

## Episode 24: Thomas W. Mitchell | Transcription

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ANNE PRICE: Hi. Welcome to Hidden Truths, the podcast that examines the root causes of economic and racial inequality. I'm Anne Price, President of the Insight Center, and for this episode, we'll be talking about how struggling families can hold on and build wealth through land ownership.

To control land is to have power, and owning land can help people build and pass on wealth to future generations. Tenancy in common ownership represents the most widespread form of common ownership of real property in the United States, but it's also very unstable. There's thousands of tenancy in common property owners across the country, many of them are poor but are of all races, who have lost their commonly owned property due to court order-forced partition.

So it kind of works like this. When a landowner dies without a will, the heirs, usually a spouse and children, inherit the estate. They own the land in common with no one person owning a specific part of it. If more family members die without wills, things can get very complicated within a couple of generations with a number of relatives owning the land in common. Anyone can buy an interest in one of these family estates -- it just takes one single heir willing to sell -- and anyone who owns a share, no matter how small, can go to a judge and request that the entire property be sold at auction.

Some land traders seek out such estates and buy these small shares with the intention of forcing auctions. And rarely do these families have enough money to compete, even when the bid is below market value. So this can happen to anyone who owns land in common. And some say that because some communities are particularly vulnerable that they are more likely to see their land stripped away.

To dig into this issue further on how to protect land and build wealth, I'm very pleased to welcome Professor Thomas W. Mitchell. He is a professor of law and codirector of the Program in Real Estate and Community Development Law at Texas A&M University School of Law. He is a groundbreaking legal scholar and teacher who has worked for more than 20 years to help some of our most economically fragile communities secure strong property rights. Thomas, thanks so much for joining me on the podcast today.

THOMAS MITCHELL: My pleasure, Anne.

ANNE PRICE: I just mentioned the importance of wills, and I'll say as a student who went to a historically black college, there was this real emphasis in teaching us to go to our families and have these very challenging conversations about having a will. We were 19 or 20 years old at the time, and I just remember, you know, why are we having this conversation? Why are you teaching us to actually have this conversation with our family members? So can you

tell us a bit more about the relationship of wills to land loss, and give us a sense of what this has really meant particularly in black communities and particularly in the South?

THOMAS MITCHELL: Right. Sure. So I think in terms of, first of all, we have movements to help different communities acquire assets in the first instance, including real property. You know, whether we're talking about land in rural areas or single-family homes in urban sectors and suburban sectors and in rural communities. But then in terms of intergenerational wealth building, wills and estate planning more generally are incredibly helpful in terms of having people in family structure, how they want to pass on assets from one generation to the other.

There are implications in terms of what I think of as the quality of ownership as one has these intergenerational transfers. And a key part of that quality is, how secure is that property ownership for those who end up acquiring assets from ancestors?

And estate planning and will-making with that advanced planning could make those transfers at a much higher quality, could help secure and stabilize ownership, and it, just in terms of effective planning, it could help deal with certain family dynamics that you can anticipate beforehand, and then structure kind of legal arrangements that would give those who acquire that land through acquiring it from an ancestor, give them a much better chance of maintaining that asset and building upon that asset so that we can have not just one generation of a family maybe kind of break out of kind of low income or impoverished backgrounds, but we could then have these families over a much longer time horizon build wealth, be able to participate in a much more effective way in our society in any number of ways.

ANNE PRICE: Thank you for that. Why is it that there are such low numbers of folks with wills? What's kind of getting in the way of why we've seen so much land loss and particularly in some communities?

THOMAS MITCHELL: Sure. So as we'll kind of get into, that the tenancy in common form of ownership, which you referred to, which when people talk about heirs' property, heirs' property is just a subset of tenancy in common ownership. It's the form of ownership that the law will give you if you do not have a will or have an estate plan that makes some other arrangement in terms of an ownership structure, legal ownership structure. And so it's the default ownership structure. It's also well-known among lawyers and business professionals as representing the most unstable form of common ownership of real property, right?

So if you don't make a will and if you don't have some other type of estate plan, and you own real property, like I said, whether it's land in a rural area or a single-family home, and you have heirs, they're going to then be saddled with this incredibly insecure form of

ownership, a form of ownership that nobody who did any advanced planning would ever choose. It'd be maybe the last option.

So then let's kind of go to root, right? So you referred to there's low levels of estate planning. So let me just kind of, you know, zero the waterfront. So generally speaking, there's been, you know, several studies -- they tend to be regional studies -- that have tried to quantify the rate of will-making in this country, right? So the biggest difference -- the studies are, come to a slightly different result, so it shows that -- these variety of studies -- at the low end, it shows that maybe 40% of Americans make wills; at the high end, maybe 60% make wills. I'm looking at a most recent study done by three economists, and in their study, it showed that 57% of Americans make a will.

But when you start unpacking it, you find out that there's incredible racial disparities in will-making and estate planning. And so one of the findings in this study, even for somebody like me who's worked on this for more than 20 years, really just jumped out. And it showed that, in addition to the overall rate, they looked at their rates by different racial or ethnic groups; and then they also corrected for the level of education within different groups, right? So at the low end, people who had no high school degree, and at the high end, people who had a college degree or a college degree and a graduate and professional degree.

So what that study showed was that, among white Americans, it turns out that 57% of white Americans that do not have a high school degree have a will. But that's the lowest rate of will-making among white Americans.

Among African-Americans, the highest rate of will-making is, not surprisingly, among African-Americans who have a college or college and graduate or professional degree -- but that's not surprising. That's in every racial or ethnic group, with more education, the will-making rate goes up.

But here's the statistic that just jumped out at me. So among African-Americans with the highest level of education in this country, it turns out that just 32% of those African-Americans have a will, right? So 57% of white Americans without a high school degree have a will, and only 32% of African-Americans with a college or something more.

And I think -- you asked the question, "Well, what's the root to this?" Right? So the first thing I'll say is -- you know, part of an academic who tries to make sure that there's actually good evidence for whatever proposition you say -- what I will say is that overall, this area, in terms of these racial disparities in will-making, estate plans have been undertheorized and there's been insufficient numbers of studies, okay? So let me just kind of say that.

But there's been, I think, three theories about why you have the African-American communities so -- the level of will-making has been so low. And I think the -- you know, so one is some people think that this is just an artifact of West African kind of estate planning or succession practices, although I've seen some other literature that calls that into question and points out that, among the different kinds of ethnic groups or tribes where

the slaves were drawn from, they actually had very different kind of estate planning or succession practices.

Others indicate that African-Americans have become cynical about the legal system given how they've been taken advantage of repeatedly. But I've seen studies where the will-making rate during the heart of Jim Crow among African-Americans was actually higher than it is today which you'd think that in the height of Jim Crow, people would be particularly cynical about the legal system.

And then the third one I've heard that, you know, wasn't in -- not in the study but it kind of rings, something about it rings true to me, was that when African-Americans at the end of the Civil War, or after the Emancipation Proclamation, first could actually become landowners, there were hardly any African-American attorneys in this country, and certainly if you look at African-American attorneys in rural areas. But for the most part, white attorneys in Southern rural counties did not want to represent African-Americans. It was kind of bad for the business. And I think that that history of a lack of access to justice, a lack of access, a very practical way, to legal services.

Over time I think not having a will or an estate plan became normal within many families, and so I do think that it's almost like we had that original sin in the late 1800s of being denied the opportunity to retain or hire a lawyer. We've now seen that cascaded across many generations. So, you know, once again, Anne, like I said, I do hope others do more in-depth studies to really get to that issue, but that, you know, those are some of the explanations.

ANNE PRICE: Thank you for that, and it's just another area that has been under-studied and is so important for us to understand the trajectory of intergenerational wealth transfers. I want to really get into how you came to work on the Uniform Partition of Heirs' Property Act, UHPA. Because it does represent the most significant reform to partition law in this country in this modern time.

You were the person charged with drafting this act, promulgated by the National Conference of Commissioners on Uniform State Laws. And I will say as a person who's worked on race and wealth for about a decade, this probably has been the most significant advancement of addressing inequality and addressing wealth-stripping that we've really seen. So how did you come to lead this effort? Tell us a little bit about that.

THOMAS MITCHELL: Yeah. So I think for me, it kind of started with how I became a law professor in the first instance. So I knew that coming out of undergrad, coming out of law school -- and I went to Howard University School of Law -- I really wanted to have a career where I'd work on social justice and that my work would have an impact. And I had practiced in a large law firm in Washington, DC, and I found out about a master's program

at the University of Wisconsin where you could spend two years doing research on a legal issue of your choosing.

And so I applied for that and spent a lot of time thinking about, what did I actually -- what actually interested me, and what animated me? And I decided not to limit it to anything I'd studied in college or studied in law school or I'd practiced when I was a practicing attorney, but you know, I did spend a week just kind of trying to get inside myself, think about, well, you know, if I really think about it, what couple issues really do I, has been a through-line in my life, whether or not I've followed up with any formal studying?

It was essentially two things I kind of came to. One was I grew up, I was born and raised in San Francisco and born in 1965 and 1970 was the highwater mark for African-Americans in San Francisco. It was 13-1/2, 14%. I think as many people know, San Francisco has had the greatest loss of an African-American population of any city in the United States.

There's currently a movie out right now called *The Last Black Man in San Francisco*. And I, you know, during parts of my childhood, I very much witnessed the reduction in the African-American population in San Francisco and had long talks with people like my dad about what were the dynamics driving that. So there was just a general sense of loss that I had in the African-American community as I saw all kinds of businesses and residents having to pack up and move out of the city.

I think the second theme that I was curious about is my -- I hadn't really had much touch with my extended family for some family complicated family dynamics, but in college I did go to the funeral of my grandfather in Newark, New Jersey, who I'd never met in my life. And then in that setting, I ended up stumbling across a bunch of family albums that showed the family's roots in Southwest Georgia. And so I had this kind of overpowering desire to learn more about the Southern African-American groups in my family.

And somehow I was thinking about, how can I combine this notion of gentrification and loss that I saw firsthand growing up in San Francisco with this desire to learn more about my African-American family's history in the South? And you know, I read up a bunch of articles and, you know, newspaper accounts, and then I kind of stumbled upon this issue of these partition sales that were forcing the sales of privately-owned properties that had been acquired from the time of the Emancipation Proclamation going forward.

It was a history I knew nothing about. It was counterintuitive when I actually read these articles about these partition actions, because we were not in law school taught that, anything about these partition actions, right, it was just portrayed as this incredibly dry, boring, you know, neutral area of law. So I think that that kind of got me started. And when I was at the University of Wisconsin, I had opportunities by working with others, including people at a center that was very important in terms of dealing with land issues called the Land Tenure Center.

I ended up getting many opportunities to travel to the South and meet firsthand a number of African-American families who really told me in excruciating detail how the law of partition actually worked on the ground as opposed to how it was framed in our property law textbooks in law school. So I think that's what kind of got me started down this path.

You know, then of course, my pursuit of research and, you know, came out with an article in 2001 that, you know, I guess is still considered the seminal article on the topic. But I also had, going back to that I wanted to have an impact, is I didn't just want to be a professor who wrote articles for an academic audience, like, you know, I always had this touchstone of like I wanted to have an impact in, you know, in a concrete, tangible way.

So I began working actually with that Land Tenure Center and we basically identified several rural, poor communities throughout the US where the issue was their lack of access to legal services was undermining their ability to maintain land or property that they had acquired. And I ended up building up a whole national network of law students who would spend their summers, all across the country, including many places in the South, working on behalf of various communities or public interest, legal organizations, legal aid organizations, on that issue of providing legal services to property owners so that they could maintain ownership of their property.

So I, you know, by the time there was an opportunity opened up to potentially have this Uniform Partition Act, part of the reason I was selected was that not only was my scholarship considered the primary or the seminal scholarship in the area, but that I also had this whole network of various organizations that had been in the trenches and working for decades on this issue. And so I think that the combined thing with my scholarship and my, kind of my network of these organizations kind of made me uniquely qualified to service the principal drafter for the Uniform Act.

ANNE PRICE: Wow. Thank you for that trajectory. Tell us a little bit about what you've seen over the years in terms of this act being passed from state to state. What do you see as some of your biggest wins and how you've overcome some struggles in some states?

THOMAS MITCHELL: Sure. So I think our biggest win was just getting this on the radar screen of the American Bar Association, which formed a task force back in 2001 or 2002 called the Property Preservation Task Force, and it was that task force that I ended up serving on that. But we advocated to -- you mentioned the organization the National Conference of Commissioners on Uniform State Laws. [Inaudible] rebranded themselves because they think that that's a mouthful, and they're right. But they've branded themselves now as the Uniform Law Commission. And so, you know, we sent later a proposal, asking them to establish their drafting committee.

Now, when we did that, it was considered an extreme reach, and now, you know, the Uniform Law Commission's 127 years. They've drafted 450 of these uniform acts. They're most known for drafting the Uniform Commercial Code, the UCC, which they did with one of their organizations. But there was little evidence that they had really done anything in their entire history to really take on an issue of social justice, let alone racial justice. You know, and those of us who were on the task force felt obligated to develop a proposal,

submit it, you know, but internally, we thought we had at best maybe a 10% chance given the history of the Uniform Law Commission not taking on these types of issues.

So I think, just when I found out back in 2007 that, of all the proposals that they had been submitted that year, and usually they get a lot, that ours was one of the four or five they selected. I, you know, that has then led to so many other things, right? So I, you know, so I think that was one, right? But second, because it was a uniform act that would actually kind of explicitly deal with social and racial justice, there were kind of minimal expectations of the success the Uniform Partition Act would experience. And just some context on that: in their 127 years, the Uniform Law Commission has promulgated 38 uniform real property acts; and the median number of states that have enacted into law any of their real property acts is one.

So it's been an area overall that they've had very little success. And then you layer on top of that that ours is not just a uniform real property act, but it is one that's addressing social justice and racial. And I think there was kind of a skepticism. There was kind of a [inaudible] that no state legislature would seriously take this up because the people it impacted, you know, African-Americans primarily, others, were folks who had little wealth, little social capital and little political capital. So that was what we were starting with.

Like the baseline was the assumption that ours would be just another uniform real property act that would sail and probably have zero enactments. So breaking through and just getting even our first state, which was Nevada -- now, I don't think Nevada's where the heart of the problem is, but that actually, by breaking through and saying, "No, you know, we actually had one state that passed it," that was helpful. I wouldn't think that the success we've had in the Southern states has, even for somebody like me who I think, and I see myself as kind of a person who's trying to keep the flame of hope alive that there could actually be reform, the fact that we've had five Southern states enact it has even surprised me, right?

And then when I looked -- you know, so those five Southern states are Alabama, Arkansas, Georgia, South Carolina and Texas. For me, I'd say that South Carolina is one of the states that really stands out, and it stands out because, after the Emancipation Proclamation, there were a number of African-Americans in South Carolina who actually acquired land. Even when the federal government reneged on its promise -- it's said, popularly is known as the 40-acre and a mule promise -- there were certain African-Americans in South Carolina who basically took the position that "We are not giving this land back, and if you want it, come take it, and we are armed." And the federal government actually acquiesced to a certain subset of those African-Americans who had acquired land.

So South Carolina was the state that had the greatest number of African-American landowners. It's also the state that has had the greatest amount of land loss in the African-American community. And so I think that, you know, when we were working to get the Uniform Partition Act in South Carolina, you know, many people just, given South Carolina's history, thought, "Okay, you know, there's absolutely no way at the end of the

day South Carolina's going to enact this into law." And we had, you know, we had some hurdles along the way.

I'm not going to give, you know, the full play-by-play, but let me just tell you what happened at the end. At the end, we ended up getting it passed in the South Carolina House. I think this was like in 2015. And we were able to bank that win for the next year, and so we were off to the South Carolina Senate. And everything seemed to be going well, until that I remember I got a call in mid-March that said all of a sudden that there was a problem, that two right-wing senators, one more than the other, were expressing real reservations about the act.

And then they asked me to draft a memo that would be circulated to all of the members of the South Carolina Senate's Judiciary Committee. And I focused on those issues that had been identified to me by two of those senators. It seemed that it convinced one of them that the act was worth supporting. But the other was, you know, hell-bent on killing our act. That other senator, who's no longer in the South Carolina legislature, was a guy named, or is a guy named Paul Thurmond, and his dad just happens to be a guy named Strom Thurmond. So you know, now I feel like I'm battling the ghost of Strom Thurmond in South Carolina.

And what happened at the very end was, given, you know, Paul Thurmond's commitment to kill our act, the South Carolina senators who had sponsored the act at the very last minute changed the name of the act. So in every other state, it's called the Uniform Partition of Heirs' Property Act. In South Carolina, it's called the Clementa C. Pinkney Uniform Partition of Heirs' Property Act. So who's Clementa Pinkney? Clementa Pinkney was the state senator and the pastor of Mother Emmanuel church in Charleston, and he was one of the nine people who was murdered by Dylan Roof, a white supremacist. In his prime -- you know, tragically, of course.

In his prime in South Carolina legislature, Clementa Pinkney was well-known to be the biggest advocate of property law reform to benefit heirs' property owners. So in renaming it in his honor, which is still the only act of the South Carolina legislature that has ever been named in his honor, any state senators who were on the fence about whether or not to support it or not or were considering the arguments that Paul Thurmond was making, I mean, the reality is none of them wanted to be on record as opposing the only act named in the honor of Clementa Pinkney. And at the end of the day, the only state senator who opposed it was Paul Thurmond.

You know, so not only, you know, did we, you know dot that -- you know, I don't want say that in light of what happened at the church. Not only did we prevail in that encounter, but the fact that is the only bill named in his honor really put South Carolina in a special spot in terms of our act. But then it, you know, afterwards, I think partially because it was named in his honor, then-Governor Nikki Haley invited three of us to her office for a ceremonial signing of the act so, and then made it quite clear this was an act that was very important to her and that it would, in her words, "help thousands and thousands of heirs' property owners throughout the State of South Carolina." So for South Carolina, it does have that

particular sense of historical importance and importance for those other reasons that I mentioned.

We've had a recent success that I think is also kind of extraordinary. So last Friday, the New York legislature just passed the Uniform Partition of Heirs' Property Act, and what's important -- not only is New York obviously an important state, but it came about because an investigative reporter with one of the major television stations in New York stumbled upon this phenomenon wherein gentrifying neighborhoods throughout every borough in New York, real estate investors, had been buying out one family member and then basically threatening a partition action if the other family members will not sell them their interest, right?

So some of them, they've then actually followed through and filed the partition action; in others, the families felt helpless once they found out what the background partition law was, and then they did sell out. And unfortunately, many of them didn't fully understand or appreciate the fair market value of their properties, and most of them ended up selling out for a price that was well below the market value of their properties. So I think what the New York, by broadcasting this -- and the reporter just did an outstanding job -- it highlighted that this is not just a rural phenomenon.

Obviously if this is happening in a place like New York City, you know, it's both a rural and urban phenomenon. And it's more a phenomenon that impacts low- to moderate-income property owners who typically don't have an estate plan, who are what we call land-rich but cash-poor. So I think that just in highlighting that, it's actually going to help us as we go forward in additional states in terms of framing this, if your particular, you know, state senator or representative happens to be in an urban area, there's a reason that you should be supporting this act as well.

So there's, you know, I could kind of go on and tell you this, almost every state I feel particularly attached to. I do think that those two states have, you know, real significance. And South Carolina really provided the opening to make our bill viable in Texas, because when I initially met with some of the legislators in Texas, they were very skeptical. I mean, they were very committed to these types of issues, but they're like, "There's just no way." And then I said, "I hear you," right? "I get why you think there's no way. Let me tell you about South Carolina that just enacted it, you know, two years ago," and you know, literally their jaws like dropped, and they just could not believe that we got it through South Carolina, and in an overwhelming way.

And that, for this other state senator in Texas went from being very skeptical to, the next day, he was the sponsor of the act, and it ended up sailing through. You know, in Texas, it was unanimous, in the Texas House of Representatives and in the Texas Senate. But South Carolina played a key role in that.

ANNE PRICE: Thank you for that and really understanding that, when folks thinks that progress can't be made in certain places, that it certainly can.

I want to tell our listeners that we have a number of great resources to get into this issue even further, and I just want to kind of close with giving us a sense of how people actually get involved in this effort throughout this, across the country. What can they do?

THOMAS MITCHELL: So one thing I appreciate when you indicate that people across the country -- so one other point I do want to make is that we've now, with the New York enactment, once we get the governor to sign that, within a month, we'll have 14 states that have enacted the UHPA into law, as well as the United States Virgin Islands, which enacted it into law last December. It has been enacted into law in every geographical region in this country, from Hawaii to the Midwest, Illinois, Iowa, Missouri, the South, Connecticut, New York.

So this is an issue that disproportionately impacts African-Americans, but not exclusively. So there are now opportunities, now that the issue has been kind of highlighted as, you know, impacting many of these communities, both rural and urban. So I'd say that if folks want to get involved, first of all, you can contact me, and I'd be happy to work with you.

And let me just tell you about some of the other people I work with. So it's kind of a small group of us who kind of consult every year about opportunities in different states. So the other person is, he's the chief counsel at the Uniform Law Commission, so if you Google "Uniform Law Commission," his name is Benjamin Orzeske, and he's always involved in this process.

And then there was a, just an incredible coalition that was formed when we began advocating for the act, or actually when we were drafting the act. So it's called the Heirs' Property Retention Coalition: HPRC. And the coordinator for that is somebody named John Pollock. So the Heirs' Property Retention Coalition has a website with John Pollock's contact information. So I think that, you know, contacting John or Ben or me or all of us would be a good kind of starting spot.

The other thing is, so right now, I'm very actively working with stakeholders in a variety of different states now for the 2020 legislative session, and one of the best models I've actually seen is in Virginia. And what's good about what's happening in Virginia now is there is a coalition that has come together, they are very diverse; so there's folks from something called Black Family Land Trust. But then the key organization in Virginia that represents land trusts, or these are not community lands; these are land trusts that tried to steward, typically rural land. They're involved. There are some folks who are interested in historic preservation. They're involved. And so it's just a very diverse group of stakeholders that are working hand in hand.

They each have their own contacts in the legislature, they're having monthly meetings, and I think for the act to prevail, that's kind of the best model. When we end up advocating for the act, you know, I always, when I testify in different legislatures, you know, I always make the point: this is an act that impacts, as I indicated, low- to moderate-income people, folks

with low rates of estate planning, but that it impacts, you know, African-Americans, white Americans, Latinos, Native Americans, really to try to make the act as universal as possible.

And in particular states, what has really helped as we've framed it is to frame it as an issue that strengthens private property rights and that protects family real estate wealth. So there's a whole, you know, discussion that we have about, how are we going to frame it, you know, even though it has impacted disproportionately, I think, African-Americans? So anyway, I think that, you know, those are, in terms of particular contacts.

And the last thing, as I think I shared with you, is the link -- so the Uniform Law Commission has a link or a page for the Uniform Partition of Heirs' Property Act, so if anybody who's interested in getting involved, they should go to that page. On that page, there's a link that says Documents, and that has -- if you click onto that, there's something called the legislative toolkit. It has all kinds of helpful information, very good, crisp summaries of the act, and then things like why your state should adopt it. So that's always a great resource to go, in a very kind of quick and dirty way of kind of then getting up to speed on the act, where it's been enacted, what is kind of our talking points. I would very much encourage people to go and check out that link.

ANNE PRICE: Thank you for that depth of resources to get engaged in this work. And thank you for tuning in to this episode of Hidden Truths, the podcast of the Insight Center for Community Economic Development. You can learn more about Thomas's work at Texas A&M University School of Law by visiting [www.law.tamu.edu](http://www.law.tamu.edu), and for more information about the Insight Center, visit [insightcced.org](http://insightcced.org). Thank you.

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