).

all citizens.”²⁸⁵ This shift in focus is critical to helping low-income and minority families stand on firmer footing as homeowners.²⁸⁶

Any policy reforms should ideally include consideration of the following:

1. Recognize the Benefits of Informal Homeownership

First, policy reforms need to recognize not only the problems created by the informal market but also the benefits. Even with more limited security and wealth building potential, informal homeownership provides numerous families with the only route available to safe and permanently affordable housing. The low entry costs—such as no credit requirements, minimal closing costs, and lower down payments—make informal homeownership appealing to these families.²⁸⁷ The chance to be a homeowner, even if it is through the informal market, also provides important personal and intangible benefits to these homeowners that renting does not provide, such as a safe and permanent place for retirement, a place for extended families to live in close vicinity to each other, and a place for residents to support their aging parents.²⁸⁸

As a result of these and other benefits, families are willing, whatever the barriers, to make many sacrifices to own a home. Attention needs to be paid to ensure that any reforms enacted to improve the title standing of informal homeowners do not impose such significant transaction costs or other barriers that they have the effect of pushing these families into even more vulnerable housing situations.

2. Reflect the Realities of the Informal Market

Finally, policy reforms need to be tailored to the different reasons families in the informal market do not better protect the title to their homes. One key reason is economics: The transaction costs involved in formalizing title can serve as a significant deterrent to low-income homeowners. For example, to protect against the further fractionalization of property, many co-tenant homeowners need access to lawyers to develop some type of maintenance agreement or create an estate plan. Once title has been clouded, there can also be significant costs to clear title, including filing costs, court costs, and

285. HERNANDO DE SOTO, *THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD* 186 (Basic Books 2002).

286. As part of this shift in policy focus, much more empirical analysis of the informal market is needed—to be able to understand more comprehensively the reasons families enter the informal market and the impact that the informal market has on families and their ability to build wealth, their security, and their well-being.

287. Freyfogle, *supra* note 70, at 304–05.

288. Ward, *supra* note 284, at 152–53, 160 (discussing benefits of informal “colonias” housing for poor Mexican-Americans).

attorney costs. A moderately simple title clearing can take as long as 10 to 20 hours of legal time or \$1,000-\$5,000 in attorney's fees. When there are multiple heirs, there is the compounded problem of trying to consolidate title by purchasing heirs' interests and dealing with holdouts. In other situations, homeowners may fail to formalize their title as a result of property taxes: heirs may not record their interest for fear of losing any existing ad valorem tax exemptions or assessment caps on the property.²⁸⁹

In addition to economic reasons, fear of lawyers and judges can be a factor as well.²⁹⁰ Education, language, and cultural norms may also play a role in the reasons why families do not formalize the title to their homes, especially for recent immigrants who have had no exposure to American property laws. For example, many of the low-income immigrant families that the Community Development Clinic has worked with on converting their installment contracts into deeds have been unaware of the significance of, or means to obtain, clear title. When they purchased their properties, they were unaware that there was a difference between purchasing a property through installment contracts and warranty deeds.

These clients also did not know they had the option of purchasing title insurance and did not understand that they had the right, under Texas law, to convert their contracts into warranty deeds. In the end, educational and informational barriers—not economic barriers—were the primary contributing factors to their clouded title situation. After receiving legal counseling from the clinic, each of the families decided to save the money to purchase title insurance and secure their title by converting their installment contracts into regular deeds, as allowed under Texas law.²⁹¹

Bad acts by unscrupulous sellers are yet another large contributor to the challenges facing homeowners entering the informal market.²⁹² Because of the lack of information, third party scrutiny, and regulatory oversight in the informal market, homeowners in the informal market are particularly vulnerable to schemes whereby the seller has no intent of transferring clear title to the buyer.

With these considerations in mind, the following are some suggested reforms.

289. Meyer, *supra* note 9, at 328–29.

290. *Id.* at 329–30 n.18.

291. Title insurance costs approximately \$350 for a \$30,000 home in Texas and \$700 for an \$80,000 home. Texas Department of Insurance, Texas Title Insurance Premium Rates, effective Feb. 1, 2007, <http://www.tdi.state.tx.us/orders/titlerates2004.html> (last visited Feb. 27, 2010).

292. See Harney, *supra* note 16, at F1.

B. First Generation Reforms

Several of the worst problems and abuses with installment contracts, lease-to-own agreements, and seller-financed purchases can be addressed by policymakers through the adoption of a series of reforms, including:

- Providing more information to informal buyers about the status of their title and importance of holding clear title, and assisting buyers in clearing clouds on their title.
- Extending more of the clear statutory protections that exist for mortgagors to installment contract and lease-to-own buyers.
- Adopting additional protections for lease-to-own buyers.
- Adopting creative broad-scale approaches to clearing titles in areas with large concentrations of clouded title issues.
- Providing more aggressive policing of abusive practices through state attorney general and local law enforcement offices.

1. Title Information, Education, and Assistance

Buyers in the informal market are often unaware of the importance of clear title and of obtaining information about their property's title status. One policy that states should consider adopting is requiring the seller of a residential property to obtain and issue an independent disclosure of the title condition prior to the closing of the home sale and the execution of an installment or lease-to-own contract. At a minimum, even if an independent disclosure is not obtained, the seller should be required to disclose a list of all third party interests and liens against the property and the names of the current record owners. This is the approach that Texas has taken, by requiring the seller to make title disclosures in installment and lease-to-own transactions.²⁹³

Merely requiring a title disclosure, however, can be problematic in that a disclosure is informational only and would not actually protect the buyer from third parties making title-related claims against the property. Another potential policy approach is to require the seller in an installment contract or seller-financed sale to purchase a title insurance policy to insure the homebuyer against all title defects except those noted in the policy. Title insurance would impose an additional cost ultimately borne by the buyer, but a fairly inexpensive cost given the protections provided. In Texas, for example, the

293. TEX. PROP. CODE ANN. § 5.069(a) (Vernon 2009) (requiring seller to provide an installment contract buyer with disclosures of conditions affecting the title to the property). Without regulatory oversight, however, protections like those contained in the Texas title disclosure law can easily be ignored.

cost of title insurance on a \$30,000 property is approximately \$350.²⁹⁴ A state could also consider requiring, through state regulation, discounted title insurance rates for lower-income buyers through the assessment of slightly higher rates in other title insurance transactions.

Low-income homebuyers also need more access to information in their native language about the importance of title and how to protect their interests in their property, such as through purchasing title insurance. The Community Development Clinic at the University of Texas School of Law has conducted a couple of successful informational workshops on title for residents of an informal subdivision outside of Austin. Prior to the workshops, many of the residents were unaware of the importance of clear title and that their title should be recorded to protect their interests. As discussed above, through the clinic, law students assisted the residents in obtaining clear title and recording their title interests in the local real property records. When we counseled our low-income clients on the protections provided by title insurance, every eligible client chose to save up the money to purchase the title insurance policy, even if it meant delaying the transaction by a few months.

Universities, states, and local governments could offer similar workshops and clinics in low-income communities to educate residents about the importance of title and assist the residents in clearing clouds on their title. Because the names of homeowners can usually be identified through the tax records in Texas, it is fairly easy to conduct outreach and provide written information to homeowners concentrated in low-income neighborhoods, where title problems are likely to be prevalent. Outreach will be even more successful when partnering with a well-known local institution that the residents will trust and respect, such as a church or social services agency.

As part of providing more education to informal homebuyers, states should consider creating an easy-to-read handout and webpage listing the basic steps that persons should take to protect their interests when buying and owning a home, including an explanation of the differences in different types of deeds, the importance of recording deeds, the risks of predatory lending, and the importance of obtaining a title insurance policy. This handout could also be mailed out annually to homeowners in low-income census tracts along with their property tax bill.

2. Extension of State Mortgagor Protections

To better address the inequities that exist with installment and lease-to-own contracts, states should consider adopting statutes that provide installment and lease-to-own buyers with more of the clear statutory protections that states

294. Texas Department of Insurance, Texas Title Insurance Premium Rates, Effective Feb. 1, 2007, <http://www.tdi.state.tx.us/orders/titlerates2004.html>.

currently extend to mortgagors in the event of default, especially those providing buyers with a right to cure, the right to a foreclosure sale, and the right to receive any of the excess sales proceeds. At a minimum, a buyer should have a right to: (1) an automatic 45-day right to cure any contract breach; (2) a right to a public foreclosure sale, especially after the buyer has made a minimum number of payments on the home; and (3) the right to receive a return on some of the equity the buyer has invested in the home in the event the buyer has to move or is in default, after the seller recovers the costs of the foreclosure.

The strongest protections that states can provide for buyers is to treat residential installment and lease-to-own contracts exactly the same as mortgages, especially with regards to protections and processes that apply upon default. States that have adopted these broad protections for installment contracts include Oklahoma²⁹⁵ and Maryland.²⁹⁶ Both the Restatement (Third) of Property: Mortgages,²⁹⁷ and the Uniform Land Security Interest Act²⁹⁸ have also taken this approach with regards to installment contracts, although they exclude lease-to-own contracts from their broad coverage.²⁹⁹

The full extension of mortgagor protections at the beginning of an installment contract makes most sense in those states that have adopted streamlined foreclosure processes allowing for non-judicial foreclosures.³⁰⁰ Otherwise, in those states with costly and lengthy foreclosure regimes, the extension of mortgagor rights at the beginning of the contract term will impose a large cost burden on the seller in the event the buyer defaults early in the contract term. The seller's costs in following the foreclosure procedures would then not be covered by the smaller down payments that are typical in the informal market. Faced with this financial burden, sellers are more likely to

295. OKLA. STAT. tit. 16, § 11A (1991).

296. MD. CODE ANN., REAL PROP. §§ 10-101-10-108; 14-201 *et seq.* (LexisNexis 2003).

297. RESTATEMENT (THIRD) OF PROP.: MORTGAGES 3.4(b) (1997) ("A contract for deed creates a mortgage."). The Comments to the Restatement justify treating contracts for deed as mortgages on several grounds: recent judicial decisions appear to favor characterization of installment contracts as mortgages; title problems arising from judicial hesitancy to enforce forfeiture with installment contracts can be avoided if the contracts are treated as mortgages; and the interests of both vendors and purchasers will be more clearly defined and recognized.

298. UNIF. LAND INTEREST SEC. ACT §§ 102(b), 111 (25) (1985).

299. 15 POWELL, *supra* note 19, § 84D.01(3). Under the Uniform Land Security Act, mortgagor protections are extended to buyers in a lease with option to purchase only if the lease was intended to provide a security interest, which is to be decided on a case-by-case basis. UNIF. LAND INTEREST SEC. ACT § 111(25) (1985) ("[T]he inclusion in a lease of an option to purchase at a price not unreasonable under the circumstances at the time of contracting does not of itself indicate the lease is intended for security.").

300. The issue of when full mortgagor protections should be extended to lease-to-own contracts is discussed in the following section.

charge a much higher down payment to cover the potential foreclosure costs, ignore the requirements, or choose not to sell through the informal market.³⁰¹

As an alternative for states with more costly judicial foreclosure processes, the law could extend mortgagor protections to the installment contract buyer only after the buyer has made a minimum number of payments towards the purchase price. In the interim, before the regular foreclosure protections kick in, the law could provide for alternative, more streamlined non-judicial foreclosure remedies.³⁰² Laws that defer the application of the regular foreclosure process, such as those in Ohio and Texas, attempt to strike a balance between the interests of the seller in recovering the costs of foreclosing on a home and the interests of the buyer in receiving a return on any equity in the property.³⁰³

In Ohio, for example, the seller must follow mortgage foreclosure procedures once the purchaser has paid 20% of the contract price or made at least five years of payments.³⁰⁴ In Texas, even though the state has a streamlined judicial foreclosure process, the state has taken the same route as Ohio and has chosen to delay extension of the mortgagor protections; only after the installment contract or lease-to-own buyer has paid at least 40% of the amount due under the contract or made at least 48 months of payments must the seller then appoint a trustee to sell the property and follow the procedures that govern foreclosure sales for deeds of trust. Any proceeds from the sale after paying off the remainder of the contract go to the buyer.³⁰⁵

301. Another possible risk for unsophisticated sellers in a mortgage-only regime is that they will lack the information and means to follow the foreclosure process and therefore fail to take the means to formalize transfer of title back to the seller in the event of the buyer's default. This would pose the biggest problem in states with complex and expensive foreclosure processes and calls out a need for states to explore developing simplified foreclosure procedures with lower transaction costs.

302. Nelson, *supra* note 74, at 1164–66.

303. *Introduction* to RESTATEMENT (THIRD) OF PROP.: MORTGAGES 3, 6 (1997) (“Real property security should be just that—security—and not an opportunity for the lender to realize a windfall profit as a result of the borrower’s default.”).

304. OHIO REV. CODE ANN. § 5313.07 (West 2009).

305. TEX. PROP. CODE ANN. § 5.066 (Vernon 2009). Texas and some other states also allow for buyers to convert their contracts for deed into warranty deeds and deeds of trust after the buyers have paid off a minimum percentage of the sales price. *See id.* § 5.081; MD. CODE ANN. REAL PROP. § 10-105 (a) (LexisNexis 2003). The problem with this alternative approach, however, is that the burden is on the buyer to be aware of the option and have the information on how to institute the conversion process. Unless the buyer has a high level of sophistication and legal know-how, the buyers will need to find a pro bono attorney or pay an attorney to draft the legal documents and track the statutory conversion process.

Because the entry-level costs of entering into an installment contract and seller-financed mortgage are essentially the same,³⁰⁶ once a state creates an even playing field in terms of what happens upon default, there is no longer much of a policy rationale for preserving the installment contract as a legitimate transaction in states with streamlined foreclosure processes.³⁰⁷ As a result, states with streamlined foreclosure processes should consider requiring sellers to transfer legal title at the outset of any installment contract transaction—in essence doing away with the installment contract. Sellers would be able to secure their equitable interest in the property with a seller-financed mortgage or deed of trust, which would impose very minimal transaction costs at the outset of the transaction, especially if a state were to make a set of standardized forms readily available for sellers and buyers. The transfer and recording of legal title up front in the transaction would also address the issues that arise in lease-to-own and installment contracts with the seller's creditors filing liens against the property. Informal buyers would then have the same protections from third party liens that mortgagors have.

Finally, for states adopting reforms that do not take the step of requiring the transfer and recording of legal title at the outset of an installment contract, these states should provide, at a minimum, stronger protections to installment contract buyers against third party liens that arise after the contract is executed. These protections, which should also be extended to lease-to-own buyers, could include: (1) requiring the seller to record the installment or lease-to-own contract; (2) barring the seller and seller's creditors from attaching liens to the property after a contract has been executed; (3) ensuring that possession of the property is enough to put third party lienholders on notice in instances where a contract has not been recorded; and (4) providing that if a lien does attach to the property against the seller's interest, the lien is subject to the buyer's interest and the buyer is entitled to maintain possession and complete the terms of the contract.

3. Additional Protections for Lease-to-Own Buyers

Lease-to-own contracts raise additional regulatory issues. Rampant abusive practices have been occurring in the lease-to-own industry, with too few of these transactions resulting in clear title passing to the buyer. In states that have adopted heightened protections for installment contract buyers, many sellers have been able to use the lease-to-own format as a way to fall outside

306. 15 POWELL, *supra* note 19, § 84D.01(2) (“[T]he parties can create a vendor-retained mortgage loan as quickly and easily as an installment land contract.”).

307. *Introduction* to RESTATEMENT (THIRD) OF PROP.: MORTGAGES, 3, 4 (“If the rules governing the mortgage are efficient, flexible, and equitable to both borrower and lender, there should be no need for the invention or perpetuation of other devices . . .”); 15 POWELL, *supra* note 19, § 84D.01(2).

the purview of these protections. Without laws protecting these buyers, unscrupulous property owners are able to use lease-to-own contracts as a way to extract large upfront fees and monthly payments with no intent of ever actually transferring title to the buyer.³⁰⁸

One regulatory response to these abuses is to make sure state law extends the same protections it provides for installment contract buyers to lease-to-own buyers. This extension of protections is especially important when a lease-to-own contract includes a long lease-up period of three or more years (including prior leases with the same buyer) or includes a large down payment or other upfront fee. In these cases, the lease-to-own contract looks more like an installment contract and, at a minimum, should be subject to the same restrictions as installment contracts.

On the other hand, some lease-to-own contracts are extended to low-income tenants by sellers with the intent of actually helping the buyers build credit and then buy the home at the end of a reasonable lease term. Our clinic has worked with nonprofits offering such a program. In these programs, the buyer does not have a credit score high enough to obtain prime third-party financing, and the seller is unable to self-finance the transaction or is not ready to extend financing to the buyer until the buyer establishes the ability to make timely payments, maintain the premises, and meet other responsibilities under the lease. The nonprofit's option fee is minor, the monthly lease payments are reasonable and approximate the fair market value of lease payments, the premises are habitable, and the option period is less than three years. Requiring the sellers in transactions that meet these qualifications to go through a public foreclosure sale—during at least the early part of a lease term—seems unduly restrictive.

In lease-option transactions where the option period is short and the upfront fees are minor, states should consider allowing sellers to follow more streamlined procedures in the event of the buyer's breach as an alternative to following the foreclosure procedures, as long as the streamlined procedures give the buyer enough advance notice, an opportunity to cure the violations, and due process to contest the termination. This remedy should then be combined with licensing and regulatory oversight—whereby only legitimate, licensed lease-to-own sellers could receive the benefit of these alternative procedures.

States should also consider requiring a license for all lease-to-own investors who enter into more than one or two lease-to-own transactions within a certain time period. The state could better police abuses through licensing and regulatory standards. For example, the regulations could require that a licensed seller must complete a certain percentage of transactions in order to

308. See generally Giusti et al., *supra* note 66.

receive the benefit of the more streamlined termination procedures. This approach would not unduly burden legitimate sellers and would facilitate the ability of buyers to build up credit in order to buy an affordable and habitable home at the end of the lease term. Similar licensing and regulatory oversight should also extend to investors involved in multiple installment contracts and seller-financed transactions.

Additional state policy responses for lease-to-own contracts include:

- Providing buyers with rights to cure so that a seller could not retain the buyer's option fee or terminate the lease-to-own contract for minor lease infractions.
- Providing buyers with a longer opportunity (e.g., 30-60 days) to cure the lease violations.
- Requiring upfront disclosures regarding the condition of the property and pre-existing liens.
- Extending certain state tenant protections to lease-to-own buyers, especially those pertaining to the landlord's duty of habitability.
- Restricting punitive option provisions such as those that set an unfair formula for determining the sales price or place undue restrictions on how the buyer can exercise the option.
- Requiring separate, up-front disclosures about the terms of the purchase option: what the purchase price is, what the financing terms are, and how the buyer can exercise the option.

Lease-to-own contracts arising out of foreclosure sale-leaseback schemes raise additional policy concerns and create the need for additional policy responses.³⁰⁹ States should consider extending full mortgagor protections to homeowners in sale-leaseback schemes. Several state courts have already extended these protections through the equitable mortgage doctrine.³¹⁰ Several states have also adopted special laws directed at these schemes, such as provisions requiring the rescue company to pay a minimum percentage of fair market value for the home, prohibitions against certain contract terms, bars on lease-option terms unless the homeowner has a reasonable ability to repay, and prohibitions against other deceptive practices.³¹¹

4. Broad-Scale Title Clearing Efforts: Utilizing Bankruptcy

In communities where large concentrations of homeowners have clouded title issues because of the informality of the land transactions, the task of

309. See RAO ET AL., *supra* note 160, § 15.4.2 n.44.

310. For a list of court cases, see *id.*

311. *Id.* §§ 15.4.5.1–15.5.5.5.

clearing the title can be daunting, especially when there are problems with the legal descriptions to the lots and government liens on the land. One region where this has been a particular challenge is in the Texas colonias, where developers have sold thousands of lots via installment contracts with an array of title issues.

When confronting compound title issues like those in the Texas colonias, broad-scale creative approaches can be more effective in remedying the harms to the buyers than a lot-by-lot approach. In the colonias, one such broad-scale approach that has proven to be particularly effective is the use of bankruptcy to clear title to land, as exemplified in a case arising out of Starr County, Texas—a county in South Texas along the border with Mexico.

From the 1980s to the early 1990s, former county judge Blas Chapa and his business partner Eliza Lopez sold 2,500 parcels of land in 16 Starr County colonias to low-income homebuyers, primarily via installment contracts, referred to in Texas as contracts for deed.³¹² There were multiple title problems with the sales from the outset: the developers failed to accurately subdivide many of the parcels; failed to prepare proper conveyance instruments; conveyed the same lot to multiple buyers; represented that a lot was conveyed when it was not; provided buyers with inadequate property descriptions; and, along with a host of other problems, conveyed lots with layers of mortgage, tax, and judgment liens.³¹³ For example, in a section of one subdivision, each homeowner's legal description to his or her lot was "off" by one lot.³¹⁴

In 1993, the State of Texas filed a lawsuit against the developers for violating state development and environmental laws in conjunction with the developers' unscrupulous land transactions and failure to provide water and wastewater services.³¹⁵ At the end of the day, the liens on the developers' properties arising from back taxes and state penalties exceeded \$22 million.³¹⁶ Under a 1995 settlement agreement between the state and the developers, the

312. Elena Cabral, *A Home on the Range*, 35 FORD FOUND. REP. 26, 27 (2004), http://www.fordfound.org/pdfs/impact/ford_reports_fall_2004.pdf.

313. *In re Starr County Colonia Assistance Corp., Inc.*, No. 99-13090-FM (Bankr. W.D. Tex. Nov. 22, 1999) (order confirming debtors' amended plan of reorganization, as modified).

314. Email from Rebecca Lightsey, Executive Director of Texas Appleseed Project, to Heather Way, Director, Community Development Clinic, University of Texas School of Law (Feb. 18, 2010).

315. *Texas v. Chapa*, No. 93-11258 (Travis Co. Tex. Dist. Ct. 1999).

316. *See In re Starr County Colonia Assistance Corp., Inc.*, No. 99-13090-FM (Bankr. W.D. Tex. Nov. 22, 1999) (order confirming debtors' amended plan of reorganization, as modified); Temporary Receiver's Rep. and Proposal for Conversion of Contract for Deed and Application for Interim Partial Payment of Expenses of Admin. of Receivership Est. at 3-4, *Texas v. Chapa*, No. 93-11258 (Travis Co. Tex. Dist. Ct. Jan. 27, 1999).

developers' land in the colonias and other related assets were placed under the control of a receiver.³¹⁷

The receiver then transferred all of its assets and liabilities into a non-profit corporation. The corporation was created specifically to serve as a receptacle for the various properties and liabilities with the intent of having the nonprofit corporation declare bankruptcy in order to resolve the numerous and conflicting claims against the properties and to clear title.³¹⁸

Through the bankruptcy court and its broad equitable powers, the parties were then able to remedy many of the title defects in the properties that were now held by the bankrupt nonprofit corporation. The court was able to approve the subdivision and partition of lots in the unplatted subdivisions, wipe out many of the liens, and oversee the issuance of new deeds to correct defective legal descriptions. When a homebuyer had been sold the same lot as another homebuyer, a substitute lot was allocated to the homebuyer through an arbitration process. New deeds without warranty were issued for lots where the developer had failed to transfer the deed. Buyers who had been sold an illegally-sized lot also had the opportunity to trade the lot for a legally subdivided lot.³¹⁹ Property disputes were handled through binding arbitration. In advance of the reorganization plan, the nonprofit obtained an agreement from the local taxing entities that they would each release their tax liens and, in exchange, any land remaining unclaimed at the end of the title clearing process would be transferred to the taxing entities.

A separate, pre-existing nonprofit—Communities Resource Group (CRG)—received a Ford Foundation grant to assist with the title clearing work, with the expectation of receiving partial reimbursement out of the title clearing transactions.³²⁰ CRG conducted a series of mass real estate closings along with numerous individual closings to transfer legal title to the homeowners with a deed recorded in the county records. Texas Rural Legal Aid (TRLA) represented the colonia families through the bankruptcy, and pro bono attorneys assisted with the clearing of title. In the end, 1,500 buyers were assisted with the title clearing efforts.

The use of bankruptcy could potentially be replicated in others areas of the country where there is concentrated informal ownership with clouded title issues and a concentrated set of real estate investors who still hold legal title to the properties. A state government or other party must have legal grounds

317. *In re Starr County Colonia Assistance Corp., Inc.*, No. 99-13090-FM (Bankr. W.D. Tex. Nov. 22, 1999) (order confirming debtors' amended plan of reorganization, as modified).

318. *See generally* Giusti et al., *supra* note 66, at 44 (summarizing the state's lawsuit in Starr County and land titling reforms arising out of the lawsuit).

319. *In re Starr County Colonia Assistance Corp., Inc.*, No. 99-13090-FM (Bankr. W.D. Tex. Nov. 22, 1999) (order confirming debtors' amended plan of reorganization, as modified).

320. *Id.*

upon which to challenge an investor's actions and be able to use a lawsuit as leverage to transfer the property and other related assets and liabilities into a separate entity that could then declare bankruptcy, thereby triggering the equitable powers of the bankruptcy court to clear title.

5. More Aggressive Policing of Abusive Practices

A final key approach to the problems generated by the informal market is for state attorneys general, state agencies and lawmakers, and local officials to engage in more aggressive policing of abusive practices by sellers in the informal market. Even the most expansive protections for buyers are futile unless the protections are enforced. Informal transactions are largely under the radar screen of government officials, and, thus, abuses occur frequently without fear of prosecution. State and local governments need to allocate more resources to protect low-income homebuyers who fall prey to unscrupulous sellers in the informal market.

C. *Second and Successive Generation Reforms*

As discussed earlier in this Article, many low-income homeowners own their homes as tenants in common via the laws of intestacy—they have inherited an interest in their home after a parent, grandparent, or other relative died without a will and now share ownership with other heirs.³²¹ For these second and successive generation owners, this form of co-ownership can trigger many problems, which increase with the passage of time as the number of heirs increases and their interests diverge.

The challenges of developing reforms to address the issues raised by tenancy-in-common ownership lie with the informal nature of this type of ownership and the fact that there are multiple and oftentimes competing interests at stake. Developing solutions to the problems created by tenancy-in-common ownership is difficult without a clearer understanding of the different interests and issues. Issues to consider include:

- Do policymakers prioritize the interests of the homeowner-occupants, or weigh these interests equally with those of the other heirs who are not living on the property?
- How should policies respond to a situation where a low-income homeowner wants to stay in his home, but the other heirs want to be bought out of their interests?
- When and how should the law take into account interests such as promoting the upkeep of homes, preserving familial and cultural ties to

321. *See supra* notes 209–23 and accompanying text.

the homestead, ensuring the alienability of property, and economic efficiency?

- When should policymakers enact laws that promote and support co-ownership over consolidated fee-simple ownership?

When deciding how to weigh different interests, case-specific facts that may need to be considered include:

- The length of time that an owner-occupant has lived in the home;
- How long a property's ownership has been fractionated;
- The number and size of the fractionated interests;
- Whether an heir has made any contribution to the maintenance and upkeep of the land or has any personal ties to the property; and
- Whether an heir is unknown or cannot be located.

The legal scholarship on the issues created by tenancy-in-common ownership has focused predominantly on heirs' property ownership by African-Americans in the rural southeastern United States.³²² This scholarship has identified the important cultural significance of real property ownership for generations of African-American families and the rapid decline of African-American land ownership in the southeastern United States, in part through partition.³²³ Much of this heirs' property was originally acquired by African-American families in the late 1800s through the early 1900s and continues to serve as a focal point for family reunions and gatherings.³²⁴ As a result, most of the recommended reforms to tenancy-in-common ownership have been in the context of preserving African-American rural land ownership and facilitation of common ownership.

In contrast, there has been very little analysis of the prevalence and issues created by tenancy-in-common ownership amongst low-income homeowners

322. See, e.g., Mitchell, *From Reconstruction to Deconstruction*, *supra* note 5, at 508; Mitchell, *Destabilizing the Normalization*, *supra* note 5, at 563; Rivers, *supra* note 219, at 148; Faith Rivers, *Inequity in Equity: The Tragedy of Tenancy in Common for Heirs' Property Owners Facing Partition in Equity*, 17 TEMP. POL. & CIV. RTS. L. REV. 1 (2007); Graber, *supra* note 219, at 277; Phyllis Craig-Taylor, *Through a Colored Looking Glass: A View of Judicial Partition, Family Land Loss, and Rule Setting*, 78 WASH. U. L.Q. 737, 751 (2000).

323. See Mitchell, *From Reconstruction to Deconstruction*, *supra* note 5, at 535 (discussing the link between land ownership, democratic participation, and building community for African-Americans); Rivers, *supra* note 219, at 154. The full extent to which African American rural land loss has been caused specifically by tenancy in common ownership versus other factors has not been extensively examined on an empirical basis. See Mitchell, *Destabilizing the Normalization*, *supra* note 5, at 559–60.

324. See Mitchell, *From Reconstruction to Deconstruction*, *supra* note 5, at 525–26 (discussing African-American land acquisition in South between the issuance of the Emancipation Proclamation and 1910).

in other settings, such as urban and semi-urban communities or areas with smaller non-agricultural homesteads. Few legal reforms have been offered to assist these low-income homeowners with the transfer of clear title to their heirs and with alleviating the negative impacts of tenancy-in-common ownership.

The law needs to better protect the interests of low-income persons who become homeowners through inheritance, by providing these homeowners with more secure and alienable title to their homes. In doing so, states should consider prioritizing the interests of homeowner-occupants over the interests of other co-tenant interests when the occupant has been the sole party to exercise the responsibilities that come with homeownership, such as paying property taxes and property upkeep. For homeowner-occupants, the home is the place where they live on a day-to-day basis and may have been the only place they have called home for their entire lives.

The status quo of proliferating tenancy-in-common ownership from generation to generation is by and large unpalatable. Broad-scale legal reforms and new policy initiatives are needed in the following areas: (1) facilitating the transfer of title to heirs and alleviating the further proliferation of tenancy-in-common ownership; (2) consolidating ownership where appropriate; (3) protecting occupants and heirs from partition sales by outside interests; (4) assisting tenant-in-common owners with managing the responsibilities of joint ownership; (5) assisting homeowners with estate planning; (6) reforming government housing assistance programs to create more flexible underwriting requirements concerning title; and (7) extending legal assistance and related resources to co-tenant homeowners.

1. Facilitate Transfer of Title to Heirs

The formal transfer of marketable title upon the death of a homeowner is largely dependent on a homeowner having obtained a will and then, upon the homeowner's death, the heirs having access to the resources and information they need to successfully administer the estate through the probate courts and document the transfer of title in the real property records. There are numerous reasons why many low-income homeowners operate outside this formal system and end up failing to transfer marketable title to their heirs, including legal barriers, lack of information, and lack of resources. This section focuses on the legal and related reforms that could better facilitate the transfer of marketable title to successive generations after a homeowner dies. By better facilitating the transfer of marketable and consolidated title upfront, soon after a homeowner has died, many of the problems created by having multiple generations of informal title transfers could be avoided.

a. Conduct State Legal Audits

One of the easiest things that can be done at the state level to help remedy the title barriers that people face when inheriting property is to conduct a legal audit of the state's title transfer system. How accessible is this system to low-income homeowners? Is there a way to better streamline certain procedures? Is there a way to create more standardized legal forms? Is there a way to increase access to legal resources where needed?

During the Hurricane Katrina recovery efforts, Louisiana attorneys working to clear title for homeowners to receive federal housing assistance uncovered extensive title problems throughout low-income communities.³²⁵ At the request of lawyers working on these problems, the Louisiana legislature created a joint committee of the Louisiana House and Senate to review existing laws and identify reforms that would increase access to marketable title.³²⁶ The committee has been a collaborative effort with a wide range of stakeholders, including the state bar association, the land title association, the bankers association, the mortgage lenders association, and legal services organizations.³²⁷

b. Reform Intestacy and Testamentary Laws

Potential areas for states to target when looking at reforming intestacy and testamentary laws that would better facilitate the transfer of formal title to heirs include:³²⁸

- Facilitating small estate administration. When a homeowner dies and the only significant asset in the estate is a home of moderate value or less, states should allow for the heirs to bypass the formal administration of the estate through a probate court and provide for a more streamlined procedure.³²⁹ States should also periodically reevaluate the dollar cap set on the value of estates eligible for small estate administrations, or index the cap to inflation, to ensure that

325. Meyer, *supra* note 9, at 330.

326. S. CON. RES. 2, 2008 LEG., 1ST EXTRAORDINARY SESS. (La. 2008).

327. Some of the promising reforms that have been identified in Louisiana include: (1) allowing for affidavits of heirship in lieu of formal judicial proceedings to establish heirship and merchantable title under certain circumstances; and (2) eliminating a document transfer tax for intra-family transfers. Meyer, *supra* note 9, at 330.

328. Several of the reforms listed here are based on proposals that have been under consideration in Louisiana as part of efforts in that state, via a legislative-appointed committee, to better facilitate the formal transfer of title to inherited real property.

329. *See, e.g.*, S. 184, 2009 Reg. Sess. (La. 2009) (bill proposes an increase in the cap for a small estate administration from \$50,000 to \$75,000 and creates a two-year statute of limitations for heirs to object to the affidavit filed pursuant to the statutory procedures).

lower-income heirs can still benefit from this alternative procedure over time.

- Allowing for affidavits of heirship. States should allow an heir to file an affidavit of heirship in the local property records to establish proof of the ownership interests in a home. While the affidavit would not sever the interests unnamed in the affidavit, the affidavit should at least serve as prima facie evidence of the facts contained in the affidavit. The unnamed heirs' burden of proof would increase after the allotted time has passed if the heirs have failed to record a document contesting the facts in the affidavit.³³⁰ To increase this reform's effectiveness, states should provide strict penalties for fraudulent affidavits.³³¹
- Allowing for the oral transfer of property in exchange for the provision of valuable services when there is clear and convincing evidence of the oral promise and performance of the services. Under traditional laws governing wills and estates, oral promises governing the transfer of title upon an owner's death are invalid. In reality, however, families may agree orally that a child can inherit the property in exchange for agreeing to take care of a sick or frail parent or taking responsibility to maintain the homestead. States should consider modifying laws to recognize and enforce these oral agreements.
- Requiring compulsory administration of estates within two years of a homeowner's death. Compulsory administration would be effective only if state and local governments created streamlined administration procedures, provided information to all heirs about the procedures and requirements, and provided resources to heirs in navigating the procedures.

330. In Texas, an affidavit of heirship is considered prima facie evidence of the facts contained therein after it has been on file for at least five years. TEX. PROB. CODE ANN. § 52(c) (Vernon 2009). Even though an affidavit of heirship does not involve a probate court procedure, many Texas title companies will accept an affidavit of heirship as proof of title, especially when there are long-standing gaps in the title to the property. Legal Hotline for Older Texans, Texas Legal Services Center, How to Select the Appropriate Probate Procedure (2005), <http://www.tlsc.org/lhot%20pubs/How%20to%20Select%20the%20Appropriate%20Probate%20Procedure.pdf>.

331. States could further this reform by requiring title companies—when the companies are considering whether to issue a title insurance policy—to accept the affidavit of heirship as proof of title after it has been on file for a requisite number of years. Alternatively, states could provide for a special title insurance pool to cover any increased risk created as a result of covering these heirs' properties.

c. Reform Property Recordkeeping Systems

Local property record systems should be integrated with birth and death records, marriage records, tax records, divorce records, and other records that affect property interests. By better integrating records, local governments could more easily track when a homeowner has died and the estate has not been administrated. Local governments could send automatic notifications to the address of a deceased homeowner and known heirs, including information about requirements concerning administration of estates, the process for administration, and information about resources for assistance. Local governments could also include information about the probate process in the annual property tax notices for homes where the last homeowner of record has died. When a property owner dies and no deeds or probate documents are filed in the real property records after four years or so, the government could presume that the household needs some type of assistance in formalizing the transfer of title and then institute more proactive steps to facilitate the transfer.

2. Facilitate Consolidation of Ownership

A common problem with fractionated heirship ownership is the proliferation of absentee owners who have a legal interest in the property but maintain no contact and undertake no responsibilities towards the property. Homeowner-occupants who wish to acquire these absentee interests and consolidate ownership to their homes face enormous barriers. While the government has interests in promoting consolidation of title for these homeowners, the government also needs to be sensitive to special cultural and historical interests in preserving common ownership on specific tracts.³³²

The following five potential policy changes would facilitate the consolidation of ownership interests in the homeowner-occupant, but also seek to preserve common ownership where appropriate:

a. Reform Statutes of Limitations

One approach to facilitate the consolidation of ownership interests in the homeowner-occupant is to reform a state's statute of limitations and quiet title laws, by creating a special "long-term co-tenant-in-possession action." The general rule for applying the statute of limitations in an adverse possession claim, with the exception of a limited number of states, is that a co-tenant cannot adversely possess property through the "constructive ouster" of other co-tenants. Mere possession and maintenance of the property is insufficient to

332. See HELLER, *supra* note 221, at 124 (discussing some of the issues, along with economic losses, that can arise out of forced consolidation for black landowners including the loss of family cohesion, generations of stewardship to the land, and community connections).

run the statute of limitations and thus effectively terminate the other co-tenants' interests in the property.³³³

Through reforming adverse possession and quiet title laws, a state could allow a long-time co-tenant to bring a quiet title action against absentee co-tenants and receive fee simple title when: (1) the co-tenant has been in possession for at least 20 years, and the absentee co-tenant has not shared in possession; (2) the co-tenant has been solely responsible during that time period for paying taxes and other upkeep of the property; and (3) the absentee co-tenants have made no claims against the property. Absentee co-tenants who wish to protect their interests during the 20-year period could do so through filing notice in the real property records or by making contributions towards the taxes and upkeep of the property. The statute could also include a provision allowing for the tacking of interests, by which the home-occupant could count his parents' or other predecessors' interests towards the 20-year period, although the tacking would not count against heirs who inherited from the same predecessor.³³⁴

The idea behind allowing for the constructive ouster of co-tenants is that with ownership comes a minimum level of responsibility, and when an heir has had only minimal contact with the property and has exerted no responsibilities regarding the property, the long-time homeowner-occupant's interests and the state's interests in consolidating title should trump the absent property owners' interests. North Carolina, New York, Tennessee, and Mississippi are states in which the courts or legislatures have adopted a similar approach by affirming the right of a co-tenant to obtain fee simple title through the sole and exclusive possession of property or through additional actions such as paying taxes and making property improvements.³³⁵

333. 3 AM. JUR. 2D *Adverse Possession* § 204 (2002).

334. Graber, *supra* note 219, at 282.

335. See, e.g., *Collier v. Welker*, 199 S.E.2d 691, 694-95 (N.C. Ct. App. 1973) (affirming right of tenant-in-common to claim constructive ouster when the tenant-in-common had been in sole and undisturbed possession and use of the land for 20 years, and when the other co-tenants had made no demand for rents, profits, or possession); *Carr v. Miss.*, 258 So.2d 17, 21-22 (Miss. 1971) (where one co-tenant purported to sell the entire fee simple and the purchaser built a dwelling, executed a mineral lease, sold timber, and paid taxes, the court found an ouster against the other co-tenants); *Bayless v. Alexander*, 245 So.2d 17, 21-22 (Miss. 1971) (co-tenant's widow constructively ousted other co-tenants where the widow had excluded other co-tenants for more than 10 years, paid all the necessary expenses associated with the land, and received all the benefits, without accounting to anyone); *Myers v. Bartholomew*, 697 N.E.2d 160, 161 (N.Y. 1998) (interpreting New York's adverse possession law to require a co-tenant to have at least 20 years of exclusive possession of the premises before adversely possessing interests held by tenants-in-common); *Morgan v. Dillard*, 456 S.W.2d 359, 364 (Tenn. Ct. App. 1970) (allowing for title by prescription when co-tenant has had sole and exclusive possession of property for 20 or more years).

The expansion of adverse possession claims makes the most sense when there are many remote and small interests in the property. In order to reduce the ability of this action to be used to strip absentee heirs of any large economic interests in property or interests in large tracts of land with cultural significance, states adopting this approach should consider applying this action only to homesteads below a certain market value and barring its application to properties that meet certain standards of cultural significance. For example, homeowners could be barred from bringing this action for properties in new land preservation districts, which could be set up in areas where there is special interest in preserving common ownership.

b. Marketable Title Acts

A second and very similar approach is to extend state marketable title acts to protect a long-time occupant of a home who has inherited an interest in the home. Marketable title acts, which have been adopted in at least 18 states, are a close cousin of statutes of limitations. Marketable title acts have the goal of promoting the marketability and simplification of title transactions by extinguishing “stale” claims and eliminating the need for lengthy title searches.³³⁶ Under these acts, a person who has a chain of title going back to a title transfer conveyance recorded in the property records (called the “root” of title) for at least the minimum statutory period (20 to 50 years), holds marketable title free of all interests that arose before the “root” of title.³³⁷

Marketable title acts place the burden on parties asserting or preserving an interest in the property to record notice of their interests in the property records within the statutory time period. The acts extinguish all claims against a record title holder that are not recorded within the statutory time period, the policy rationale being that the minimal burden imposed on the other interest holders to re-record their interest is outweighed by the public good of creating more secure and marketable land transactions. While marketable title acts are similar to statutes of limitation, they are more reliable because the time periods are not tolled due to legal disability.³³⁸

Through reforms to marketable title acts, states could extend the protections in the acts to homeowners in possession of the premises who have inherited a tenant-in-common interest. Such reforms could allow for the statutory period to be triggered not only by the recording of a co-tenant’s interests in the property records but, alternatively, through the co-tenant’s payment of taxes on the property for a minimum statutory period, to the extent the tax records are publicly accessible. The burden would then shift to

336. 14 POWELL, *supra* note 19, § 82.04(1)(c); 11 THOMPSON ON REAL PROPERTY § 92.06 (David A. Thomas ed., 2002).

337. 14 POWELL, *supra* note 19, § 82.04(3); 11 THOMPSON, *supra* note 336, § 92.06.

338. 11 THOMPSON, *supra* note 336, § 92.06; 14 POWELL, *supra* note 19, § 82.04(1)(b).

absentee heirs either to preserve their interests in the property by filing notice in the property records or paying part of the taxes. If the absentee co-tenants failed to preserve their interests within the statutory period, the act would assume they have abandoned their interest and would extinguish their interests. Similar to the adverse possession reforms, this approach would put a minimal burden on the absentee heirs to assert some level of interest in the property.³³⁹ Limits on this expanded marketable title right could be applied for areas where there is cultural significance in preserving common ownership, similar to the limits discussed above for adverse possession.

c. Forced Sale Actions

A third policy approach to consolidating title in the homeowner-occupant is through a forced sale action. Texas has taken this approach.³⁴⁰ Similar to adverse possession and quiet title reforms, a forced sale action gives the long-time homeowner-occupant a tool by which to consolidate interests in the home.

Under the Texas statute, if a person has inherited an interest in a home, the person (the “petitioner”) can bring a forced sale action against an absentee heir if the petitioner has paid the absentee heir’s interests for at least three out of the last five years, and the absentee heir has failed to respond to the petitioner’s written demand for reimbursement. If the absentee heir’s location is unknown, the demand can be made via publication once a week for four weeks. After the action is brought, the court can then order a sale of the absentee heir’s interests to the petitioner. The petitioner is responsible for paying the absentee heir for his or her interest in the property minus the absentee heir’s share of taxes that the petitioner has paid on the property.³⁴¹

Forced sale actions have had limited success in Texas as a means to allow the homeowner-occupant to consolidate interests. In order to successfully bring a forced sale action, the homeowner-occupant has to have the means to hire an attorney, as well as pay for court costs and all of the known and unknown heirs’ interests in the property minus their share of taxes paid by the occupant. To successfully utilize such actions, low-income homeowners will generally need access to government or other forms of financial assistance.

d. Tax Foreclosure and Nuisance Abatement Actions

The failure of the co-tenants to pay property taxes and maintain the property will likely lead eventually to tax liens on the property and uninhabitable living conditions, and could potentially lead to code enforcement liens and nuisance abatement actions. Through a nuisance abatement action,

339. For a similar proposal, see John C. Payne, *The Alabama Law Institute’s Land Title Acts Project: Part I*, 24 ALA. L. REV. 175, 184–86 (1971).

340. TEX. PROP. CODE ANN. §§ 29.001 *et seq.* (Vernon 2009).

341. *Id.* §§ 29.001–29.004.

courts in many states have the ability to appoint a receiver to step into the shoes of the owner and remediate the dangerous living conditions on the property.³⁴² In some states, these powers may be very broad and, at the end of the receivership action, the court can order the sale of the property if the owner does not reimburse the receiver for the receiver's expenses.³⁴³

For homeowner-occupants facing property tax liens and dangerous living conditions, tax foreclosure and nuisance abatement laws could be creatively modified to assist the homeowner with staying in the home, improving the housing conditions, and with consolidating the title through the creation of fee simple ownership. As a first step, states should make sure that both tax foreclosure and nuisance abatement statutes empower courts with the ability to create fee simple ownership and to clear clouds on the title. As a second step, states could create a special bypass mechanism that would allow a government land bank, a nonprofit organization, or other entity to have the right to acquire title to the property and then facilitate the transfer of a deed to the property back to the homeowner-occupant.³⁴⁴ To be successful, funding would be needed to cover the costs of bringing the court actions, the cost of any property rehabilitation, and other associated costs.

342. For a summary of key provisions in state receivership statutes, see MALLACH, *supra* note 275, at 50–59.

343. In Texas, for example, a new receivership law allows for the court to order the sale of a property in receivership, to issue fee simple title to the purchaser, and to wipe out liens that cannot be paid out of the sales proceeds. S. 1449, 81st Reg. Sess. (Tex. 2009) (codified at TEX. LOCAL GOV'T CODE ANN. § 214.003(b) (Vernon 2009)). A separate Texas statute gives courts additional broad powers to address issues facing nuisance properties. TEX. CIV. PRAC. & REM. CODE ANN. §§ 64.001–66.108 (Vernon 2009). Two jurisdictions where receivership actions are used successfully in tackling problems of abandoned property with clouded title issues are Ohio and Baltimore, both of which also allow for a court-ordered sale of the property. OHIO REV. CODE ANN. § 3767.41 (West 2009); BALTIMORE, MD., INT'L. BLDG. CODE §§ 121 *et seq.* (2009). For a thorough discussion of the Baltimore receivership law, see James J. Kelly, Jr., *Refreshing the Heart of the City: Vacant Building Receivership as a Tool for Neighborhood Revitalization and Community Empowerment*, 13 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 210 (2004). For a more general discussion on receivership and a state-by-state survey of receivership laws, see MALLACH, *supra* note 275.

344. For example, if the local and state government liens and receivership costs exceed the value of the property, the property could be struck off without a sale or sold at a reduced price to a land bank and then deeded over to the occupant of the home. *See, e.g.*, TEX. LOCAL GOV'T CODE ANN. § 379E.008 (Vernon 2009) (authorizing tax foreclosed properties to be sold directly to a land bank when the appraised value of the property is exceeded by the court costs and government liens on the property). Alternatively, if there is still economic value in the property after taking into consideration the government liens and court costs, a land bank or nonprofit organization could have a right of first refusal to purchase the property at a tax foreclosure sale and then deed the property to the occupant of the home, if the right level of financial assistance is provided to support the purchase.

e. Government Assistance

More government assistance is needed to assist low-income homeowners with consolidating their ownership by buying out the other co-tenants' interests. U.S. Department of Agriculture (USDA) and U.S. Department of Housing and Urban Development (HUD) grant programs should be modified to provide funding to give low-income heirship property owners the means to purchase the absentee owners' interests and consolidate title to their home.

3. Reform Partition Laws

As discussed above, traditional partition laws place homeowners at risk of losing their homes through partition actions brought by other co-tenants.³⁴⁵ The law allows for any heir to force a partition of the property, regardless of whether the heir has made any contributions or has any personal connections to the property.³⁴⁶ At the same time, partition actions may provide the homeowner with the only legal means to consolidate title to the home, especially when there are heirs who cannot be located or identified.

States can secure stronger protections for the homeowner living in the home and facing a hostile partition action by giving the homeowner an option or right of first refusal to purchase the property at the price offered by the petitioning co-tenant, along with the right to pay the purchase price over a period of time.³⁴⁷ States should also consider legislative reforms extending equitable powers to judges in partition actions and the flexibility to devise alternative remedies that would provide the homeowners living on the premises with an opportunity to stay in their homes.³⁴⁸

Other potential reforms to partition statutes that would better protect the interests of the homeowner living on the premises include:

- For partition actions brought by an absentee co-tenant, the court should require a minimum purchase price in the event of a partition by sale and put in place mechanisms to ensure that the property is being sold for maximum value.³⁴⁹

345. See *supra* text accompanying notes 234–43.

346. A.B.A., USING LIMITED LIABILITY COMPANIES, *supra* note 213, at 3.

347. States that have adopted some version of a right of first refusal option include South Carolina, Georgia, and Louisiana. S.C. CODE ANN. § 15-61-25 (2007) (providing non-petitioning co-tenant with right of first refusal to buy petitioner's interest); GA. CODE ANN. §§ 44-6-166.1(c)–(d) (2009) (non-petitioning co-tenants provided with right to buy out their pro rata share of the petitioner's interest); LA. REV. STAT. ANN. § 9:1113 (2007) (non-petitioning co-tenant permitted to buyout their pro rata share of a petitioner who holds less than a 15% interest in the property). For a complete list of partition sale statutes, see Pollock, *supra* note 245.

348. Meyer, *supra* note 9, at 330.

349. Several states, including Illinois, Indiana, Kansas, and Ohio, require that court-ordered partition property be sold for a minimum sales price although not necessarily for the full-

- Require an absentee co-tenant bringing a partition action to pay for the attorney's fees and court costs instead of allowing for the attorney's fees to be paid from the proceeds of the partition sale in contested actions.³⁵⁰
- Increase the notice requirements to homeowners when a partition action is brought by absentee co-tenants to give the homeowners more time to attempt to obtain funding to buy out the petitioners' interests or to purchase the property through a right of first refusal.
- Create a waiting period for "strangers to title," which requires an outsider acquiring an interest in the property to wait a certain amount of time before bringing a partition action, which serves as a disincentive to speculators looking to make a quick buck by forcing the sale of co-tenancy property.³⁵¹
- Allow the homeowner's contributions to the property, such as the payment of taxes and improvements to the property, to be taken into account in calculating the purchase price at the partition sale.

Some reforms may be on their way. The American Bar Association's Property Preservation Task Force has been working on issues created by tenancy-in-common ownership and partition actions.³⁵² The task force brought these issues to the attention of the National Council of Commissioners on Uniform State Laws (NCCUSL),³⁵³ which is now in the drafting stages of a uniform partition act.³⁵⁴

4. Facilitate Collective Management of the Property

When consolidation of title is inappropriate or too difficult to achieve, heirs need more tools to collectively manage the property with their other co-

appraised value. Memorandum from Thomas W. Mitchell, Associate Professor of Law, University of Wisconsin Law School, to the Drafting Committee on Uniform Tenancy in Common Partition Act (Nov. 6, 2007), *available at* http://www.law.upenn.edu/bll/archives/ulc/utcpa/2007nov6_issuesmemo.htm (laying out issues for the drafting committee to consider in drafting a uniform tenancy in common partition act and surveying the partition laws in the states and several other countries).

350. For a list of state statutes that disallow the payment of attorney's fees from the proceeds of a partition sale in contested actions, see *id.*

351. Arkansas has a three-year waiting period. See ARK. CODE. ANN. § 18-60-404 (2009). See also Memorandum from Thomas W. Mitchell, *supra* note 349.

352. See, e.g., A.B.A. PROP. PRESERVATION TASK FORCE, REP. OF THE PROP. PRESERVATION TASK FORCE (2006), *available at* <http://www.abanet.org/dch/committee.cfm?com=RP018700>.

353. Letter from David J. Dietrich to Shannon Skinner, National Conference of Commissioners on Uniform State Laws (Jun. 16, 2005) (on file with author). See Persky, *supra* note 224, at 48–49 (discussing the efforts to create a uniform partition law).

354. For an overview of issues being considered, see Memorandum from Thomas W. Mitchell, *supra* note 349.

tenants. At a minimum, co-tenants would ideally have a tenancy-in-common agreement, in which the owners set forth in writing an agreement about how the property is to be managed.³⁵⁵ The agreement should include provisions that:

- Assign responsibility of the owners to contribute to property management costs.
- Govern the sale of an owner's interest, including a right of first refusal and a discounted sales price that takes into account the nature of the fractionated interest.
- Decide how decisions are made (e.g., unanimous consent, super-majority, majority).
- Govern what happens when a family member dies or divorces.³⁵⁶

Other effective approaches include incorporating the broader use of limited liability companies (LLCs) and land trusts into the ownership and management of heirship property, especially for larger tracts of land. With an LLC, the heirs would no longer own a direct interest in the property, but instead would own an interest in the LLC.³⁵⁷

Creating a separate ownership entity such as an LLC can offer significant protections for co-owners.³⁵⁸ First, an LLC protects the owners (called "members") from partition actions.³⁵⁹ Second, an LLC can streamline governance decisions.³⁶⁰ Thus, when a loan is needed for improvements to the property, an LLC can allow for a simple majority vote of the members or approval by a set of managers, instead of having to get consent of every single owner.³⁶¹ Third, an LLC can segregate economic interests from governance interests and protect what happens to the property upon the death, bankruptcy, or divorce of a member.³⁶² For example, the LLC governance documents or default rules could provide that, when a co-owner dies, his economic interest in the LLC passes to his heirs, but his governance rights (i.e., the ability to vote

355. Careful consideration must be given to ensure that the co-tenancy relationship is not considered to be a partnership by default under IRS rules. *See* IRS REV. PROC. 2002-22.

356. The Property Preservation Task Force, a project of the American Bar Association's Real Property, Trust and Estate Law Section has developed a model tenancy in common agreement, which is available on the task force's website, at <http://www.abanet.org/dch/committee.cfm?com=RP018700> (last visited Jan. 28, 2009).

357. *See generally* Mitchell, *From Reconstruction to Deconstruction*, *supra* note 5, at 568-72.

358. The exact nature of the benefits of creating an LLC to own heirship property will depend on state law. The following discussion on the benefits draws from an examination by Thomas Mitchell, which is based on Delaware law. *Id.* at 568.

359. *Id.* at 569.

360. *Id.* at 570.

361. *Id.*

362. *Id.* at 569-70.

on decisions concerning the management of the property) do not pass to his heirs.

A land trust provides similar protections for tenant-in-common owners.³⁶³ By putting real property into a land trust, the owners give title to a trustee, who holds the title to the real estate for the beneficiaries of the trust and is governed by a trust agreement.³⁶⁴ The owners become beneficiaries, who have the power to direct the trustee to deal with the management of the property, but ultimately hold all management powers for the property.³⁶⁵ The owners are protected from a forced partition of the land because the beneficiaries' interests in a land trust are personal property.³⁶⁶ Other benefits include protections from judgments against the beneficiaries.³⁶⁷

On the downside, a primary obstacle to creating an LLC or land trust is obtaining the consent of all the owners. One single holdout can refuse to enter into a common management agreement and thus dramatically limit the utility of the agreement as a tool to manage the co-ownership interests. In the case where there are heirs who cannot be located, LLCs and land trusts are especially limited in their effectiveness.

The transaction costs in creating and managing an LLC or land trust also serve as an impediment, especially for lower-income heirs. Forming an entity typically requires a lawyer to be involved to handle the formation and draw up the governance documents or enough sophistication on part of the owners to be able to draw up the legal documents on their own. There are also transaction costs in the on-going management of the entity.³⁶⁸ Nevertheless, in instances where owners are able to obtain agreement from the heirs and obtain assistance with the formation and management of a separate entity, an LLC or land trust can be an effective tool to facilitate common ownership.

To address the hold-out issues in putting property into a separate entity such as an LLC or land trust, states could consider allowing a majority of owners to convert ownership into an LLC, or allow courts to order a

363. A well-drafted beneficiary agreement for the land trust is important to facilitate agreement concerning the maintenance and management of the property. For a sample beneficiary agreement to be used in a land trust to preserve common ownership of heirs' property in Florida, see Wilhelmina F. Kightlinger, *Uses of Land Trusts in Preserving Tenancy in Common Property*, app. E at 41–44 (Apr. 2005), <http://meetings.abanet.org/webupload/commupload/RP294000/relatedresources/landtrustpaper.pdf>.

364. Julius Zschau, *Use of Land Trusts in Preserving Tenancy in Common Property*, *THE PRACTICAL REAL ESTATE LAWYER* 53, 53–54 (Jan. 2007).

365. *Id.* at 54.

366. *Id.* at 53–54.

367. *Id.* at 54.

368. See Anthony Mancuso, *NOLO'S QUICK LLC: ALL YOU NEED TO KNOW ABOUT LIMITED LIABILITY COMPANIES* 37–38 (5th ed. 2009) (noting that California, Delaware, Illinois, Massachusetts, New Hampshire, Pennsylvania, and Wyoming charge anywhere from \$100 and \$500 in recurring annual fees).

conversion of tenancy-in-common ownership into one of these alternative structures when appropriate.³⁶⁹ States should also review the statutory default rules concerning the management and maintenance of property through these existing entity structures to ensure they address any special issues pertaining to heirship property. Alternatively, states could consider adopting special default rules or authorize the creation of a new subset of family limited liability companies or family land trusts to manage the heirship property.

Other potential reforms to facilitate collective management of heirship property include:

- Changing the default rules for tenancy-in-common owners to allow a majority or supermajority of interests to make binding decisions concerning the management and maintenance of the property, along with extending a fiduciary duty to the co-tenants to protect the interests of the minority interest holders. This change would better align the rules governing heirship property with other forms of joint ownership such as LLCs and corporations. Special provisions would need to be enacted to protect the interests of the homeowner living on the property.
- Allowing a court, upon petition of a co-owner, to determine the use and management of the property, in the event of disagreement amongst the co-owners. Especially in the event of natural disasters, the court should have the authority to give co-owners living on the property the ability to receive government assistance to rebuild or rehabilitate the property.

5. Assist Homeowners with Estate Planning

One of the key contributors to tenancy-in-common ownership is the fact that so many low-income adults do not utilize estate planning techniques that would allow them to better plan for the transfer and management of their property upon their death. One of the best ways for a homeowner to circumvent the problems created by tenancy-in-common ownership is through well-crafted estate plans such as wills. Yet, half of lower-income, older adults do not have wills.³⁷⁰

Affordable housing developers and government funders should consider requiring a will as a condition of a home closing and rolling the cost of the will into the closing costs. The federal government should also consider allocating

369. Mitchell, *From Reconstruction to Deconstruction*, *supra* note 5, at 568 (proposing allowing a majority or super majority of co-tenant interests to convert the ownership into an LLC).

370. Only half of American adults 50 and older with annual incomes of less than \$15,000 have a will. AARP RESEARCH GROUP, WHERE THERE IS A WILL ... LEGAL DOCUMENTS AMONG THE 50+ POPULATION: FINDINGS FROM AN AARP SURVEY 2 (2000), <http://assets.aarp.org/rgcenter/econ/will.pdf>.

funding for the cost of wills as part of all home sales utilizing HOME or Community Development Block Grant (CDBG) funding.³⁷¹

In light of the importance of wills and estate planning, further study is also needed to determine the different reasons why some homeowners do not obtain wills.³⁷² Are there cultural barriers to obtaining a will? Income barriers? With this information, governmental entities and other interested parties could craft more effective outreach strategies and policy approaches to increase the incidence of wills among low-income homeowners.

6. Reform Government Housing Programs to Create More Flexible Title Requirements

State and federal housing assistance programs, especially those targeting victims of natural disasters, should not unduly penalize homeowners for holding clouded title. In Texas, after state policies and underwriting criteria resulted in several years of delays or denials of federal disaster housing assistance to low-income families with title issues, the state housing agency adopted new and more lenient rules regarding proof of title.³⁷³ Under these rules, the applicant for disaster housing assistance no longer has to show formal proof of title, but can instead show alternative forms of proof such as being listed as the owner on the tax rolls and a record of paying property taxes.³⁷⁴ The rules further address issues that arise when there are co-owners who cannot be located—applicants would otherwise often be barred from assistance under this common scenario.³⁷⁵ An applicant can now provide an affidavit stating that the co-tenants could not be located after a reasonable

371. See U.S. Department of Housing and Urban Development – HOME Investment Partnerships Program, <http://www.hud.gov/offices/cpd/affordablehousing/programs/home/> (last visited Oct. 5, 2009) (“HOME provides formula grants to States and localities that communities use—often in partnership with local nonprofit groups—to fund a wide range of activities that build, buy, and/or rehabilitate affordable housing for rent or homeownership or provide direct rental assistance to low-income people.”); U.S. Department of Housing and Urban Development – Community Development Block Grant Programs, <http://www.hud.gov/offices/cpd/communitydevelopment/programs/> (last visited Oct. 5, 2009) (“The CDBG program works to ensure decent affordable housing” and “to provide services to the most vulnerable in our communities.”).

372. See Mitchell, *Destabilizing the Normalization*, *supra* note 5, at 581 & n.94 (discussing how the root causes of low will-making rates among low-income African-Americans are unknown, and that it is unknown how the rates of will-making by low-income African-American landowners compare with similarly situated white landowners).

373. The Texas Department of Housing and Community Affairs Board approved a policy allowing for alternative documentation of an ownership interest at its April 23, 2009 meeting. See TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS, BOARD MEETING AGENDA 4d (2009), <http://www.tdhca.state.tx.us/pdf/agendas/090423-book-090416.pdf>.

374. *Id.*

375. *Id.*

effort.³⁷⁶ A new Texas statute requiring similar flexible criteria for proof of title was enacted in 2009.³⁷⁷

7. Extend Legal Assistance

One of the biggest barriers that low-income homeowners face in securing the title to their homes is lack of access to lawyers. Potential ways to provide more legal resources to homeowners include creating new law school clinical programs, developing pro bono projects within the private bar, and providing more state and federal funding for nonprofit legal assistance programs. Across the southeastern United States, partnerships have already been created among local bars, legal aid groups, and nonprofit organizations to deliver assistance to heirs' property owners.³⁷⁸ Through these collaborative projects, lawyers can prepare educational materials, conduct community clinics, and provide one-on-one assistance to homeowners in one or more of the following areas:³⁷⁹

376. *Id.*

377. TEX. GOV'T CODE ANN. § 2306.188 (Vernon 2009).

378. The Heirs Property Retention Coalition is a collaborative organization of nonprofits, academics, and practitioners that is working to serve the needs of minority landowners in the Southeast. Heir's Property Retention Coalition, <http://www.southerncoalition.org/hprc/> (last visited Oct. 3, 2009). The coalition is developing a resource center to help heirs manage co-ownership and develop a plan for their property, and is linking families with resources to help them develop or preserve the asset, depending on their wishes. *Id.* Legal initiatives in Louisiana include a collaboration of Louisiana Appleseed, the New Orleans Legal Assistance Corporation, Loyola Law School and other local lawyers and organizations, which are engaged in heirs' property issues and other title clearing work to help low-income families impacted by the hurricane secure title to their homes. In Georgia, the nonprofit organization Georgia Appleseed has launched an Heirs Property Project, and is partnering with the NAACP, DLA Piper, the University of Georgia, and others to produce educational materials and deliver information on heirs' property to impacted families. *See* Georgia Appleseed – Heir Property Project, <http://www.gaappleseed.org/heir/> (last visited Oct. 3, 2009).

In Mississippi, the law firm of DLA Piper, the Mississippi Center for Justice, the Lawyers Committee for Civil Rights, local groups, and others have been partnering to hold community legal clinics and assist families with clearing title to qualify for hurricane assistance. Personal telephone conversation with Jeremy Adam Kruger, Associate, DLA Piper (Dec. 4, 2008). Other groups involved in land titling issues for low-income homeowners include the Southern Coalition for Social Justice in North Carolina, the Land Loss Prevention Project in North Carolina, legal aid programs across the south, the Coastal Community Foundation of South Carolina, the Alabama Appleseed Center for Law and Justice, and others. In Texas, the state bar, through the Texas Young Lawyers Association (TYLA), has partnered with local nonprofits and Texas RioGrande Legal Aid to deliver land titling assistance in colonias, although these efforts have been focused primarily on land title problems arising from installment contracts and not heirship issues. *See TYLA Tackles Land Title Project in Colonias*, 64 TEX. B.J. 346 (2001) (discussing the title clearing work of volunteers with TYLA).

379. David Tipson with the Lawyers Committee for Civil Rights shared part of this process as part of the work of a collaborative project in Mississippi and North Carolina to assist low-income

- Educate homeowners about title and wills. Lawyers can prepare community outreach materials and conduct educational workshops about what happens to homeowners' title when they die, the importance of estate planning, and how to manage co-tenancy ownership.
- Assist with estate planning. As discussed above,³⁸⁰ a major cause of heirs' property is lack of estate planning. Lawyers can set up wills and estate planning clinics and provide free or reduced-cost assistance to homeowners in developing an estate plan such as a will to make sure the owner's wishes about the transfer of title are honored upon the owner's death. Lawyers can also assist low-income heirs with the administration of an estate upon the owner's death.
- Clarify and clear up ownership interests. Lawyers can assist families with determining the chain of title and clarifying the current ownership interests by determining the identity of the current interest holders, conducting title and genealogy research, and tracking down heirs and government records. Lawyers can also assist families in trying to remove clouds on title and clear up ownership interests by filing probate actions, negotiating with lienholders, filing affidavits of heirship, bringing quiet title actions, and other measures.³⁸¹
- Consolidate title. Lawyers can assist families with drafting legal documents to acquire the interests of other co-tenants via purchase or gift, bringing partition actions where appropriate, and accessing other state legal remedies to consolidate title, such as adverse possession or forced sale actions.
- Facilitate collective ownership. Lawyers can assist families with drafting tenancy-in-common agreements, forming LLCs and land trusts, and providing mediation services where needed to help families work through disagreements concerning how to handle heirship property. Families also need assistance in developing long-term management plans for properties. Lawyers can further assist families with accessing resources, including government grants, to carry out the management plan and maintain the property.

VI. CONCLUSION

In policy discussions on how to improve homeownership opportunities in the United States, the informal paths to ownership are overlooked. Yet, these

landowners who own heirship property. Personal telephone conversation with David Tipson, Counsel, Lawyers Committee for Civil Rights (Nov. 21, 2008).

380. See discussion *supra* Part V.C.5.

381. Clearing title can be a challenging and time consuming area of legal assistance.

informal paths to homeownership are widespread and generate multiple problems for low-income homeowners. Potentially millions of low-income families acquire their homes through informal means such as inheriting their homes as tenants in common or buying their homes via installment contracts, lease-to-own agreements, and seller-financed transactions. In contrast to homeowners acquiring homes in the formal market, these informal owners are at a much higher risk of holding inferior and insecure title to their homes—if they hold the title at all.

The country's legal system contributes to pervasive disparities between formal and informal homeowners. Multiple laws and systems exist that result in secure and alienable title for families who can create an estate plan, probate a will, and access a bank mortgage. These protections, however, are unavailable to many low-income families who buy or inherit their homes informally. Moreover, because of limited third party oversight and little government policing, unscrupulous sellers and real estate investors are able to easily evade what limited protections exist.

Similar to the 1800s when the country made dramatic changes to laws to accommodate the vast number of claims by squatters in the West, the United States needs an overhaul today of its property laws and legal structures to accommodate the interests of the vast number of low-income homeowners with insecure and unclear title to their homes. Policies must begin to look more closely at the character of ownership and form of title that many lower-income families hold to their homes in the United States. The country needs new policies to increase the property rights available to informal homeowners, legal education to help these homeowners understand their property rights, and legal resources and government oversight to help these homeowners enforce their property rights.

Providing low-income families with clear title to their homes will by no means address all of the needs and challenges facing low-income homeowners in accessing safe, decent housing opportunities.³⁸² Clear title is a critical building block, however, which then lays the ground work for addressing these other critical needs.³⁸³ Low-income families share in the American aspiration of homeownership. Policymakers must ensure that all families, regardless of income, have the opportunity to obtain secure title to their homes.

382. See Giusti et al., *supra* note 66, at 52.

383. See *id.*