

## NEITHER MAGIC BULLET NOR LOST CAUSE: LAND TITLING AND THE WEALTH OF NATIONS

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*This Article offers a critique of land titling movements that advocate the uniform formalization of property rights. Formalizing property rights is a popular idea in academic circles. This Article seeks to determine whether such widespread praise is justified based on an analysis of the available empirical literature on the subject. It argues that instead of property rights formalization being a panacea for alleviating poverty in the developing world, rights formalization is but one part of a more holistic process of legal reform that is required before economic development might be catalyzed and property rights defined in culturally relative terms. Not only does this research provide new insights from development economics and the rule of law in an attempt to find a scholarly consensus on the critical question of formalizing property rights, but it also engages first principles as emerging and developed markets wrestle with the lessons from the Great Recession. It makes an original contribution by applying new conceptual frameworks to the field including polycentric governance, as well as using case studies from Indonesia, South Africa, and the United States. Ultimately, this Article analyzes the “meta-question” of whether we should indeed place “law alongside economics as foundational for studying the wealth of nations.”<sup>1</sup>*

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<sup>1</sup> O. Lee Reed, *What Is “Property”?*, 41 AM. BUS. L.J. 459, 501 (2004).

## TABLE OF CONTENTS

INTRODUCTION .....	102
I. THE PROMISE OF PROPERTY RIGHTS FORMALIZATION .....	109
A. <i>The Central Role of Capital to the Formalization Thesis</i> .....	110
B. <i>Defining “Property” in the Context of Formalization</i> ....	112
C. <i>Raising Dead Capital: Why Formalized Property Rights are Part of the Answer</i> .....	114
II. DOES THE MYSTERY OF CAPITAL REMAIN A MYSTERY?	
CRITIQUES OF THE TITLING MOVEMENT.....	120
A. <i>Analyzing the Efficacy of Titling Efforts</i> .....	122
B. <i>Cultural Considerations in Land Titling Design</i> .....	125
C. <i>Formalizing the “People’s Law”</i> .....	132
D. <i>Empirical Support for the Four Links in the Formalization Chain</i> .....	139
1. <i>Indirect Benefits of Formalization: Trade</i> .....	142
2. <i>Indirect Benefits of Formalization: Entrepreneurship</i> .....	143
E. <i>Summary: Why Formalization is Not the Whole Answer</i> .....	144
III. CASE STUDIES IN LAND TITLING: UNITED STATES, INDONESIA, AND SOUTH AFRICA .....	145
A. <i>Property Rights in the American West and Developed World</i> .....	145
B. <i>Analyzing Reform Efforts in Indonesian Land Law</i> .....	148
C. <i>The South Africa Land Titling Experience</i> .....	160
IV. NEITHER MAGIC BULLET NOR LOST CAUSE: THE NEED FOR A DEEPER CONTEXTUAL UNDERSTANDING OF PROPERTY RIGHTS .....	162
CONCLUSION .....	168

## INTRODUCTION

On January 22, 2012, some two thousand Brazilian police raided an illegal settlement comprised of landless workers situated in the outskirts of São Paulo to restore the property to its private owners.<sup>2</sup> Sixteen people were arrested as they tried to defend their

<sup>2</sup> *Brazil Police Storm Landless Settlement Near Sao Paulo*, BBC NEWS (Jan. 22, 2012, 5:57 PM), <http://www.bbc.co.uk/news/world-latin-america-16675027>.

homes, and more than six thousand others were evicted following a legal dispute over their rights to the land that the workers “had developed into a settled neighbourhood” boasting shops and churches since 2002.<sup>3</sup> This episode in Brazil is being repeated around the world as urban populations explode.<sup>4</sup>

The year 2008 witnessed a milestone in the way people live: “for the first time in human history,” more people live in cities than in rural areas.<sup>5</sup> But this “triumph of the urban” is not without its costs.<sup>6</sup> Approximately nine hundred million people currently live in slums throughout the developing world, a figure that is expected to grow to more than 1.7 billion by 2030.<sup>7</sup> Life in these slums can be unbearable.<sup>8</sup> The Mathare slum in Nairobi, Kenya, for example, extends some seven miles and is home to more than five hundred thousand people, who are among the poorest people in sub-Saharan Africa.<sup>9</sup> But where many people see poverty without hope, others see a persistent drive to climb the economic ladder.<sup>10</sup>

Proponents often laud free trade, free markets, and international investment as the path to prosperity, but despite widespread adoption of these “staples of the Washington Consensus,” more than 1.2 billion people still live on less than \$1 per day.<sup>11</sup> Since World War II, developed nations have spent a

<sup>3</sup> *Id.*

<sup>4</sup> See, e.g., Mark R. Montgomery, *The Urban Transformation of the Developing World*, 319 *Sci.* 761, 761 (2008).

<sup>5</sup> *Id.*; United Nations Expert Group Meeting on Population Distribution, Urbanization, Internal Migration and Development, Jan. 21-23, 2008, iii, U.N. Doc. ESA/P/WP.206 (Mar. 2008), available at [https://www.un.org/esa/population/meetings/EGM\\_PopDist/EGM\\_PopDist\\_Report.pdf](https://www.un.org/esa/population/meetings/EGM_PopDist/EGM_PopDist_Report.pdf).

<sup>6</sup> Jim Hansen, *Living in an Urban Slum: The Places We Live*, KENYA IN 2011 (Apr. 30, 2011, 1:17 PM), <http://kenyain2011.blogspot.com/2011/04/living-in-urban-slum-places-we-live.html>.

<sup>7</sup> See U.N. HUMAN SETTLEMENTS PROGRAMME, *THE CHALLENGE OF SLUMS 12* (2003), available at <http://www.unhabitat.org/pmss/listItemDetails.aspx?publicationID=1156>.

<sup>8</sup> See KATHARINE BOO, *BEHIND THE BEAUTIFUL FOREVERS: LIFE, DEATH, AND HOPE IN A MUMBAI UNDERCITY 5-7* (2012) (describing life in a Mumbai slum).

<sup>9</sup> See Jim Hansen, *The Children of Mathare Slum*, KENYA IN 2011 (Apr. 30, 2011, 12:41 PM), <http://kenyain2011.blogspot.com/2011/04/children-of-mathare-slum.html>.

<sup>10</sup> See, e.g., HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 4* (2000).

<sup>11</sup> Robert J. Samuelson, *The Spirit of Capitalism*, *FOREIGN AFFAIRS* (Jan.

staggering amount on targeted foreign aid for poverty alleviation, such as for improving infrastructure and enhancing the prospect of long-term economic growth.<sup>12</sup> But macroeconomic evidence does not support the notion that this aid is catalyzing significant economic growth in many of the world's poorest places.<sup>13</sup> The search for alternatives beyond these orthodox remedies for relieving poverty has led some, such as Professor Mancur Olson, to conclude that it is not a lack of resources that is to blame for lagging development; rather, it is the weakness of institutions that are otherwise poised to take advantage of these resources.<sup>14</sup> In particular, Professor Olson singles out the need for multilevel institutions to impartially enforce contracts and secure property rights.<sup>15</sup> Other institutional economists, such as Hernando de Soto (who has done much to popularize the field), have built upon Professor Olson's work by arguing that the key to economic development is the growth of local capital markets built on robust, formalized property rights regimes.<sup>16</sup> Their central thesis is that

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2001) (reviewing HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2000)) (noting that “[f]rom 1987 to 1998, the share of sub-Saharan Africa’s population living on less than \$1 per day remained constant at approximately 46 percent”; Latin America and Caribbean poverty rates were maintained at roughly 16 percent; while South Asia’s poverty rates fell from 45 percent to 40 percent. One of the main success stories has been East Asia, where the average poverty rate has dropped from 27 percent to 15 percent. As a result of these failures, countries from Venezuela to Russia have become more skeptical about the benefits of classic free market economics); *see also Poverty Overview*, WORLD BANK, <http://www.worldbank.org/en/topic/poverty/overview> (last visited Feb. 18, 2014) (“[I]f the current rate of progress is to be maintained, some 1 billion people will still live in extreme poverty in 2015.”).

<sup>12</sup> See Channing Arndt, *Technical Cooperation*, in *FOREIGN AID AND DEVELOPMENT: LESSONS LEARNT AND DIRECTIONS FOR THE FUTURE* 154, 163 (Finn Tarp & Peter Hjertholm eds., 2000).

<sup>13</sup> See William Easterly, *Can Foreign Aid Buy Growth?*, 17 *J. ECON. PERSPECTIVES* 23, 40 (2003) (“The goal [of foreign aid] is simply to benefit some poor people some of the time.”).

<sup>14</sup> See Mancur Olson Jr., *Big Bills Left on the Sidewalk: Why Some Nations are Rich, and Others Poor*, 10 *J. ECON. PERSPECTIVES* 3, 7 (1996) (“[V]ariations in institutions and policies are surely the main determinants of international differences in per capita incomes.”).

<sup>15</sup> *Id.* at 6 (“The structure of incentives depends not only on what economic policies are chosen in each period, but also on the long run or institutional arrangements: on the legal systems that enforce contracts and property rights and on political structures, constitutional provisions, and the extent of special-interest lobbies and cartels.”).

<sup>16</sup> See generally DE SOTO, *supra* note 10. This Article uses the terms

formalized, state-sanctioned property rights generate capital and promote economic development, as seen in the relative success of developed legal systems that have formalized hitherto informal economies.<sup>17</sup> The argument, in simplistic terms, is that if it worked for the West, it will work for the rest.<sup>18</sup> This Article offers a critique of the hypothesis that formalized private property rights are uniformly a key determinant of the wealth of nations.

Formalizing property rights is a popular idea. Endorsements range widely. Former President Bill Clinton, for example, publicly declared that Hernando de Soto was “probably the world’s most important living economist” for his work on property rights formalization.<sup>19</sup> Even the World Bank has supported the formalization thesis, stating, “Land is a key asset for the rural and urban poor.”<sup>20</sup> But, to be successful, formalized property rights regimes must be culturally relative, recognizing the rich array of local traditions and legal systems replete around the world.

This fact may be illustrated by considering the experience of Native American communities.<sup>21</sup> The U.S. Congress began

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“formalization” and “land titling” interchangeably, as is customary in the literature. *See, e.g.,* Quy-Toan Do & Lakshmi Iyer, *Land Titling and Rural Transition in Vietnam*, 56 *ECON. DEV. & CULTURAL CHANGE* 531, 531 (2008).

<sup>17</sup> *See* Jim Thomas, Book Review, 34 *J. LATIN AM. STUDIES* 189, 189–91 (2002) (reviewing HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2000)).

<sup>18</sup> *See* Kevin E. Davis, *The Rules of Capitalism*, 22 *THIRD WORLD Q.* 675, 675–77 (2001) (reviewing HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2000) (noting that both de Soto’s books, *The Other Path* and *The Mystery of Capital*, outline the virtues of laws that facilitate asset transfers. Building off the traditional theories regarding the importance of property rights, de Soto argues that people who hold formally recognized rights are more accountable than those who do not, since they have a formal, vested stake that may be taken away in the event of a default); HERNANDO DE SOTO, *THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD* (1989) (arguing that the reason that informal economies existed was the large degree of bureaucracy in developing countries that forced small businesses to stay unregistered, and caused land to go untitled).

<sup>19</sup> *This Land Is Your Land*, *WORLD POL’Y INST.*, <http://www.worldpolicy.org/journal/summer2011/this-land-is-your-land> (last visited Feb. 18, 2014); John Gravois, *The De Soto Delusion*, *SLATE* (Jan. 29, 2005, 12:33 AM), [http://www.slate.com/articles/news\\_and\\_politics/hey\\_wait\\_a\\_minute/2005/01/the\\_de\\_soto\\_delusion.html](http://www.slate.com/articles/news_and_politics/hey_wait_a_minute/2005/01/the_de_soto_delusion.html).

<sup>20</sup> *Land Policies for Growth and Property Reduction*, *WORLD BANK POL’Y RES. REPORT* xvii (2008), available at <http://documents.worldbank.org/curated/en/2003/06/2457830/land-policies-growth-poverty-reduction> [hereinafter *WORLD BANK POLICY RESEARCH REPORT*].

<sup>21</sup> *See* Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and*

privatizing commonly held Native American land in 1887, a process known as “allotment” that would eventually cost Native Americans two-thirds of their property and devastate tribal communities.<sup>22</sup> According to Professor Kenneth Bobroff, “[a]llotment failed . . . because it attempted to impose private property on the indigenous peoples who had no conception of the private ownership of land.”<sup>23</sup> But contrary to the conventional wisdom of the time, Native Americans possessed a complex system of fluid tribal property rights systems prior to the Congressionally mandated, static system of allotments.<sup>24</sup> Thus, the disastrous consequences to the welfare of Native Americans was not caused by instituting a property rights system, but rather by imposing a rigid system that failed to account for traditional Native American property rights regimes that were based on cultural norms reflective of the common social good. Evidence from the Oregon Trail also exemplifies how culturally determined and deeply ingrained property rights can be to a community even absent a means to enforce them.<sup>25</sup> Despite life-threatening travails, emigrants respected a complex system of ownership on the trail from Ohio to California, sometimes under horrific conditions.<sup>26</sup>

The goal of this Article is to determine whether the widespread praise for property rights formalization is justified based on an analysis of the available literature on the subject.

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*the Myth of Common Ownership*, 54 VAND. L. REV. 1559, 1559–61, 1621 (2001).

<sup>22</sup> *Id.* at 1560–61. This Article uses terms like “Indian” and “Native American” interchangeably in reference to indigenous peoples of the Americas, as is consistent with the accounts of scholars and activists. *Id.* at 1560 n.2 (citing STEPHEN CORNELL, *THE RETURN OF THE NATIVE: AMERICAN INDIAN POLITICAL RESURGENCE* vi (1988)).

<sup>23</sup> *Id.* at 1561 (citing *Babbitt v. Youpee*, 519 U.S. 234, 238 (1997)).

<sup>24</sup> *Id.* at 1562–63. Subsequent to the enactment of the 1887 Dawes Act, though, an act of Congress was required to amend Native American property law. *See id.* at 1563 (citing General Allotment Act, ch. 119, 24 Stat. 388 (1887)).

<sup>25</sup> *See* John Phillip Reid, *Paying for the Elephant: Property Rights and Civil Order on the Overland Trail*, 41 HUNTINGTON LIBRARY Q. 37, 56–58 (1977); *see also* AMELIA CLEWLEY FORD, *COLONIAL PRECEDENTS OF OUR NATIONAL LAND SYSTEM* 432, 462 (1908) (noting that “squatting” was “one of the oldest traditions in the colonies” and detailing how widespread it was throughout colonial America through the nineteenth century, as well as illustrating why property rights laws in emerging nations must conform to local cultural traditions or risk obsolescence and why people living in poverty take what they need to survive in spite of formal property institutions).

<sup>26</sup> *See* Reid, *supra* note 25, at 58.

Particular attention is paid to the importance of considering the various derivations of property rights in culturally relative terms. In essence, the Article argues that, because of the difficulty of setting up adequate legal systems that are sensitive to cultural norms and the common good, land titling in the form of a single, externally-imposed and static system of private property rights should not be viewed as a one-size-fits-all solution to catalyzing capital and building wealth. That is not to say that formalizing private property rights is always a failing proposition—far from it. The incentives created by private property rights are, assuming perfect enforcement, critical to enticing individuals to maximize the benefit of their land without worrying about free riders.<sup>27</sup>

While many cultures practice some form of private property in the context of exclusive right to an object,<sup>28</sup> the difference lies in the fact that “private property” does not always mean exclusive private right to a set of tangible or intangible resources as it does in many Western systems.<sup>29</sup> But the boundaries for exclusive use must be set according to commonly accepted norms if they are to be self-sustaining and successful with minimal disruption to local communities with differing legal traditions. This emphasis on local governance to sustainably manage resources evokes Nobel Laureate Elinor Ostrom and her colleagues’ framework of polycentric governance, which in part has shown through numerous field studies that top-down planning by national officials is oftentimes unnecessary to build efficient regimes.<sup>30</sup> Rather, by recognizing and reinforcing local rules, if done correctly by incentivizing systems where “large, medium, and small governmental and nongovernmental enterprises engage in diverse cooperative as well as competitive relationships,” such a bottom-up approach can lower transaction costs, leaving people better off.<sup>31</sup> This framework will be applied to titling efforts, particularly

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<sup>27</sup> See Elinor Ostrom, *A General Framework for Analyzing Sustainability of Social-Ecological Systems*, 325 *SCI.* 419, 419 (2009).

<sup>28</sup> See HERITAGE FOUND., 2014 INDEX OF ECONOMIC FREEDOM: EXPLORE THE DATA, <http://www.heritage.org/index/explore> (last visited Apr. 18, 2014).

<sup>29</sup> See generally Elinor Ostrom & Charlotte Hess, *Private and Common Property Rights* (Ind. Univ. Workshop in Political Theory and Policy Analysis, Working Paper No. W07-25, 2007).

<sup>30</sup> See Elinor Ostrom, *Polycentric Systems as One Approach for Solving Collective-Action Problems 2* (Ind. Univ. Workshop in Political Theory and Policy Analysis, Working Paper No. 08-6, 2008).

<sup>31</sup> *Id.* at 3–4 (discussing the distinction between polycentric systems and a

in determining how titling can reinforce rather than replace organic regimes. There is also a cognitive component of the exclusive right to property to consider, insofar as a lack of understanding about how to behave in foreign private property systems can strain local communities.<sup>32</sup> Other literature has noted the need for titling programs to avoid the marginalization of women or the poor, but ignores larger questions of what form property rights should take.<sup>33</sup> This Article thus makes an original contribution by critiquing the formalization thesis and, for the first time that I could locate, applying principles of polycentric governance to argue for localized, culturally-relative titling efforts to help safeguard human rights and build the wealth of nations.<sup>34</sup>

The Article is structured as follows. Part I offers a general introduction to the land titling literature focusing on the work of leading institutional economists. Part II assesses the results of empirical studies measuring the efficacy of property rights formalization. Part III focuses on how lessons have been applied using examples from the United States, Indonesia, and South

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“monocentric hierarchy”) (citing Bruno S. Frey & Reiner Eichenberger, *FOCJ: Competitive Governments for Europe*, 16 INT’L REV. L. ECON. 315, 315 (1996)); see also Daniel H. Cole, *From Global to Polycentric Climate Governance*, 2 CLIMATE L. 395, 405 (2011) (“Instead of a ‘monocentric hierarchy,’ where governmental units at higher levels make all the decisions, and units at lower levels simply follow commands from above, a truly polycentric system is one in which governmental units both compete and cooperate, interact and learn from one another, and responsibilities at different governmental levels are tailored to match the scale of the public services they provide.”); Elinor Ostrom, *Polycentric Systems for Coping with Collective Action and Global Environmental Change*, 20 GLOBAL ENV’T L. CHANGE 550, 552 (2010) (“Polycentric systems are characterized by multiple governing authorities at differing scales rather than a monocentric unit.”).

<sup>32</sup> See Jude Wallace, *Making Land Markets Work for All*, INT’L FED. SURVEYORS 2 (May 2009), [http://www.fig.net/pub/monthly\\_articles/may\\_2009/may\\_2009\\_wallace.html](http://www.fig.net/pub/monthly_articles/may_2009/may_2009_wallace.html). I am indebted to Professor O. Lee Reed for his comments and insights that led to the significant revision of this section, as well as for his encouragement to consider a wide sampling of institutional economists, and for his argumentation regarding the formalization hypothesis.

<sup>33</sup> See, e.g., Brett J. Miller, *Living Outside the Law: How the Informal Economy Frustrates Enforcement of the Human Rights Regime for Billions of the World’s Most Marginalized Citizens*, 5 NW. U. J. INT’L HUM. RTS. 127, 127–29 (2007).

<sup>34</sup> But see Scott Burris, Michael Kempa & Clifford Shearing, *Changes in Governance: A Cross-Disciplinary Review of Current Scholarship*, 41 AKRON L. REV. 1 (2008); William Boyd, *Climate Change, Fragmentation, and the Challenges of Global Environmental Law: Elements of a Post-Copenhagen Assemblage*, 32 U. PA. J. INT’L L. 457 (2010); Cole, *supra* note 31, at 405.



Africa. Finally, Part IV summarizes the promise and perils of property rights formalization and the applicability of polycentric governance in land titling efforts to help unlock the wealth of nations. In conclusion, the Article argues that property rights formalization does hold the promise of unlocking capital and growing the wealth of nations, but notes that legal reform must be both comprehensive and culturally relative, taking special note of the unique sociopolitical heritages of the societies in question. This is consistent with both the literature on polycentric theory and the corpus of human rights law, and recognizes the extent to which property informality is problematic for both economic and social development.

#### I. THE PROMISE OF PROPERTY RIGHTS FORMALIZATION

Market-based capitalism has led to rapid industrialization and widespread prosperity in the developed world, but capitalism has not been as universally embraced in the developing world, in some cases breeding discontent and insecurity, as well as contributing to an explosion of unplanned urban sprawl.<sup>35</sup> As of 2007, more than half of the “urban population in Africa and more than 40 percent in Asia live[d] under informal tenure,” i.e., living on land to which one does not have any formal title.<sup>36</sup> This unregistered sprawl is a central conundrum with which institutional economists, such as de Soto, grapple. But de Soto is only the most prominent of the institutional economists, having been called “the global guru of neo-liberal populism.”<sup>37</sup>

Proponents of the land titling movement frame the issue by asking what role legal institutions play in development. This is not a new question. More than forty years ago, according to Professor Kevin Davis, “the first law and development movement disintegrated as its leading figures loudly renounced their prior conviction that legal institutions alone were crucial determinants of a society’s prospects for development.”<sup>38</sup> But more recently, partly inspired by the work of Douglass North, among others, there has

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<sup>35</sup> See, e.g., Diego Sánchez Anocha, *The Models of Capitalism Approach and Development: An Application to Small Countries in Latin America*, LATIN AM. STUDIES ASSOC. at 2 (Mar. 15–18, 2006); DAVID CLARK, URBAN WORLD/GLOBAL CITY 70 (2003).

<sup>36</sup> WORLD BANK POLICY RESEARCH REPORT, *supra* note 20, at xxv.

<sup>37</sup> MIKE DAVIS, PLANET OF THE SLUMS 79 (2006).

<sup>38</sup> DAVIS, *supra* note 18, at 675.

been a resurgent belief that rule of law institutions do matter.<sup>39</sup> Following the work of the French historian Fernand Braudel, this school of institutional economics came to this conclusion by arguing that the main reason that the developing world has been held back economically is a lack of domestic capital that has inhibited the growth of robust capital markets, which in turn holds back entrepreneurs.<sup>40</sup> Professor North and others within this school would likely not go so far as to argue that the mere titling of land is sufficient in and of itself to grow national wealth absent broader reforms.<sup>41</sup> But certain adherents such as de Soto have placed the formalization thesis at the center of their efforts, arguing that appropriate public information about ownership should be made available and that legal institutions are critical to economic development because they promote the growth of capital markets. It is worth analyzing this argument in some detail given its centrality to the land-titling thesis.

#### A. *The Central Role of Capital to the Formalization Thesis*

Today, three main questions are typically addressed in discussing the role of property rights in development, namely: (1) “what role do legal institutions play in development?”; (2) “[w]hy have some countries failed to develop” necessary institutions?; and (3) what steps may be taken “to foster the development of” such institutions?<sup>42</sup> Two primary camps have attempted to answer these questions. The first is made up of institutional economists such as de Soto and his followers, who are collectively referred to here as “formalizers.” On the other side of the debate are those who argue that formalization has proven to be too socially and institutionally complex, costly, and time consuming to effectively advance large-

<sup>39</sup> See William M. Dugger, *Douglas C. North's New Institutionalism*, 29 J. ECON. ISSUES 453, 453 (1995).

<sup>40</sup> See Jim Webb, *Braudel's Civilizational Economics*, 27 COMP. CIVILIZATIONS REV. 143, 144 (1992) (reviewing FERNAND BRAUDEL, *THE PERSPECTIVE OF THE WORLD VOL. III* (1986)).

<sup>41</sup> See, e.g., Douglas C. North, *Institutions*, 5 J. ECON. PERSP. 97, 98 (1991) (“The central issue of economic history and of economic development is to account for the evolution of political and economic institutions that create an economic environment that induces increasing productivity.”).

<sup>42</sup> DAVIS, *supra* note 18, at 675–76; Kevin Davis & Michael J. Trebilcock, *What Role Do Legal Institutions Play in Development?*, IMF, at 10 (1999), available at <https://www.imf.org/external/pubs/ft/seminar/1999/reforms/trebil.pdf>.

scale poverty alleviation.<sup>43</sup> The case for formalization is laid out below and critiqued in Part II. Part III then uses case studies to examine on-the-ground realities, and Part IV analyzes areas for compromise between these competing camps. First, though, core principles of capital and property rights must be introduced to provide a framework for discussion.

According to de Soto, “[c]apital is the force that raises the productivity of labor and creates the wealth of nations.”<sup>44</sup> It is the starting point of credit history, of the creation of securities that are then sold on secondary markets.<sup>45</sup> Capital, in other words, is essential for the creation of markets that create positive externalities. As such, it is central to economic development and poverty alleviation. But what exactly is “capital,” and how do property rights lead to its promotion?

Capital is commonly confused with money, but money is simply a facilitator, making transactions easier.<sup>46</sup> In contrast, capital is an asset that is fixed and realized in a particular subject, and is “the most tangible and detectable of assets.”<sup>47</sup> Yet it is not the subject itself, such as a house, which is the key to capital, but rather the potential of that subject to create additional capital.<sup>48</sup> Capital, then, is not the building, but rather an economic concept about the building embodied in a consensual legal representation.<sup>49</sup> In this manner, capital is the potential that an accumulated stock of

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<sup>43</sup> See, e.g., Edward Robbins, *Formalisation of Land and Housing Tenure to Empower the Poor: Simple Nostrum or Complex Challenge?*, in RIGHTS AND LEGAL EMPOWERMENT IN ERADICATING POVERTY 175, 175 (Dan Banik ed., 2008).

<sup>44</sup> DE SOTO, *supra* note 10, at 5.

<sup>45</sup> *Id.* at 6–7.

<sup>46</sup> See *id.* at 11–12.

<sup>47</sup> *Id.* at 30, 40–42 (noting that the roots of the critical theoretical basis of capital’s importance lie in the work of Adam Smith and Karl Marx. For Smith, the “division of labor and the subsequent exchange of specialized products” was the source of increased productivity. “The more capital was accumulated, the more specialization became possible, and the higher society’s productivity.”). For a discussion of how informality impacts the division of labor, see Avner Grief, *Cultural Beliefs and the Organization of Society: Historical and Theoretical Reflection on Collectivist and Individualist Societies*, 102 J. POL. ECON. 912 (1994); Simon Johnson et al., *Entrepreneurs and the Ordering of Institutional Reform: Poland, Slovakia, Romania, Russia and Ukraine Compared*, 8 ECON. OF TRANSITION 1, 1–3 (2000) (discussing similar limitations when trading is confined to closed circles.).

<sup>48</sup> DE SOTO, *supra* note 10, at 49.

<sup>49</sup> *Id.* at 50.

assets has to deploy new production.<sup>50</sup> In essence then, proponents such as de Soto claim that property rights are a prerequisite of capital—to put it simply, “you need a property right before you can make money.”<sup>51</sup> Critically, formalizers then go on to argue that informal property rights do not unlock the capital held in property such as small businesses, street vendors, and urban marketplaces.<sup>52</sup> To accomplish that feat, they argue, formalized, state-sanctioned property rights are required. But what specifically do “property” and “property rights” mean? Different interpretations abound, leading to the first primary critique of the formalization thesis.

### B. Defining “Property” in the Context of Formalization

Theorists from Cicero to John Locke have failed to reach a common definition of “property,”<sup>53</sup> and, according to Professor O. Lee Reed, “to some scholars it is merely considered ‘a contested concept and one that evolves historically.’”<sup>54</sup> The dictionary “defines property as a thing or collection of things that one owns,” or as “a bundle of ‘sticklike rights.’”<sup>55</sup> The positive rights making up this bundle include the rights to possess, to use, to consume, or to alienate property.<sup>56</sup> Interpretations of property can bring to the fore nearly the full range of human experience, from murder to liberty.<sup>57</sup> Some contend that property rights exploit the poor,<sup>58</sup>

<sup>50</sup> Davis, *supra* note 18. As an analogy for the dual nature of capital, consider livestock. It is possible to obtain milk, food, hides, and even fuel from animals. It is also possible to breed them. This illustration of capital demonstrates both “the physical dimension of assets . . . as well as its capacity to generate surplus value.” DE SOTO, *supra* note 10, at 40–41.

<sup>51</sup> DE SOTO, *supra* note 10, at 64; *see also* James C. W. Ahiakpor, *Mystifying the Concept of Capital: Hernando de Soto’s Misdiagnosis of the Hindrance to Economic Development in the Third World*, 13 INDEP.REV. 57, 67–69 (2008) (critiquing de Soto’s work in this area).

<sup>52</sup> *See, e.g.*, Samuelson, *supra* note 11.

<sup>53</sup> O. Lee Reed, *What Is “Property”?*, 41 AM. BUS. L.J. 459, 470 n.34 (2004) (citing PETER STEIN & JOHN SHAND, *LEGAL VALUES IN WESTERN SOCIETY* 207 (1974)).

<sup>54</sup> *Id.* at 470 n.34 (citing MARGARET JANE RADIN, *REINTERPRETING PROPERTY* 245 n.45 (1993)).

<sup>55</sup> *Id.* at 459; *see also* WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1818 (Philip Babcock Gove ed., 1986) (defining property pertinently as “something that is or may be owned or possessed”).

<sup>56</sup> *See* A.M. Honore, *Ownership*, in *OXFORD ESSAYS IN JURISPRUDENCE* 107, 113–20 (A. G. Guest ed., 1st ser., 1961).

<sup>57</sup> *See* Reed, *supra* note 53, at 459–60 (citing KENNETH PATCHEN, *THE*

while others, such as the formalizers,<sup>59</sup> believe that formalized property rights are the salvation of the poor.<sup>60</sup> Commentators do not even agree whether property is a natural right<sup>61</sup> or an artificial creation of the state,<sup>62</sup> or whether property rights lead to environmental degradation<sup>63</sup> or are a primary way to stave off collective harm.<sup>64</sup> The amorphous definitions of property, from “that which is owned,” which the U.S. Supreme Court has referred to as property “in its vulgar . . . sense,”<sup>65</sup> to ownership over resources,<sup>66</sup> complicate the arguments for and against formalizing property rights that will be discussed in Parts II-IV.<sup>67</sup>

What is clear from this enormous array of contradictory claims is that property is an important concept, one to which increasing attention is being paid in development circles now that there is a growing consensus “that the material rise of the West during the last” three centuries is at least in part attributable to

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JOURNAL OF ALBION MOONLIGHT 25 (1941); JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS 31–32 (1986)).

<sup>58</sup> *Id.* at 459–60 n.9.

<sup>59</sup> See Gravois, *supra* note 19; WORLD BANK POLICY RESEARCH REPORT, *supra* note 20, at xvii.

<sup>60</sup> *E.g.*, TOM BETHELL, THE NOBLEST TRIUMPH: PROPERTY AND PROSPERITY THROUGH THE AGES 202 (1998); CASS R. SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE 210 (1997); *cf.* LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 131 (1999) (discussing the legal concept of private property in the cyber law context, and arguing that the State’s interests in property can trump individual rights).

<sup>61</sup> See JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 18–30 (C. B. Macpherson ed., 1980) (1690).

<sup>62</sup> See Reed, *supra* note 53, at n.75 (citing M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 327 (Alexis C. Angell ed., 2d ed. 1998) (1891)).

<sup>63</sup> *Cf.* AL GORE, EARTH IN THE BALANCE 287 (1992) (stating that large Brazilian landowners have pursued “short-term profits” at the expense of “long-term ecological tragedy”). See Reid, *supra* note 25, at n.13.

<sup>64</sup> Reed, *supra* note 53, at 461–62.

<sup>65</sup> *Id.* at 468 (quoting *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377 (1945)).

<sup>66</sup> See LAWRENCE C. BECKER, PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS 18 (1977).

<sup>67</sup> See R. H. TAWNEY, THE ACQUISITIVE SOCIETY 54 (1920) (“[Property rights] may be conditional like the grant of patent rights, or absolute like the ownership of ground rents, terminable like copyright, or permanent like a freehold, as comprehensive as sovereignty or as restricted as an easement, as intimate and personal as the ownership of clothes and books, or as remote and intangible as shares in a gold-mine or rubber plantation.”).

legal institutions formalizing property rights.<sup>68</sup> If this is indeed correct, then property rights, particularly those that advance a right of exclusion, may place “law alongside economics as foundational for studying the wealth of nations.”<sup>69</sup> For this reason, clarifying and advancing property regimes are critical subjects for development economists and rule of law practitioners alike. What is needed, then, is a critical analysis of the extent to which formalized property rights do in fact promote economic development and what, if any, sociopolitical pitfalls exist in formalizing hitherto informal economies, as is alluded to by the literature on polycentric governance discussed below.

*C. Raising Dead Capital: Why Formalized Property Rights are Part of the Answer*

One school of thought among scholars maintains that coupling an efficient contract law system with private property rights provides a solid foundation for successful market economies.<sup>70</sup> In some ways, this tradition dates back to William Blackstone, who argued that enforcing property rights through contracts incentivizes individuals “to make socially desirable investments in improving assets.”<sup>71</sup> The work of modern formalizers builds off of this foundation. Professors John Turner and Hans Harms helped begin the line of modern work in the 1960s and 1970s, arguing for the importance of formalizing property rights, which they termed “land regularisation.”<sup>72</sup> They, and modern formalizers generally, succinctly argue that “titling,” i.e. formalization, “improves land market efficiencies,” reduces uncertainty, and provides incentives to develop property, thus

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<sup>68</sup> Reed, *supra* note 53, at 463 n.18 (noting that the relatively robust property systems of the Western nations: “(1) provide maximum incentive for new resource development because they allow private persons to keep the increase from their efforts; (2) allow landholders to work outside their homes by protecting land and housing from seizure by others; (3) facilitate the generation of development capital from land and other resources by enabling these resources to be put up to secure loans; (4) make resources easily divisible so that those who value them most highly can transfer them by contract.”).

<sup>69</sup> *Id.* at 501.

<sup>70</sup> See, e.g., Andrzej Rapaczynski, *The Roles of State and the Market in Establishing Property Rights*, 10 J. ECON. PERSPECTIVES 87, 87 (1996); Davis, *supra* note 18, at 676.

<sup>71</sup> Davis, *supra* note 18, at 676; WILLIAM BLACKSTONE COMMENTARIES ON THE LAWS OF ENGLAND, VOL. 2 OF THE RIGHTS OF THINGS 979 (1766).

<sup>72</sup> Robbins, *supra* note 43, at 176 n.3.

catalyzing capital markets.<sup>73</sup> The developed world got rich, then, formalizers assert, because of advanced property systems that allowed entrepreneurs to realize the full potential of their fixed assets, and in turn led to the development of banking and capital markets.<sup>74</sup> In other words, property makes people accountable and assets fungible,<sup>75</sup> thus providing all the mechanisms required for financial systems to function.<sup>76</sup>

As an example of the important role that formalized property rights play in promoting economic development, consider mortgages. Mortgages are the single most vital source of capital to start small businesses in the United States.<sup>77</sup> Without property rights, innovative businessmen and businesswomen would be unable to leverage their home equity to take out loans and turn their ideas into reality, curtailing growth. Beyond funding new enterprises, half of the credit in the U.S. is tied to some form of real or personal property.<sup>78</sup> Indeed, up to half of the wealth of the developed world is held in some form of real estate,<sup>79</sup> although these figures changed to an extent beginning in 2008 as a result of the global financial crisis with lingering effects on small business loans.<sup>80</sup> Property, then, is a crucial driver of capital creation in

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<sup>73</sup> *Id.* at 176; see Karol C. Boudreaux, *The Legal Empowerment of the Poor: Titling and Poverty Alleviation in Post-Apartheid South Africa*, 5 HASTINGS RACE & POVERTY L.J. 309, 314 (2008).

<sup>74</sup> See Christopher Clague et al., *Contract-Intensive Money: Contract Enforcement, Property Rights, and Economic Performance*, 4 J. ECON. GROWTH 185, 185–86 (1999) (analyzing the importance of secure property rights to economic growth and investment).

<sup>75</sup> WORLD BANK POLICY RESEARCH REPORT, *supra* note 20, at xxi (arguing that widespread land ownership strengthens democratic accountability).

<sup>76</sup> DE SOTO, *supra* note 10, at 63; Davis, *supra* note 18, at 677; John McMillan & Christopher Woodruff, *Interfirm Relationships and Informal Credit in Vietnam*, 114 Q. J. ECON. 1285, 1286 (1999).

<sup>77</sup> See, e.g., Christian E. Weller & Amanda Logan, *Wall Street Leads to Your Street*, CTR. FOR AM. PROGRESS (Oct. 1, 2008), [http://www.americanprogress.org/issues/2008/10/wall\\_street\\_leads.html](http://www.americanprogress.org/issues/2008/10/wall_street_leads.html); DE SOTO, *supra* note 10, at 7.

<sup>78</sup> Heywood Fleisig, *Secured Transactions: The Power of Collateral*, 33 FINANCE & DEV. 44, 44 (1996). However, a question arises about how far to expand the definition of property; for example, it is an open question as to whether intellectual property should be considered property for purposes of collateral. See Davis, *supra* note 18, at 679.

<sup>79</sup> DE SOTO, *supra* note 10, at 86.

<sup>80</sup> See, e.g., Josh Bivens, Andrew Fieldhouse & Heidi Shierholz, *From Free-Fall to Stagnation*, ECON. POL'Y INST. (Feb. 14, 2013), <http://www.epi.org/publication/bp355-five-years-after-start-of-great-recession/>; Felix Salmon, *The*

developed economies.<sup>81</sup> As de Soto argues:

[T]he substantial increase of capital in the West over the past two centuries is the consequence of gradually improving property systems, which allowed economic agents to discover and realize the potential in their assets, and thus to be in a position to produce the non-inflationary money with which to finance and generate additional production.<sup>82</sup>

Institutional economists such as de Soto assert that this vast source of capital stemming from formalized property is not available in developing countries due to high rates of informality.<sup>83</sup> Indeed, it has been estimated that as much as 90 percent of the population in some developing nations now operates outside the formal economy.<sup>84</sup> Beyond facing a number of threats to their wellbeing, people operating outside the formal economy have limited opportunities to leverage their assets. Tax revenues are also lost, or so the argument goes, and capital growth is curbed.<sup>85</sup> “Without legal ownership of the homes they inhabit or the businesses they operate, the poor” in developing countries operate in “a shadow economy subject to expropriation” as well as “bureaucratic arbitrariness[] and political corruption.”<sup>86</sup> As a

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*Wealth Effects of House Price Declines*, UPSTART BUS. J. (Nov. 9, 2008), <http://upstart.bizjournals.com/views/blogs/market-movers/2008/11/09/the-wealth-effects-of-house-price-declines.html>; Scott Shane, *The Great Recession's Effect on Small Loans to Business*, SMALL BUS. TRENDS (Apr. 23, 2012), <http://smallbiztrends.com/2012/04/the-great-recessions-effect-on-small-loans-to-business.html>.

<sup>81</sup> See Fleisig, *supra* note 78, at 44–46.

<sup>82</sup> DE SOTO, *supra* note 10, at 65.

<sup>83</sup> See, e.g., Hernando de Soto, *Egypt's Economic Apartheid*, WALL ST. J. (Feb. 3, 2011), <http://online.wsj.com/article/SB10001424052748704358704576118683913032882.html>.

<sup>84</sup> *Id.* (referencing Egypt); *A Man and a Morass: Briefing Nigeria's Prospects*, ECONOMIST, May 2011, at 26–28.

<sup>85</sup> See Kerry A. Dolan, *A New Kind of Entitlement*, FORBES (Dec. 23, 2002), <http://www.forbes.com/forbes/2002/1223/321.html>. Land formalization increases tax revenues, and potentially strengthens local political accountability, though the World Bank does not spell out how these outcomes may be attained. See WORLD BANK POLICY RESEARCH REPORT, *supra* note 20, at xxi. *But see* Manya M. Mooya, *Property Rights, Real Estate Markets and Poverty Alleviation in Namibia's Urban Low Income Settlements*, 34 HABITAT INT'L 436, 436 (2010) (finding in the Namibian context that there was limited potential to derive benefits from real estate markets in aid of capital accumulation absent interventions made to bring about increased trading activity).

<sup>86</sup> Gary D. Libecap, Book Review, 61 J. ECON. HIST. 1166, 1166 (2001) (reviewing HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM*



result, entrepreneurs in developing nations cannot use their property as collateral to start new businesses or take out mortgages to improve their land, limiting economic growth.<sup>87</sup> Accordingly, formalizers argue that the savings of the developing world is wasted since it is held in an inefficient form for capital creation—instead of registered homes and businesses, it is invested in unrecorded property and unincorporated firms.<sup>88</sup>

A system is needed to translate the invisible savings of the developing world into capital, making illegality the exception rather than the norm.<sup>89</sup> To accomplish this feat, formalizers argue that formal property institutions are required to expand opportunities to generate capital.<sup>90</sup> A 2002 World Bank Development Report states that such an effective property law system would lower transaction costs across the developing world.<sup>91</sup> Currently, high transaction costs in property markets can make it more difficult to provide credit, constrain the private sector, and decrease overall development rates.<sup>92</sup> In fact, a 2008 World Bank study found that, in India, such distortions reduce annual GDP growth by as much as 1.3 percent.<sup>93</sup> Property formalization could lower transaction costs, creating savings that would then be passed on to property holders who then possess more capital to make improvements and establish credit.<sup>94</sup> The

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TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE (2000)).

<sup>87</sup> *But see* Klaus Deininger & Gershon Feder, *Land Registration, Governance and Development: Evidence and Implications for Policy*, 24 *WORLD BANK RES. OBSERVER* 233, 246 (Aug. 2009) (arguing that when property cannot be used as collateral, access to credit for low-income individuals may be limited).

<sup>88</sup> DE SOTO, *supra* note 10, at 6–7.

<sup>89</sup> *Id.* at 30.

<sup>90</sup> Libecap, *supra* note 86, at 1166–67.

<sup>91</sup> *See* BUILDING INSTITUTIONS FOR MARKETS, *WORLD BANK DEV. REPORT* 8 (2002), available at <http://www.worldbank.org/wdr/2001/fulltext/fulltext2002.htm>.

<sup>92</sup> *WORLD BANK POLICY RESEARCH REPORT*, *supra* note 20, at xix.

<sup>93</sup> *Id.*

<sup>94</sup> *See* Matthew Rosenberg, Book Review, 78 *INT'L AFF.* 174, 174 (2002) (reviewing HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2000)) (noting that most of the developing world does not enjoy collateralized mortgages, instead relying on extra-legal means to manage property). De Soto illustrates the power of formalization by referring to a story from the U.S. Civil War. He relates “the story of an Indian merchant who had been promised by a prophet that he would be rich beyond his wildest dreams.” DE SOTO, *supra* note 10, at 37. Motivated,

question becomes: how might such property reforms commence, and what forms should they take?

Property rights based on exclusion already exist in many developing nations, even in informal urban areas such as in the outskirts of São Paulo.<sup>95</sup> In particular, communal property rights systems reminiscent of Native American regimes remain prevalent around the world.<sup>96</sup> Myriad examples are explored below, and include housing developments with communal property on the grounds, and even corporations, since the relationship between stockholder and the firm is far from individual ownership.<sup>97</sup> The question then becomes whether imposing a private property regime on top of preexisting communal relationships will function the way formalizers intend, especially given that common property has been found in some contexts to enjoy better outcomes than private property systems.<sup>98</sup> A powerful example is the Maasai pastoralists of Kenya, as explored by Professor Ostrom and Esther Mwangi.<sup>99</sup> Originally, Maasai pastoralists maintained “seasonal herd movements between dry and wet season pastures within and outside Maasai territory.”<sup>100</sup> During the colonial period, the British replaced the Maasai’s communal system with “individual ownership of specific parcels of land.”<sup>101</sup> This legacy of privatization continued even after independence through the 1980s

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the merchant traveled the world in search of his fortune. *Id.* Finding nothing, he returned home dejected, but when digging a new well on his property struck the Golconda lode, the world’s greatest diamond mine. *Id.* The analogy is clear—formalizers believe that everything that people in the developing world need to increase capital and end poverty is right under their noses, so to speak: “[E]ven those who live under the most grossly unequal regimes possess far more than anybody has ever understood.” *Id.* at 16.

<sup>95</sup> See *Brazil Police Storm Landless Settlement*, *supra* note 1.

<sup>96</sup> See Elinor Ostrom & Charlotte Hess, *Private and Common Property Rights*, in *ENCYCLOPEDIA OF LAW & ECONOMICS* 53, 54 (Boudewijn Bouckaert & Gerrit De Geest eds., 2010).

<sup>97</sup> *Id.* at 72 (“Since the income that will be shared among stockholders, management, and employees is itself a common pool to be shared, all of the incentives leading to free riding (shirking) and overuse (padding the budget) are found within the structure of a modern corporation.”).

<sup>98</sup> *Id.* at 54.

<sup>99</sup> See Esther Mwangi & Elinor Ostrom, *Top-Down Solutions: Looking Up from East Africa’s Rangelands*, *ENV’T MAG.*, Jan.–Feb. 2009, at 34, available at <http://www.environmentmagazine.org/Archives/Back%20Issues/January-February%202009/MwangiOstrom-abstract.html>.

<sup>100</sup> *Id.* at 36.

<sup>101</sup> *Id.*

and is thought to have led to changing land use patterns and escalating conflicts over scarce resources.<sup>102</sup> Ostrom and Mwangi observe that such consequences are not limited to Kenya: “When institutions are not well-matched to the ecological and social conditions on the ground, tragic overuse is likely to result.”<sup>103</sup>

This argument explicitly evokes Garrett Hardin’s classic tragedy of the commons model, predicting the eventual overexploitation and degradation of open access, common pool resources.<sup>104</sup> This model has become part of the conventional wisdom in diverse fields ranging from economics and ecology to political science and law.<sup>105</sup> Hardin called for either nationalization or privatization to avoid this tragedy.<sup>106</sup> But since its introduction more than forty years ago, the theory has been critiqued and modified, notably by Professor Ostrom, which is part of the reason for her shared 2009 Nobel Prize in Economics.<sup>107</sup> Rather than seeing all common pool resources as being open access, existing in an anarchic state of overexploitation, Ostrom posits that “resources are embedded in complex, social-ecological systems” operating on multiple levels.<sup>108</sup> Her and others’ work has identified numerous examples of such polycentric systems in which local communities have successfully managed community resources for the common good without the necessity of state intervention,<sup>109</sup> underscoring the need for culturally relative, community-driven property rights regimes applicable to critiquing the formalization thesis.

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> See Garrett Hardin, *The Tragedy of the Commons*, 162 *SCI.* 1244, 1244–45 (1968).

<sup>105</sup> See e.g., ARTHUR F. MCEVOY, *THE FISHERMAN’S PROBLEM: ECOLOGY AND LAW IN THE CALIFORNIA FISHERIES, 1850–1980* 214 (1986).

<sup>106</sup> Hardin, *supra* note 104, at 1248.

<sup>107</sup> See, e.g., ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 1–3 (1990); Jay Walljasper, *Ostrom’s Nobel Prize a Milestone for the Commons Movement*, *COMMONS MAG.* (Dec. 16, 2013), <http://onthecommons.org/magazine/ostrom%E2%80%99s-nobel-prize-milestone-commons-movement>.

<sup>108</sup> See Ostrom, *supra* note 27, at 419.

<sup>109</sup> See, e.g., Elinor Ostrom, *A Polycentric Approach for Coping with Climate Change* 40 (World Bank Policy Research, Working Paper No. 5095, 2009). Polycentrism has arisen across an array of disciplines, from law to urban studies, and involves the study of multiple power centers in a given environment. See, e.g., SURYA PRAKASH SINHA, *LEGAL POLYCENTRICITY AND INTERNATIONAL LAW* 1 (1996); Robert C. Kloosterman & Sako Musterd, *The Polycentric Urban Region: Towards a Research Agenda*, 38 *URBAN STUD.* 623, 623 (2001).

In an ideal scenario, freeing “dead capital”<sup>110</sup> in the developing world would begin a second industrial revolution and help narrow the large disparities in wealth and income between the developed and developing nations.<sup>111</sup> Without reform, the “legal apartheid” in which 80 percent of property is held informally could continue<sup>112</sup>—by 2015, one-half to one-third of the total output from the developing world may be “extralegal,” according to de Soto.<sup>113</sup> If formalization may help end these disparities and catalyze economic development, it should be encouraged. But before formalization is accepted as the path to promote equitable, sustainable growth around the world, the data and methodology upon which the formalizers base their claims must be analyzed, as must the extent to which such goals mesh with polycentric principles.

## II. DOES THE MYSTERY OF CAPITAL REMAIN A MYSTERY? CRITIQUES OF THE TITLING MOVEMENT

If property titling is a path to the legal and economic empowerment of the poor, then results from titling programs should provide supporting evidence.<sup>114</sup> After all, developing countries have been experimenting with titling programs for decades, oftentimes with mixed results.<sup>115</sup> Some proponents, such as de Soto, dismiss unsuccessful efforts, noting: “An extraordinary number of them had been prematurely aborted because of poor results . . . and with the exception of some rural Thai property certification programs, none of these efforts succeeded in turning extralegal assets into legal ones.”<sup>116</sup> Although early abandonment was not the problem that prevented the full unlocking of capital in Peru after formalization in the early 1990s, that program has also

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<sup>110</sup> Davis, *supra* note 18 (noting that de Soto defines “dead capital” as the building on publicly owned land, land zoned for exclusively industrial or commercial use, or the illegal subdivision of true ownership among unregistered individuals).

<sup>111</sup> Libecap, *supra* note 86, at 1167.

<sup>112</sup> DE SOTO, *supra* note 10, at 83.

<sup>113</sup> *Id.* at 84.

<sup>114</sup> Boudreaux, *supra* note 73, at 312.

<sup>115</sup> Christopher Woodruff, *Review of de Soto's The Mystery of Capital*, 39 J. ECON. LITERATURE 1215, 1216, 1220 (2001) (book review).

<sup>116</sup> DE SOTO, *supra* note 10, at 169.

had mixed results.<sup>117</sup> This fact calls into question several aspects of the formalization hypothesis that are expanded on below, including whether formalization automatically leads to increased collateral and access to credit.

Critics of titling movements argue that land tenure has proven to be too “complex, [controversial,] costly, and time consuming to” promote large-scale poverty alleviation.<sup>118</sup> Emblematic of this camp is Anna Kajumulo Tibaijuka, who states, “The global experience of land titling is that it is too slow, expensive and cumbersome to meet the needs of the poor, posing a serious equity and governance issue.”<sup>119</sup> Formalization critics note that there is only weak evidence that titling benefits property security, and little support for the proposition that titling leads to expanded access to credit, or better jobs and more labor time away from home, as discussed below. Nor is there a proven increase in transaction certainty, the ability to transfer property, or less displacement of the poor.<sup>120</sup> In fact, certain studies in South Africa found that land titling actually created more homelessness and disempowered more people than was the case before the program commenced.<sup>121</sup>

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<sup>117</sup> See Woodruff, *supra* note 115, at 1215. No comprehensive data has been published on how successful the Peruvian titling program has been since it was enacted. This is surprising given that in 1990 President Fujimori appointed de Soto to begin registering informal land claims of Peruvians with an aim to making them available to generate collateral for gaining credit. See EDESIO FERNANDES AND ANN VARLEY, *ILLEGAL CITIES: LAW AND URBAN CHANGE IN DEVELOPING COUNTRIES* 25 (1998). One of the few estimates of the program’s success states that 300,000 titles were registered, and the value of that land doubled in six years. Dolan, *supra* note 86 (arguing that titling meant that Peru’s poor could deal with just one agency to obtain title, rather than up to fourteen, thus “lowering the cost of registering a business to \$174”). But of the more than 200,000 Lima households that were awarded property titles between 1998 and 1999, only 24 percent obtained any financing by 2002, and this financing was from the state, not banks. Gravois, *supra* note 19. For the sake of comparison, in El Salvador, one million properties have been titled under a titling scheme similar to Peru’s, reportedly leading to \$800 million in new mortgages annually. Dolan, *supra* note 85.

<sup>118</sup> Robbins, *supra* note 43, at 176.

<sup>119</sup> Anna Kajumulo Tibaijuka, *UN-Habitat’s Contribution to Security of Tenure*, in *LEGAL EMPOWERMENT: A WAY OUT OF POVERTY* 28 (M.E. Brothier & J.A. Solberg eds., 2006).

<sup>120</sup> Robbins, *supra* note 43, at 177; A. Durand-Lasserve & H. Selod, *The Formalization of Urban Land Tenure in Developing Countries*, *WORLD BANK URBAN RES. SYMPOSIUM* 118–120 (May 14, 2007).

<sup>121</sup> Robbins, *supra* note 43, at 177; Ben Cousins et al., *Will Formalizing Property Rights Reduce Poverty in South Africa’s “Second Economy?”*

Critics also argue that informal markets and forms of land tenure are “more contextual, more efficient, and more flexible than the formal.”<sup>122</sup> Regardless of formal titling, informal economies in urban land economies are important and will likely continue to exist.<sup>123</sup> Both the formalizers and their critics at times occupy extreme positions, according to Professor Edward Robbins: “For the supporters of titling, the informal is chaotic while for its opponents the formal is overly constricting and inappropriate.”<sup>124</sup> In order to critique both camps, and potentially find common ground, this Part analyzes the efficacy of land titling based on the available empirical data beginning with a discussion of de Soto’s thesis given that his work is credited with jumpstarting popular attention in the field.

#### A. *Analyzing the Efficacy of Titling Efforts*

Arguably the most well-known account of the land-titling thesis is propounded by de Soto in *The Mystery of Capital*. But the work is not without its methodological problems. It was meant for a popular audience, and so is long on examples and metaphors and short on empirical studies and citations.<sup>125</sup> Still, the examples de Soto evokes are powerful. Consider his finding that obtaining a formal property title in the Philippines takes 168 steps through fifty-three public agencies, and may take on average anywhere between thirteen and twenty-five years.<sup>126</sup> Or the fact that it is allegedly so expensive to register a business in Mexico that there are approximately 2.65 million unregistered microbusinesses in Mexico City alone.<sup>127</sup> If the 1.5 million informal food stands were put together, they would stretch over one hundred miles.<sup>128</sup> Together, these examples illustrate “a culture of illegality, corruption, and excessive risk-taking” that develops in nations

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*Questioning the Mythologies of Hernando de Soto*, POL’Y BRIEF No. 18, PROGRAMME FOR LAND AND AGRARIAN STUDIES 27 (2005).

<sup>122</sup> Robbins, *supra* note 43, at 177.

<sup>123</sup> See T. ANAYAMBA, ‘DIVERSE INFORMALITIES’ SPATIAL TRANSFORMATIONS IN NAIROBI (2006).

<sup>124</sup> Robbins, *supra* note 43, at 177.

<sup>125</sup> See *id.* at 176–78; Renzo G. Rossini & J.J. Thomas, *The Size of the Informal Sector in Peru: A Critical Comment on Hernando de Soto’s El Otro Sendero*, 18 WORLD DEV. 125, 125 (Jan. 1990).

<sup>126</sup> DE SOTO, *supra* note 10, at 20.

<sup>127</sup> *Id.* at 28.

<sup>128</sup> *Id.* at 29.

with large informal economies in which homes are insecure, and property is illiquid.<sup>129</sup> The resulting inability to convert homes into equity, he argues, is “the major stumbling block that keeps the rest of the world from benefiting from capitalism.”<sup>130</sup> What is the value of all this unregistered residential and commercial property? De Soto and his team offer a figure of \$9.3 trillion in untapped capital in the developing world.<sup>131</sup> That figure is roughly “40 times all of the foreign aid sent to developing countries since 1945.”<sup>132</sup>

It is unclear how de Soto and his team arrived at their estimate of dead capital. Their methodology is opaque. Using surveys from just five cities—Cairo, Lima, Manila, Mexico City, and Port-au-Prince<sup>133</sup>—they extrapolated to the rest of the developing world, estimating that 85 percent of urban land, and 53 percent of rural land, is held either informally or illegally.<sup>134</sup> It is by multiplying these extralegal holdings by their fair market value that de Soto arrives at \$9.3 trillion.<sup>135</sup> The problems with this methodology are apparent and have been well documented.<sup>136</sup> These problems include not taking into account the location of properties, and abstracting out results from a small, unrepresentative sample.<sup>137</sup> Given these shortcomings, several authors have attempted to gauge a more accurate figure for the value of informal property in the developing world. Professor Christopher Woodruff, for example, estimates a total a figure of \$3.6 trillion.<sup>138</sup> The salient point,

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<sup>129</sup> Libecap, *supra* note 86, at 1167. The main problem surrounding property rights is not security of ownership. In fact the reverse may be the case—ownership is too secure. Land must be subject to seizure for it to be used as collateral by banks, which has happened a great deal in the United States since 2008. *See Sales of New Homes Fell 2.1 Percent in May*, NPR, June 23, 2011, available at <http://www.npr.org/blogs/thetwo-way/2011/06/23/137366337/sales-of-new-homes-fell-2-1-percent-in-may>. This is far more difficult in an informal system of land ownership. Woodruff, *supra* note 115, at 1215–16.

<sup>130</sup> DE SOTO, *supra* note 10, at 5.

<sup>131</sup> *Id.* at 35.

<sup>132</sup> *Id.* at 33.

<sup>133</sup> *Id.* at 24, 31.

<sup>134</sup> *See* Woodruff, *supra* note 115, at 1220 (noting that the figure of 85 percent is “much higher than three of the four countries for which de Soto provides detail—Peru (53 percent), the Philippines (57 percent), and Haiti (68 percent)”).

<sup>135</sup> DE SOTO, *supra* note 10, at 29.

<sup>136</sup> *See, e.g.*, Thomas, *supra* note 17, at 189–91.

<sup>137</sup> *See generally* FRIEDRICH SCHNEIDER & DOMINIK H. ENSTE, *THE SHADOW ECONOMY: AN INTERNATIONAL SURVEY* (2002).

<sup>138</sup> Woodruff, *supra* note 115, at 1221.

though, is that even an estimate of \$3 trillion is still approximately \$5,000 per developing country household based on purchasing power parity, which is enough to make a significant difference in people's lives. Matthew Rosenberg agrees, arguing that even if de Soto's numbers are not accurate, they still point to the majority of the property in the developing world being held informally; and this land is worth a significant amount of money that could be used to help jumpstart developing economies.<sup>139</sup> To demonstrate how this may be done, de Soto evokes the example of the American West, but the relevance of this case study raises a host of additional concerns that are addressed in Part III regarding how to put the formalization theory into practice.<sup>140</sup>

None of this is meant to detract from the importance of this work, nor to ignore de Soto's other ongoing projects through the Institute for Liberty and Democracy, which is active in more than twenty nations.<sup>141</sup> In some ways, that is the downside of "pop academics," whose scholarly work can be oversimplified to a thesis that the author would likely not support. It is likely untrue, for example, that de Soto or many other institutional economists believe that land titling alone is sufficient to jumpstart poverty alleviation in the developing world. De Soto makes clear in *The Mystery of Capital* that broader legal reforms are critical to property reform.<sup>142</sup>

Yes, there are significant problems with de Soto's data and methodology in *The Mystery of Capital*, but the formalizers are correct that informal economies will only increase without property rights reform, potentially leading to higher rates of bribery and corruption.<sup>143</sup> In Peru, for example, one study determined that bribes alone already "raise the cost of running a small business by 10 to 15 percent."<sup>144</sup> Thus, the formalization thesis does have some merit. However, as with the subsequent modifications of Hardin's classic tragedy of the commons,<sup>145</sup> the

<sup>139</sup> Rosenberg, *supra* note 94, at 174.

<sup>140</sup> See *infra* Part III.

<sup>141</sup> See INST. FOR LIBERTY AND DEMOCRACY, OUR WORK, <http://www.ild.org.pe/index.php/en/map> (last visited Jan. 14, 2014).

<sup>142</sup> See DE SOTO, *supra* note 10, at 189, 198.

<sup>143</sup> *Id.* at 195; A Man and a Morass, *supra* note 84.

<sup>144</sup> Samuelson, *supra* note 11.

<sup>145</sup> Compare Hardin, *supra* note 104, at 1244–45, with ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE



wider literature on formalizing property rights has modified the classic formalization thesis, but not completely disavowed it outright. Five primary critiques are relevant, including: (1) the absence of cultural considerations in the formalization hypothesis; (2) the need to develop grassroots political coalitions to bring comprehensive property reform; (3) the social cost and environmental degradation of titling; (4) the efficacy of previous titling efforts, challenging the central claim of formalizers that land titling leads to capital growth; and (5) the necessity of considering the benefits and drawbacks of property formalization, such as gains from trade and entrepreneurship, from a more inclusive perspective. Each of these critiques is addressed in turn within the framework of polycentric management in order to ascertain how the formalization thesis should be modified in light of recent empirical findings.

### B. *Cultural Considerations in Land Titling Design*

The World Bank has noted the importance of cultural context in structuring effective property formalization programs, stating “[p]olicy advice that is oblivious of either the complexity of . . . [cultural] issues or the historical and political repercussions of policy interventions in this area can lead to unintended negative consequences.”<sup>146</sup> But the trap that many institutional economists (including, at times, de Soto) seem to fall into is that they dismiss the notion that the developing world has not developed economically due to cultural considerations as untrue and inhumane,<sup>147</sup> arguing instead that human nature with regard to property is uniform and that everyone will seek to maximize profits and respond identically to identical assumptions.<sup>148</sup> But human nature might not be so uniform. Different values, beliefs, and customs are replete around the world.<sup>149</sup> Leading scholars such

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ACTION 3, 6–8 (1990) (summarizing and critiquing the tragedy of the commons and discussing the role played by local communities in sustainably managing common pool resources).

<sup>146</sup> WORLD BANK POLICY RESEARCH REPORT, *supra* note 20, at xvii.

<sup>147</sup> See DE SOTO, *supra* note 10, at 4.

<sup>148</sup> See LAWRENCE E. HARRISON & SAMUEL P. HUNTINGTON, *CULTURE MATTERS: HOW VALUES SHAPE HUMAN PROGRESS* 60–61 (2000).

<sup>149</sup> See *id.* at 21–27. Samuelson, *supra* note 11, at 209. Some argue that different cultures accept capitalism’s principles, and put them into practice, more readily than do others. For example, Mariano Grondona argues that prolonged economic development may only occur in a society in which twenty traits are

as Professor Robert Samuelson have recognized this fact, arguing against a “single bullet” approach to land titling and for a degree of cultural relativism.<sup>150</sup> Similarly, Professor John Phillip Reid has made the case that the specific legal boundaries of property rights must come from cultural norms in order to enjoy the force necessary for wealth creation.<sup>151</sup> Cultural considerations thus may well modify the overall formalization hypothesis. Property has different meanings and degrees of importance in different parts of the world. Even within countries, diverse regions and groups can have dissimilar experiences.<sup>152</sup> Property then may be “best understood as the distribution of social entitlements that vary in form and substance” in and among states and cultures.<sup>153</sup> This complexity should be taken into account when constructing titling programs, but often is not.

Many institutional economists seem to agree with de Soto that “[i]nternational law treats the property rights of individuals as more sacred than the sovereignty of states,”<sup>154</sup> in that a Western, market-based view of property rights is favored in many international instruments.<sup>155</sup> But on-the-ground realities differ.

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present, including competition, innovation, hard work, and trust in the individual. Samuelson, *supra* note 11, at 209. Carlos Montaner maintains that in large parts of Latin America people “nurture . . . relationships in which personal loyalty is rewarded and merit is substantially ignored.” He goes on to note that the Catholic clergy undermine the psychology of success through intoning against the profit motive. HARRISON & HUNTINGTON, *supra* note 148, at xxv, 59, 62.

<sup>150</sup> See Samuelson, *supra* note 11.

<sup>151</sup> See JOHN PHILLIP REID, *LAW FOR THE ELEPHANT: PROPERTY AND SOCIAL BEHAVIOR ON THE OVERLAND TRAIL passim* (1997).

<sup>152</sup> Samuelson, *supra* note 11. As an example, consider a letter from a U.S. nurse and Peace Corps volunteer in Malawi, with the following passage:

Malawians are a lovely people who value social relationships above all else. My job was to teach Western-style management skills to the nursing and administrative staff [of a local hospital.] As part of a management skills training course, I instituted the disciplinary process that was on the books but used since the British left in 1964. After a week, the supervisors returned and flatly refused to try and better supervise their employees using a disciplinary process. Why? The employees had put a curse on them, and they were afraid.

Samuelson, *supra* note 11.

<sup>153</sup> Robbins, *supra* note 43, at 179; see C.M. HANN, *PROPERTY RELATIONS: RENEWING THE ANTHROPOLOGICAL TRADITION* 10–12 (1998).

<sup>154</sup> DE SOTO, *supra* note 10, at 166.

<sup>155</sup> The formalization literature, and de Soto in particular, similarly criticize developing countries for providing too much protection to land owners: “the law and official agencies are trapped by early colonial and Roman law, which tilt

Thus, while it may well be true that “[p]rivate property is arguably the single most important institution of social and political integration,”<sup>156</sup> de Soto, and at times other formalizers, are apt to generalize the universality of their claims and oversimplify the barriers standing in the way of reaching desired outcomes.<sup>157</sup> As an example of the various types of property rights that should be considered in the formalization analysis, consider the prevalence of leasing relationships.

An increasingly common facet of life in developing and developed nations alike is the rise of rental markets. For example, according to the World Bank, more than 70 percent of land in some developed nations is rented or leased.<sup>158</sup> Yet leasing relationships are commonly ignored in titling schemes that expound the virtues of individual, private property rights over local cultural considerations.<sup>159</sup> Titling may have dire effects on these leasing relationships. How would sub-lesers in Copenhagen, or a family of renters on government land in Nairobi, react to a sudden change in property rights allocations? Evidence from South Africa suggests that property formalization may actually raise rental prices and inhibit the development of low-cost rental markets, be they formal or informal.<sup>160</sup> Consequently, there is a need to create security of tenure in leasing arrangements without a reallocation of property rights; this is a question that has not been adequately considered in the formalization literature to date.

Other policies besides titling may benefit lesers. In particular, the free, uninhibited operation of rental markets has been shown to lead to more secure property rights.<sup>161</sup> The World Bank, for example, advocates for the removal of bureaucratic barriers inhibiting the growth of rental markets, such as increasing the duration of tenancy and eliminating rent ceilings.<sup>162</sup> Studies focusing on Ethiopia indicate that barriers to the efficient operation of rental markets undermine the growth of non-farm enterprises.<sup>163</sup>

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toward protecting ownership.” *Id.* at 62.

<sup>156</sup> *Id.* at 195.

<sup>157</sup> See Thomas, *supra* note 17, at 189–91.

<sup>158</sup> WORLD BANK POLICY RESEARCH REPORT, *supra* note 20, at xxxii.

<sup>159</sup> *Id.* at xliii.

<sup>160</sup> Cousins, *supra* note 121, at 28.

<sup>161</sup> See WORLD BANK POLICY RESEARCH REPORT, *supra* note 20, at xxxvii.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at xxxiv.

Eliminating these restrictions on rental land could promote accelerated development of the rural economy, and be less economically or politically costly than a classic titling scheme. Many South Asian countries also have regulation “restricting land rentals to avoid exploitation of tenants by landlords.”<sup>164</sup> The case for the gradual abolition of such restrictions is bolstered by evidence from Southeast Asian countries that illustrates how quickly “active markets in use rights can develop” in the absence of burdensome restrictions.<sup>165</sup> Similar arguments apply to Latin America, which also has a history of weak land rental markets with many restrictions that lead to high transaction costs.<sup>166</sup> There are rich layers of entities, from individuals, to groups, to governments that claim property,<sup>167</sup> but many people in the developing world may be helped not through formalizing property rights, but, at least in the interim, through the less burdensome route of leasing reform.<sup>168</sup>

Beyond leasing, other examples of common property systems are replete around the world from South Africa to Indonesia and closer to home as is explored in Part III.<sup>169</sup> Common property comes in many forms, but often involves “group control over a resource” leading “to the balancing of benefits and costs.”<sup>170</sup> A common property system may be defined as a form of resource ownership in which the resource and user group are well defined, and rules exist regarding joint use.<sup>171</sup> Unlike open access areas lacking property rights,<sup>172</sup> common property involves ex ante rights and duties for non-property holders.<sup>173</sup> Common property is

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<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *See id.* at xxxv.

<sup>167</sup> Robbins, *supra* note 43, at 187.

<sup>168</sup> *See* Reed, *supra* note 53, at 485 (“Property establishes and preserves social order and encourages resource development by protecting private resources acquired without coercion, theft, or deception from the predations of others in the general community.”).

<sup>169</sup> *See infra* Part III.

<sup>170</sup> GLENN G. STEVENSON, COMMON PROPERTY ECONOMICS: A GENERAL THEORY AND LAND USE APPLICATIONS 3 (1991) (distinguishing between open access resources and common property).

<sup>171</sup> *Id.* at 40 (listing seven characteristics of common property systems).

<sup>172</sup> *Id.* at 49.

<sup>173</sup> *Id.* at 43, 49; WIETZE LISE, AN ECONOMETRIC AND GAME THEORETIC MODEL OF COMMON POOL RESOURCE MANAGEMENT 22 (2007).

thus like private property in that “the resource has a definable set of users who may be declared its owners, outsiders are excluded from use, and the users control resource extraction to increase the . . . net product in order to benefit themselves.”<sup>174</sup> But it is unlike private property because of the prevalence of collective ownership.<sup>175</sup>

Figure 1: Types of Property Institutions<sup>176</sup>

	<b>Private Property</b>	<b>Common Property</b>	<b>Open Access – Limited User</b>	<b>Open Access – Unlimited User</b>
<b>Group Limitation</b>	One Person	Members Only	Members Only	Open to Anyone
<b>Extraction Limitation</b>	Extraction Limited by Decision	Extraction Limited by Rules	Extraction Unlimited	Extraction Unlimited

Self-governing communities may use common property rights, according to Professor Ostrom, “in making and adapting rules within collective choice arenas regarding the inclusion or exclusion of participants, appropriation strategies, obligations of participants, monitoring and sanctioning, and conflict resolution.”<sup>177</sup> Some remote areas, such as Swiss alpine meadows, have been so managed for centuries.<sup>178</sup> This stands in contrast to the externally imposed and inflexible property regime from the Dawes Act set up to govern Native Americans’ land transactions, noted in the introduction.<sup>179</sup> Effective communal property management is the stuff of grassroots public participation. Polycentric theorists, including Professor Ostrom, have extolled the benefits of small, self-organized communities in the context of managing common resources.<sup>180</sup> Professor Ostrom in particular

<sup>174</sup> STEVENSON, *supra* note 170, at 57.

<sup>175</sup> *See id.* at 69.

<sup>176</sup> Figure redrawn from *id.* at 58.

<sup>177</sup> Ostrom, *Polycentric Systems*, *supra* note 30, at 8.

<sup>178</sup> *See id.* *See generally* ROBERT NETTING, *BALANCING ON AN ALP: CHANGE AND CONTINUITY IN A SWISS MOUNTAIN COMMUNITY* (1981).

<sup>179</sup> *See supra* text accompanying note 24.

<sup>180</sup> *See, e.g.*, Elinor Ostrom et al., *Revisiting the Commons: Local Lessons, Global Challenges*, 284 *SCI.* 278, 278 (1999) (questioning policymakers’ use of

states that social groups are often able to design, utilize, and adapt ingenious mechanisms in long-surviving resource systems to allocate use rights among themselves.<sup>181</sup> Even the medieval English commons from Hardin's paper was subject to regulation, such as stinting to prevent overgrazing, which was a layer of detail lost in his original analysis.<sup>182</sup> The same holds true now with meadow commons in Japan,<sup>183</sup> and even for online communities.<sup>184</sup> Professor Ostrom postulates that polycentrism featuring bottom-up governance and common property, depending on the culture at issue, can help capitalize on local knowledge and is a viable alternative to outright privatization or nationalization in some circumstances.<sup>185</sup>

Land titling in the form of privatizing land that was once managed collectively eschews polycentric notions of the benefits of common property systems and self-governance. The theory underlying such privatization is at its root about the incentive structure of private property rights, which give the owner a pecuniary interest in refraining from destructive practices and that in turn may be used to catalyze the creation of capital markets. Privatization requires the divvying up of land into distinct parcels and assigning individual rights to hold, use, and transfer those parcels as desired, subject to pertinent legal restrictions.<sup>186</sup> Economists argue that if private property rights are distributed to "users of common property. . . [then] incomes from labor and property will eventually exceed. . . income from labor alone," so long as private ownership is not concentrated into a monopoly.<sup>187</sup>

Property rights are sometimes applied in combinations that incorporate various overarching ideologies. For instance, many

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Garrett Hardin's tragedy of the commons in light of the empirical data showing self-organizing groups can effectively manage common-pool resources).

<sup>181</sup> See Ostrom, *Polycentric Systems*, *supra* note 30, at 8.

<sup>182</sup> See Susan J. Buck Cox, *No Tragedy on the Commons*, 7 ENVTL. ETHICS 49, 49–51 (1985).

<sup>183</sup> See David Feeny et al., *The Tragedy of the Commons: Twenty-Two Years Later*, 18 HUMAN ECOLOGY 1, 10 (1990).

<sup>184</sup> See Joseph S. Nye, Jr., *Cyber Power*, HARV. KENNEDY SCH. 15 (May 2010).

<sup>185</sup> See Ostrom, *Polycentric Systems*, *supra* note 30, at 1.

<sup>186</sup> See, e.g., PAUL B. TRAWICK, *THE STRUGGLE FOR WATER IN PERU: COMEDY AND TRAGEDY IN THE ANDEAN COMMONS* 304 (1991).

<sup>187</sup> R. Peter Terrebonne, *Privatizing the Commons: The Distribution of Total Product*, 19 EASTERN ECON. J. 165, 165 (1993).

tribal cultures balance individual ownership with the norms of collective groups.<sup>188</sup> A contemporary example is China, where Deng Xiaoping's reforms have pushed China towards transforming property rights through the creation of special economic zones and leasing what had been communal land.<sup>189</sup> These reforms provide a vivid illustration of how fundamentally different types of property rights may coexist within a single society and contribute to its rapid economic development.<sup>190</sup>

Before turning to the political and environmental implications of codifying cultural relativism within land titling design, it is important to note the applicability of the “tragedy of the anticommons” to help explain the drawbacks of formalization. The tragedy of the anticommons situation is one “in which private ownership leads to underuse . . . that is detrimental to both individual owners and the public”—the opposite of the tragedy of the commons discussed above.<sup>191</sup> Under this conceptualization, “multiple owners each have a right to exclude others . . . and no one has an effective privilege of use” stifling innovation.<sup>192</sup> This situation is rare because property owners can oftentimes buy one another out and develop the resource, but it can happen.<sup>193</sup> Land titling has been described as a type of anticommons, in that a

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<sup>188</sup> See, e.g., David E. Ault & Gilbert L. Rutman, *The Development of Individual Rights to Property in Tribal Africa*, 22 J.L. & ECON. 163, 163 (1979); Scott J. Shackelford, *The Tragedy of the Common Heritage of Mankind*, 28 STAN. ENVTL. L.J. 109, 153–54 (2009) (expanding on this treatment of comparative political ideologies and their conceptualization of property rights).

<sup>189</sup> See Louis Putterman, *The Role of Ownership and Property Rights in China's Economic Transition*, 144 CHINA Q. 1047, 1047 (1995); *Still Not to the Tiller*, ECONOMIST, Oct. 23, 2008, at 16, available at <http://www.economist.com/node/12471124>; Peter F.

<sup>190</sup> See *Promises, Promises: A “Breakthrough” in Land Reform? Or a Damp Squib?*, ECONOMIST, Oct. 16, 2008, at 62, available at [http://www.economist.com/world/asia/display\\_story.cfm?story\\_id=12437707](http://www.economist.com/world/asia/display_story.cfm?story_id=12437707).

<sup>191</sup> Mark A. Rodwin, *Patient Data: Property, Privacy & the Public Interest*, 36 AM. J.L. & MED. 586, 603 (2010).

<sup>192</sup> *Id.* at 603–04 (quoting Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 624 (1998)); Michael A. Heller, *The Tragedy of the Anti-commons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 624 (1998).

<sup>193</sup> See Richard A. Epstein & Bruce N. Kuhlik, *Is There a Biomedical Anticommons?*, REG., Summer 2004, at 54–56 (arguing against a biomedical anticommons, but noting that an anticommons scenario can arise such as in situations of sequential monopolists).

multitude of owners means that no one person has a veto over management decisions, resulting in gridlock.<sup>194</sup> But D. Benjamin Barros has critiqued this application, since not all “owners” are equal and in fact overlapping authority leads to transaction costs and free riders, but not necessarily to the formation of an anticommons.<sup>195</sup> This interpretation evokes Professor Ostrom’s work on polycentric governance, in particular the idea that overlapping authority and group control is not necessarily something to be feared, even if it may be foreign to Western notions of private property. The success of such forms of governance depends on building the political coalitions necessary to undertake culturally relative property reform efforts as part of broader rule of law and access to justice initiatives.

### C. Formalizing the “People’s Law”

Overcoming political opposition is central to formalizing the “people’s law,” and consequently reinforcing and legitimizing, rather than replacing, local property regimes. For example, in Nairobi, “it is not the lack of laws regarding land [that inhibits reform], it is about the unwillingness or lack of political will on the part of government in light of actions by powerful members of society to effectively enforce the law.”<sup>196</sup> As with the “thin” reform of procedural rule of law, there are significant political interests who wish to maintain the status quo in the developing world, including politicians, large property owners, and their lawyers.<sup>197</sup> Indeed, much of the land now being adversely possessed by the poor is likely held by urban elites.<sup>198</sup> Giving the poor legal title to the land they occupy would effectively amount to the uncompensated redistribution of a massive amount of wealth that will be fought by elites across the developing world.<sup>199</sup> But formalizers such as de Soto pay scant attention to how to build the political coalitions necessary to take on powerful vested interests,

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<sup>194</sup> See D. BENJAMIN BARROS, HERNANDO DE SOTO AND PROPERTY IN A MARKET ECONOMY 110 (2010).

<sup>195</sup> *Id.* at 111.

<sup>196</sup> Robbins, *supra* note 43, at 184.

<sup>197</sup> Samuelson, *supra* note 11.

<sup>198</sup> See, e.g., *Brazil Police Storm Landless Settlement*, *supra* note 2.

<sup>199</sup> See Deininger & Feder, *supra* note 87, at 238–39, 257 (arguing that marginal governance in developing nations often means that instituting more formalized land rights cements the dominance of the elite).



noting “[T]he poor must make their voices heard in the democratic process,” but emphasizing a top-down approach starting with the Executive.<sup>200</sup> This conclusion runs contrary to the grassroots mobilization envisioned by Professor Ostrom, and stands in contrast to myriad field studies demonstrating the benefits of local self-organization relying on small groups rather than state-imposed reform.<sup>201</sup> And even if reform was successful, new property owners would have to continue mobilizing to protect against expropriation, which may be difficult since it is not clear how happy the poor would be to accept government recognition if it brought with it taxes and regulation.<sup>202</sup> As Professor Robbins states, “The offer of tenure with the costs and responsibilities it may entail is not an obvious economic good for those who straddle city and country.”<sup>203</sup>

One of the growing risks of failing to politically mobilize is being unable to protect against mass expropriation (i.e., expropriating the property of an entire community). This practice is increasingly common given that, as has been shown, land values often increase after formal titling,<sup>204</sup> violating the fundamental right of exclusion that is the basis of property rights<sup>205</sup> as

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<sup>200</sup> DE SOTO, *supra* note 10, at 191. Other nations such as Argentina have had more success with instituting a top-down approach, but even there the political atmosphere has become increasingly polarized. *See, e.g.*, Roger F. Noriega & José R. Cárdenas, *Argentina’s Race to the Bottom*, AM. ENTERPRISE INST. (Mar. 15, 2013), <http://www.aei.org/outlook/foreign-and-defense-policy/regional/latin-america/argentinas-race-to-the-bottom/>.

<sup>201</sup> *See, e.g.*, Clark C. Gibson, Elinor Ostrom & Margaret A. McKean, *Forests, People, and Governance: Some Initial Theoretical Lessons*, in PEOPLE AND FORESTS: COMMUNITIES, INSTITUTIONS, AND GOVERNANCE 227, 227–28 (Clark C. Gibson et al. eds., 2000).

<sup>202</sup> Robbins, *supra* note 43, at 192 (noting that many small businesses operate at a slim margin, and formalization may cut into that profit margin, indirectly impacting local support of property reform).

<sup>203</sup> *Id.* at 189.

<sup>204</sup> WORLD BANK POLICY RESEARCH REPORT, *supra* note 20, at xxvi.

<sup>205</sup> At the conceptual core of property lies what Blackstone termed in exaggeration the “total exclusion of the right of any other person in the universe.” Reed, *supra* note 53, at 487–88, 500 (“If having ‘property’ means anything, historically and legally, it is that the owner can exclude others from the resource owned and that others have a duty not to infringe this right.”). According to Professor Reed’s definition of exclusion, property has several characteristics, including: “(1) a constitutional right; (2) recognized and enforced by the laws of the state; (3) that excludes others from specifiable limited resources; (4) which are originally possessed or have been acquired without coercion, theft, or deception.” *Id.* at 473.

recognized by the U.S. Supreme Court.<sup>206</sup> One study estimated “that a formal title doubles the price of land in Brazil.”<sup>207</sup> Another found “that land values are increased by a more modest” 4 percent in Ecuador.<sup>208</sup> Many estimates seem to fall within this range.<sup>209</sup> In Phnom Penh, Cambodia, for example, formal titles have increased the value of land by ten times the prior asking price.<sup>210</sup> In this case, the land was so valuable that the slums were cleared out, and the residents relocated—seemingly defeating one of the primary purposes of reform efforts by being too successful.<sup>211</sup> In other instances, such as in Manila, “squatters”<sup>212</sup> have sold their land to middle-income residents who wait for the announcement of a titling program and then enjoy the leap in property values.<sup>213</sup> Thus, land titling may increase the risk that the politically powerful will take, or at least undercompensate, the poor for their land. Studies

<sup>206</sup> *Id.* at 488 n.86 (citing *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999); see also *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 246 (1918) (Holmes, J., concurring) (“Property depends upon exclusion by law from interference . . .”); cf. *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (referring to “one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others”); *Int’l News Serv.*, 248 U.S. at 250 (Brandeis, J., dissenting) (“An essential element of individual property is the legal right to exclude others from enjoying it.”)).

<sup>207</sup> See Lee Alston, Gary Libecap & Robert Schneider, *The Determinants and Impact of Property Rights: Land Titles on the Brazilian Frontier*, 12 J. OF L., ECON. & ORG. 25, 25–26 (1996).

<sup>208</sup> See Jean O. Lanjouw & Philip I. Levy, *Untitled: A Study of Formal and Informal Property Rights in Urban Ecuador*, 112 ECON. J. 986, 986–87 (2002) (“[T]he value of property owned by a newly established household with no adult males can increase 46% with the acquisition of title.”).

<sup>209</sup> See, e.g., Emmanuel Jimenez, *Tenure Security and Urban Squatting*, 66 REV. ECON. & STAT. 556, 556–58 (1984) (finding an increase of 58 percent in the value of land after formal titling); Joseph Friedman, Emmanuel Jimenez & Stephen Mayo, *The Demand for Tenure Security in Developing Countries*, 29 J. DEV. ECON. 185, 185 (determining that formal titles increase the value of land in Manila by 25 percent).

<sup>210</sup> See Special Representative of the Secretary-General for Human Rights in Cambodia, *Land Concessions for Economic Purposes in Cambodia: A Human Rights Perspective*, Cambodia Office of the High Comm’r on Human Rights UN 22 (Nov. 2004), available at [http://cambodia.ohchr.org/WebDOCs/DocReports/2-Thematic-Reports/Thematic\\_CMB14112004E.pdf](http://cambodia.ohchr.org/WebDOCs/DocReports/2-Thematic-Reports/Thematic_CMB14112004E.pdf).

<sup>211</sup> See *id.*

<sup>212</sup> “Squatters” is a common term in the formalization literature referring to impoverished citizens of the developing world who reside on property to which they have no formal title. It is not meant here to be derogatory in any way.

<sup>213</sup> Gravois, *supra* note 19.

suggest that legal reform is only effective when the government can be held accountable, which is not necessarily true in all developing nations.<sup>214</sup>

There is also the difficult question to consider of whether a legal amnesty for those who have previously benefited from the invasion of another's land leads to a greater overall respect for property. Would such an action in fact create perverse incentives, i.e., the hope for future amnesty, thus increasing the motivation for property invasion and thereby sacrificing the integrity of nascent political coalitions?<sup>215</sup> In response, Geoffrey Payne, a British urban planning consultant, has recommended "temporarily insulating slums from" commercial land markets "by granting informal neighborhoods" land rights for a limited duration.<sup>216</sup> This interim period would allow land values to increase. Then, the neighborhood would receive a group land title, which then may be subdivided, avoiding future predatory practices,<sup>217</sup> and having the added benefit of maintaining local property allocations. It is important, though, to ultimately grant property rights over a long enough horizon such that investment incentives may "be defined in a way that makes them easy to observe, enforce, and exchange."<sup>218</sup>

Realizing the benefits from land registration seems to depend on the quality of governance and the nature of the intervention.<sup>219</sup> Cohesive political organization is essential to bring about lasting property reform enjoying majority support. Such organization should be catalyzed from the bottom up in keeping with polycentric governance to stand the best chance of enduring success,<sup>220</sup> while recognizing that there is still a coordinating role for governments, such as by reinforcing local cultural best practices, to avoid problems of gridlock as is discussed in Part

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<sup>214</sup> See Deininger & Feder, *supra* note 87, at 257–58.

<sup>215</sup> Cf. Mahmood Mamdani, *A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC)*, 32 *Diacritics* 33, 33–34 (2002) (discussing the role of amnesty in the South African TRC process).

<sup>216</sup> Gravois, *supra* note 19.

<sup>217</sup> See GEOFFREY PAYNE ET AL., *SOCIAL AND ECONOMIC IMPACTS OF LAND TITLING PROGRAMMES IN URBAN AND PERI-URBAN AREAS: INTERNATIONAL EXPERIENCE AND CASE STUDIES OF SENEGAL AND SOUTH AFRICA* 29 (2008), available at [http://www.unrol.org/files/synthesis\\_report.pdf](http://www.unrol.org/files/synthesis_report.pdf).

<sup>218</sup> WORLD BANK POLICY RESEARCH REPORT, *supra* note 20, at xxii.

<sup>219</sup> See Robbins, *supra* note 43, at 191.

<sup>220</sup> See Ostrom, *supra* note 109, at 3–5.

IV.<sup>221</sup> Grassroots organizations and civil society generally should be encouraged if both governments and powerful local elites are to respect the various titles and claims held by people and groups and curtail mass expropriation.<sup>222</sup> Property titles are by themselves useless without a robust political culture and legal system to enforce them.<sup>223</sup>

Yet even if political coalitions are successful in formalizing the informal economy, is that necessarily the optimal outcome? The cost-effectiveness and long-term impacts of government intervention in property rights are not well known.<sup>224</sup> Moreover, formalizers can go too far in the other direction and spend so much effort on deciding how to formalize customary property relationships that they neglect to consider whether existing customary rules are, in fact, good rules. Some scholars, such as Professor Robert Cooter, have published studies suggesting that customary rules generated by closely-knit groups may be efficient when the law reflects those local social norms.<sup>225</sup> Yet others, such as Professor Michael Trebilcock, note that some customary law discounts the interests of outsiders, and particularly vulnerable minority groups, women,<sup>226</sup> indigenous peoples, and nomads.<sup>227</sup>

<sup>221</sup> Cf. Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 STAN. J. INT'L L. 283, 283 (2004) (discussing network theory as applied to transnational regulatory networks and its progeny).

<sup>222</sup> See, e.g., Ostrom et al., *supra* note 180, at 282 (illustrating the benefits of local self-organization to manage common resources).

<sup>223</sup> Robbins, *supra* note 43, at 189.

<sup>224</sup> See Deininger & Feder, *supra* note 87, at 256.

<sup>225</sup> See Robert Cooter, *The Rule of State Law and the Rule-of-Law State: Economic Analysis of the Legal Foundations of Development*, in ANNUAL WORLD BANK CONFERENCE ON DEVELOPMENT ECONOMICS 191, 191–92 (M. Bruno & B. Pleskovic eds., 1996) (“Alignment of state law with social norms enables citizens to economize on costly legal counsel by using morality as a guide to legality . . . . [Risky behavior can be] rational when state law reflects social norms. When this is the case most people perceive the law as just, and many people obey the law out of respect, thereby creating a rule-of-law state.”); Robert Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PENN. L. REV. 1643, 1643–44 (1996).

<sup>226</sup> WORLD BANK POLICY RESEARCH REPORT, *supra* note 20, at xx (finding that control of land has been shown to be particularly imperative for women, whose asset ownership affects household spending, such as on girls’ education).

<sup>227</sup> Michael Trebilcock, *Comment on Cooter The Rule of State Law and the Rule-of-Law State: Economic Analysis of the Legal Foundations of Development*, in ANNUAL WORLD BANK CONFERENCE ON DEVELOPMENT ECONOMICS 187–90 (Micheal Bruno & Boris Pleskovic, eds., 1996).

Examples from the U.S. experience include the mining associations in California, which excluded Mexican and Asian miners.<sup>228</sup> Without certain safeguards, formalizing these relationships could run the risk of codifying informal law lacking human rights protections. As an example of exclusion concerns that may arise, there are inheritance considerations. In many cultures, women and certain family members are not always eligible to inherit property.<sup>229</sup> Currently, these people have property rights as members of a group. But if property is privatized, these rights could disappear, potentially resulting in fewer, not greater, property rights protections for the overall population.<sup>230</sup> This further underscores the need for instilling localized, culturally relative formalization into titling efforts along with baseline human rights protections so as not to jeopardize at-risk populations.<sup>231</sup>

There is also the larger question to consider of how, in the words of Matthew Rosenberg, “informal property arrangements can” best “be incorporated into a formal body of” enforceable law.<sup>232</sup> What is the optimal mechanism, for example, for codifying the unwritten holdings of local, informal dispute resolution bodies?<sup>233</sup> Formalizers such as de Soto argue that such a system

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<sup>228</sup> DE SOTO, *supra* note 10, at 137–38, 145.

<sup>229</sup> See, e.g., Elizabeth Cooper, *Women and Inheritance Sub-Saharan Africa: What Can Change?*, 30 DEV. POL’Y REV. 641, 641 (2012).

<sup>230</sup> Robbins, *supra* note 43, at 187.

<sup>231</sup> See Miller, *supra* note 33, at 133; Declaration on the Right to Development, G.A. Res. 41/128, art. 1, ¶¶.1-2, U.N. Doc. A/RES/41/128 (Dec. 4, 1986), available at <http://www.un.org/documents/ga/res/41/a41r128.htm>. Other drawbacks of formalizing customary law include the fact that it may not keep pace with rapid environmental and technological changes, though it may stand a better chance than externally imposed one-sized-fits-all schemes such as the Dawes Act. See Eric A Posner, *Law, Economics and Inefficient Norms*, 144 U. PENN. L. REV. 1697, 97–98 (1996); Samuelson, *supra* note 11. Technology can also be a lifeline for squatter communities struggling with the travails in informality, as seen in the U.N. program to map slums using satellites in order to enhance legitimacy and enable the development of basic services. See *Kenya Slum Upgrading Project*, UN-Habitat <http://www.unhabitat.org/content.asp?cid=668&catid=206&typeid=13> (last visited Mar. 24, 2014).

<sup>232</sup> Rosenberg, *supra* note 94.

<sup>233</sup> In answer to this issue, de Soto evokes another anecdote, describing passing a series of farms in rural Bali. Each property had a different dog that was defending it: “Those Indonesian dogs may have been ignorant of formal law, but they are positive about which assets their masters controlled.” DE SOTO, *supra* note 10, at 162.

could be organically generated, given that many local informal dispute resolution bodies use “quasi-legal” methods for resolving property disputes that share commonalities and could be codified.<sup>234</sup> Efficient conflict resolution is key if land formalization is to succeed, including “ensuring minimum standards for the rapid dispensation of justice, accountability, and transparency.”<sup>235</sup> Professor Ostrom’s work on polycentric governance similarly recognizes the critical importance of effective, low-cost dispute resolution.<sup>236</sup> The key for formalizers “is to show that informal property arrangements can” in fact be codified and enforced.<sup>237</sup> This would require “that the people have more direct political” and economic “control over their property” to the extent that their cultures allow.<sup>238</sup>

Codifying the people’s law must also be done in an environmentally conscious manner since encouraging land claims can also hurt society by leading to environmental degradation. Motivated by potential gains, squatters with a high tolerance of risk will settle on and claim marginal land, such as land left vacant to prevent erosion, thus increasing social environmental costs.<sup>239</sup> However, there is a counterargument to this concern insofar as this initial “invasion” of property will not need to be repeated, since early landowners will leverage their property as capital to start businesses. Latecomers may then choose to devote their labor to the established economy rather than settling marginal land given higher possible rates of return. Again, insights from the field of polycentric governance provide evidence of local groups being able to sustainably manage their property.<sup>240</sup> Different cultures

<sup>234</sup> Rosenberg, *supra* note 94.

<sup>235</sup> WORLD BANK POLICY RESEARCH REPORT, *supra* note 20, at xxi. See ANIL DIVAN, LEGAL AND JUDICIAL REFORM (2002) (discussing the need for legal reform in India); H.R. Bhardwaj, *Legal and Judicial Reforms in India*, Int’l Ctr. Alt. Dispute Resolution, available at [http://www.icadr.org/articles/article\\_1.html](http://www.icadr.org/articles/article_1.html) (last visited Mar. 24, 2014) (investigating the use of informal Indian alternative dispute resolution systems termed ‘Lok Adalats’ (peoples’ courts) to settle disputes and reduce judicial backlog).

<sup>236</sup> See Thomas Dietz, Elinor Ostrom & Paul Stern, *The Struggle to Govern the Commons*, 302 SCI. 1907, 1909, 1909 (2003).

<sup>237</sup> Rosenberg, *supra* note 94.

<sup>238</sup> *Id.*

<sup>239</sup> See Carol N. Rose, *Invasions, Innovation, Environment*, in HERNANDO DE SOTO AND PROPERTY IN A MARKET ECONOMY 21, 29 (D. Benjamin Barros ed., 2010).

<sup>240</sup> See Ostrom, *supra* note 30, at 2.

maintain varied perspectives and philosophies regarding environmental governance.<sup>241</sup> These various approaches can, in the best-case scenario, result in adaptive learning. In the worst case, they can spark enduring conflicts. Ensuring the sustainable use of resources while respecting local traditions requires infusing titling efforts with characteristics identified by advocates of polycentric governance, including the need for robust information sharing, effective conflict resolution, graduated sanctions, and adaptive frameworks that can flex with changing socioeconomic and environmental conditions as are discussed in Part IV.<sup>242</sup> Building such flexible titling efforts to formalize the people's law is no small feat. The picture is muddied still further when considering the empirical support for the links in the formalization chain, discussed next.

#### D. *Empirical Support for the Four Links in the Formalization Chain*

The primary assumptions underpinning the formalization hypothesis are that newly granted land titles may be used as collateral to generate loans to make improvements,<sup>243</sup> spur financial institutions, and increase growth rates.<sup>244</sup> It is uncontroversial that property is a key element for generating wealth, but significant questions arise from this basic premise. Would a market develop for property after titling? And does such a market exist in developing nations, albeit informally, already? Would the value be high enough to overcome transaction costs?<sup>245</sup> To parse these issues, studies demonstrate that four transfers must happen for formalization to function as advertised: (1) property must be transformed into collateral; (2) collateral must be transformed into credit; (3) credit must be transformed into income; and (4) income must be transformed into capital markets.<sup>246</sup>

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<sup>241</sup> See Dietz, Ostrom & Stern, *supra* note 236, at 1909.

<sup>242</sup> *Id.*

<sup>243</sup> Inequality can hamper growth because loans cannot be collateralized. See e.g. Philippe Aghion, Eve Caroli & Cecilia Garcia-Penalosa, *Inequality and Economic Growth: The Perspective of the New Growth Theories*, 37 J. ECON. LIT. 1615, 1615 (Dec. 1999).

<sup>244</sup> Thomas, *supra* note 17, at 189–91.

<sup>245</sup> See Thomas, *supra* note 17, at 189–91.

<sup>246</sup> See Hans P. Binswanger & Klaus Deininger, *Explaining Agricultural and*

Empirical investigation yields mixed signals as to the actual occurrence and general robustness of these four transfers. First, in Peru it was shown that titling did not lead to an increase in available collateral of the kind that banks were likely to recognize.<sup>247</sup> However, studies from other nations, notably Thailand, have reached the opposite conclusion. Two studies in particular are illustrative. The first, by Professor Gershon Feder, examines the “effects of formal titles in four rural provinces in Thailand,” finding that, regardless of the involvement of banks, “owners of untitled land are as likely to receive credit as farmers with titled land, even from banks.”<sup>248</sup> For those Thai farmers “with untitled land, group lending” is substituted for collateral,<sup>249</sup> highlighting the more collective conception of property rights common in certain societies and providing further evidence against adopting a one-size-fits-all approach. But “the size of loans” that farmers with formalized property received from banks is over 50 percent larger.<sup>250</sup> The authors explain this result through the fact that “titled land can be used as collateral . . . having a formal title increases the value of land, and hence the value of the available collateral.”<sup>251</sup> Indeed, due to imperfections in the credit markets, such as the inability of banks to foreclose on poor rural borrowers and the increased covariance of risk in farming communities due to the common risk factor of weather, large farm owners may be the only ones able to benefit from increased access to credit.<sup>252</sup>

Second, the basic credit model maintains that formalized property rights increase a borrower’s collateral value due to lower transaction costs, thereby increasing efficiency and, eventually, output. Some “evidence suggests that access to credit is increased” to an extent through formalized titling, assuming an efficient credit

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*Agrarian Policies in Developing Countries*, 35 J. ECON. LIT. 1958, 1958–60 (1997); Timothy Besley, *Property Rights and Investment Incentives: Theory and Evidence from Ghana*, 103 J. POL. ECON. 903, 903–04 (1995).

<sup>247</sup> See WORLD BANK POLICY RESEARCH REPORT, *supra* note 20, at xxvi.

<sup>248</sup> Woodruff, *supra* note 115, at 1219; see Gershon Feder, *The Impact of Landownership Security: Theory and Evidence from Thailand*, 2 WORLD BANK ECON. REV. 187, 187 (1998); Gershon Feder, *Collateral Guaranties and Rural Credit in Developing Countries: Evidence from Asia*, 2 AGRICULTURAL ECON. 231, 231–32 (1988).

<sup>249</sup> Woodruff, *supra* note 115, at 1219.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 1219 n.8.

<sup>252</sup> See Deininger & Feder, *supra* note 87, at 246.



market and the absence of cost to property rights reform.<sup>253</sup> Yet other studies have found that titling does little to increase access to credit.<sup>254</sup> Some go so far as to conclude that in markets with low competition among lenders, it might not be optimal to have enforceable property rights, and that if property rights were formalized no efficiency gains would be realized.<sup>255</sup> Results from other regions of the world on the link between formal property rights and investment activity are similarly ambiguous. Researchers in Paraguay found that farmers with more than four hectares of land who have a formal title have good access to credit, but that having a formal title had no effect on farmers with less than two hectares of land.<sup>256</sup> Nevertheless, Timothy Besley determined that “farmers who have various transfer rights to their land in Ghana invest more in” improvements,<sup>257</sup> which can raise productivity.<sup>258</sup> Consequently, there is some support for the first two links in the formalization chain, but that evidence is far from definitive. Increased access to credit depends on the liquidity of the market and the existence of worthy investment projects; these conditions do not always play out in practice.<sup>259</sup>

Where credit is given, some evidence for the third link, between credit and income, suggests that earnings are indeed increased by some 25 percent after formalization.<sup>260</sup> These

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<sup>253</sup> Woodruff, *supra* note 115, at 1219; *see* Tim Besley & Matreesh Ghatak, *The de Soto Effect* ii (STICERD Working Paper, London School of Economics & Political Science, Apr. 2009), [http://eprints.lse.ac.uk/25429/1/de\\_soto\\_effect.pdf](http://eprints.lse.ac.uk/25429/1/de_soto_effect.pdf) (finding that the positive impact of formalization varies “with the degree of market competition. Where competition is weak, it is possible that borrowers will be worse off when property rights improve.”).

<sup>254</sup> Woodruff, *supra* note 115, at 1219; *but see* WORLD BANK POLICY RESEARCH REPORT, *supra* note 20, at xxvi (noting that in Peru, property rights formalization has contributed to a 50 percent increase in the labor market).

<sup>255</sup> *See* Besley & Ghatak, *supra* note 253, at ii (arguing that in inefficient systems, lenders would favor property rights reform, while poor borrowers would lobby against reform).

<sup>256</sup> *See* M.R. Carter & P. Olinto, Getting Institutions Right for Whom: The Wealth-differentiated Impact of Property Rights Reform, XXI LASA Cong. (1998); Robert Ruben et al., Land Rights, Farmers’ Investment, and Sustainable Land Use: Modeling Approaches and Empirical Evidence, in *ECONOMIC POLICY AND SUSTAINABLE LAND USE* 317, 326–27 (Nico Heerink et al. eds., 2001).

<sup>257</sup> Woodruff, *supra* note 115, at 1219 n.7; Besley, *supra* note 246, at 903.

<sup>258</sup> WORLD BANK POLICY RESEARCH REPORT, *supra* note 20, at xix.

<sup>259</sup> *See* Deininger & Feder, *supra* note 87, at 246, 256.

<sup>260</sup> *See* Jonathan Morduch, *The Microfinance Promise*, 37 J. ECON. LIT. 1569, 1569–70 (1999).

findings show that if collateral could indeed “be translated into credit,” it “would likely have a significant impact on earnings.”<sup>261</sup> Once again, though, other studies have reached a contradictory conclusion, noting that “[t]here is . . . no evidence of either a credit effect or a measurable impact of titling on income or expenditure, consistent with the notion that, without complementary changes in banking and rules for land transactions, titling alone is unlikely to set off big changes in economic structure.”<sup>262</sup>

In sum, there is relatively little data linking formalizing property titles to increased collateral, credit access, and thus poverty reduction.<sup>263</sup> Nor are there many studies demonstrating how widespread property ownership leads directly to advanced capital markets.<sup>264</sup> Further research is needed to delve more deeply into the links in the formalization chain, as well as the relationship between titling, trade, and entrepreneurship.

#### 1. *Indirect Benefits of Formalization: Trade*

The connection between property and trade is in many ways stronger than its relationship to capital markets, and may be considered an additional if unintended component of the formalization chain. There is a strong empirical link between formalized property rights and trade promotion. As Professor Woodruff explains:

I may not know you, but I can quickly confirm whether you own real estate, automobiles, or other assets. I can also learn whether you have pledged those assets in support of other transactions. And, within some limits, I can take those assets from you if you do not perform as promised in our relationship.<sup>265</sup>

Researchers investigated settlers on Brazil’s Amazonian frontier to determine the veracity of this link between titling and trade, finding that “having title is perceived as an advantage by settlers, as it broadens the range of potential purchasers.”<sup>266</sup> Other researchers surveyed titled and untitled landowners in Guayaquil,

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<sup>261</sup> Woodruff, *supra* note 115, at 1220.

<sup>262</sup> Deininger & Feder, *supra* note 87, at 253.

<sup>263</sup> See HARRISON & HUNTINGTON, *supra* note 148, at xxxiv.

<sup>264</sup> Woodruff, *supra* note 115, at 1220 (“Capital markets function poorly in developing countries for reasons other than property title.”).

<sup>265</sup> *Id.* at 1217.

<sup>266</sup> Alston, Libecap & Schneider, *supra* note 207, at 29.

Ecuador, and “asked whether they would be able to contract with a stranger for the sale or rental of their property.”<sup>267</sup> Those with formalized property claims were far “more likely to say they could do so.”<sup>268</sup> Such an efficient titling system can also help prevent abuses of the rule of law.<sup>269</sup> Consequently, besides creating collateral and credit, property formalization may have other benefits, including trade promotion and entrepreneurship, but more empirical research is needed to confirm these links.

## 2. *Indirect Benefits of Formalization: Entrepreneurship*

Like trade, there is also empirical support for the proposition that titling incentivizes capital improvements to the home and incentivizes entrepreneurial activity. For example, one study found that in South Africa, title-holders invest in improving their homes more often than informal residents, which often raises property values.<sup>270</sup> Professor Robert Townsend similarly reported “data from separate surveys in rural Thailand, focusing on the formation of household enterprises,” noting that households with “businesses are much more likely . . . to have titled land” and suggesting that titling “may encourage entrepreneurship.”<sup>271</sup> Yet other work has found that banks are responsible for less than 10 percent of startup funding to entrepreneurs in developing economies, again demonstrating the reluctance of banks to use formalized titles as collateral.<sup>272</sup> One reason for this may be that collateral prices can be very high, valued at many times the size of the principal loans in some countries.<sup>273</sup> “In Mexico, for example, banks require collateral averaging three times” the principal.<sup>274</sup> This is partly due

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<sup>267</sup> Woodruff, *supra* note 115, at 1217.

<sup>268</sup> *Id.*; see Lanjouw & Levy, *supra* note 208, at 986, 1000–01.

<sup>269</sup> See DE SOTO, *supra* note 10, at 198.

<sup>270</sup> See Gina Shoeman, *Soweto Property Market Boom*, PROP. NEWS (Dec. 12, 2006), <http://www.privateproperty.co.za/news/market-news/soweto-property-market-boom.htm?id=51>; Erica Field & Maximo Torero, *Do Property Titles Increase Credit Access Among the Urban Poor? Evidence from a Nationwide Titling Program* (Mar. 2006) (unpublished manuscript), available at <http://www.economics.harvard.edu/faculty/field/files/FieldToreroocs.pdf>.

<sup>271</sup> Woodruff, *supra* note 115, at 1219; ROBERT M. TOWNSEND, TOWNSEND THAI PROJECT HOUSEHOLD ANNUAL RESURVEY (2010), <http://cier.uchicago.edu/data/annual-resurvey.shtml>.

<sup>272</sup> Woodruff, *supra* note 115, at 1219.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* at 1219; Rafael La Porta, Florencio López-de-Silanes & Guillermo Zamarripa, *Related Lending*, 118 Q. J. ECON. 231, 231 (2003).

to high foreclosure costs that may be reduced through a comprehensive property rights system.<sup>275</sup>

In summary, if there are not breaks in the formalization chain, then the literature demonstrates that there are at least stress points that require further empirical treatment. Though there is some support in Ghana, Paraguay, and Thailand that formal land titles increase access to formal credit and promote trade, other studies have found that urban squatters in Turkey, Mexico, South Africa, and Colombia enjoy little of the benefit of formalized property rights that formalizers suppose. For example, according to Professor Alan Gilbert, “[i]n Bogotá. . . property titles seem to have brought neither a healthy housing market nor a regular supply of formal credit.”<sup>276</sup> Moreover, some banks increasingly “care more about stable employment than” land ownership in making loan decisions.<sup>277</sup> Thus, it is clear that there are other forces at work beyond simply the presence or absence of titling that explain the success or failure of these programs—capital markets and property rights regimes “function poorly in developing countries” for other reasons than property rights alone.<sup>278</sup> These include: foisting inflexible private property rights regimes on cultures unfamiliar with the concept; lack of grassroots political coalitions to promote culturally relative and holistic reform; and insufficient attention being paid to property relationships, such as leasing, that are common in the developing world.<sup>279</sup> Each of these factors must be addressed if property reform is to embrace polycentric principles and to become more lasting and culturally compassionate.

#### E. *Summary: Why Formalization is Not the Whole Answer*

This review of the empirical literature has demonstrated that the formalization theory is overly broad, trying to do too much with too little empirical support. What evidence exists demonstrates that at best the four links in the formalization chain are strained, and that cultural and political dimensions must be

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<sup>275</sup> Woodruff, *supra* note 115, at 1220 (“The sort of broad-based, property registration system might help reduce foreclosure costs, but is not likely to be sufficient by itself.”).

<sup>276</sup> Gravois, *supra* note 19.

<sup>277</sup> *Id.*

<sup>278</sup> Woodruff, *supra* note 115, at 1220.

<sup>279</sup> Libecap, *supra* note 86, at 1167–68.

added to the classic formalization thesis for it to enjoy more universal resonance. At least, a distinction should be made between institutions that define property rights (including personal property) and those that regulate those who default on their obligations and may be deprived of their rights.<sup>280</sup> This clarification denotes the need for formalizers to consider studies from the field of polycentric governance to craft land titling programs that reinforce rather than replace local good governance while providing baseline human rights protections. But that is far easier said than done—it is so difficult that, in fact, there has arguably not yet been a single completely successful formalization program.<sup>281</sup> Land titling, then, is only part of the answer to solving urban poverty and galvanizing entrepreneurship.<sup>282</sup> This fact is made more evident below, by comparing the experiences of Indonesia and South Africa with the United States in order to exemplify the many nuances in property reform.

### III. CASE STUDIES IN LAND TITLING: UNITED STATES, INDONESIA, AND SOUTH AFRICA

Applying the lessons from Part II to build successful property reform interventions requires analyzing case studies of land titling. Three in particular illustrate the divergent nature and types of titling systems, juxtaposing the property reform process in the United States that formalizers have pointed to as a successful model with contemporary reform efforts in Indonesia and South Africa. This Part begins by analyzing the relevance of the U.S. experience to titling efforts before investigating ongoing efforts at land titling further afield. Throughout, the importance of culturally relative and localized reform is emphasized, in keeping with polycentric principles.

#### A. *Property Rights in the American West and Developed World*

During the late nineteenth century, overlapping land claims

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<sup>280</sup> See Davis, *supra* note 18, at 189–90.

<sup>281</sup> See WORLD BANK POLICY RESEARCH REPORT, *supra* note 20, at xx (noting that land formalization programs impact “(a) households’ ability to produce for their subsistence and to generate a marketable surplus; (b) their social and economic status and often their collective identity; (c) their incentive to invest and to use land in a sustainable manner; and (d) their ability to self-insure and/or to access financial markets.”).

<sup>282</sup> *Id.*

were the norm in the American West, and squatting was common before adverse possession was an established legal doctrine,<sup>283</sup> just as is the case in many developing nations today. The United States overcame this state of affairs by codifying Locke's labor theory of value, according to de Soto.<sup>284</sup> The thinking goes that if a person makes improvements on their land, they should have the first chance at acquiring legal title to it. Formalizers including de Soto point to this "swift recognition of squatters' claims to land on the frontier" and the resulting drop in land prices as being ideal drivers for quick and efficient formalized property claims.<sup>285</sup> Although this principle does have some relevance to the situation of developing countries, significant differences abound. These include: the series of executive, legislative, and judicial efforts needed to form the modern U.S. property regime; the differences between rural and urban adverse possession; as well as the need for political organization on a massive scale to advocate for this long series of legislative changes.

The process of formalizing property rights in the West that culminated in the Homestead Act was far from straightforward. In fact, the process required action by the Supreme Court,<sup>286</sup> more than five hundred federal statutes, and thousands of state laws.<sup>287</sup> And despite all these efforts, it was largely retroactive—thirty-two million people and more than three hundred thousand farms were settled in the American West between 1785 and 1890, but only two million were settled legally under these progressive statutes.<sup>288</sup> The case study of the American West raises further doubt concerning the likelihood that the U.S. experience may be applied in the developing world. It is, after all, "hidden in thousands of pieces of

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<sup>283</sup> Adverse possession occurs when a trespasser acquires ownership by occupying a parcel of land until the end of the statutorily set period of time runs out. *See, e.g.*, Matthew Baker, Thomas Miceli, C. F. Sirman, & Geoffrey K. Turnbull, *Property Rights by Squatting: Land Ownership Risk and Adverse Possession Statutes*, 77 LAND ECON. 360, 360 (2001).

<sup>284</sup> DE SOTO, *supra* note 10, at 17, 163, 172.

<sup>285</sup> Libecap, *supra* note 86, at 1167.

<sup>286</sup> The Supreme Court ruled against the rights of squatters in the 1823 case *Green v. Biddle*, 21 U.S. (8 Wheat.) 1 (1823). But in 1828, Congress determined that squatters performed a valuable public service by improving the land, and by 1856, twelve states had overturned this decision. DE SOTO, *supra* note 10, at 134. In 1878, the Supreme Court affirmed the practice of squatting on public and Western private lands in *Jennison v. Kirk*, 98 U.S. 453, 459 (1878).

<sup>287</sup> DE SOTO, *supra* note 10, at 128.

<sup>288</sup> *Id.*

legislation, statutes, regulations, court decisions, and institutions,”<sup>289</sup> which are exceedingly difficult to replicate in foreign contexts, much like the rationale behind newly independent nations choosing to institute civil rather than the more complex and abstract common law.<sup>290</sup> Similarly, property reform was often far from peaceful, being at times violent and tumultuous in the quest for balancing private claims with the common good.<sup>291</sup>

The long process of formalizing property rights was only relatively recently completed in parts of the developed world, demonstrating that any similar change in the diverse property regimes of developing nations would likely be a long campaign rather than a one-off political battle. For example, there were thirty-five mining guilds that handled property disputes between the prospectors in California through 1850, while the same process happened in claims associations in the Midwest until the twentieth century.<sup>292</sup> Germany completed its formalized property registration in 1896.<sup>293</sup> Japan only did so in 1958.<sup>294</sup> The battle between second-hand clothes dealers and peddlers in France lasted more than three hundred years and may have led to as many as sixteen thousand executions, stopping only with the French Revolution, according to de Soto.<sup>295</sup> Eventually, European governments were forced to retreat in the face of the flood of extralegal businesses. Some nations adapted relatively well to a market economy (such as the United Kingdom), while in others, unrest and violence resulted (namely in Russia and France).<sup>296</sup> These examples demonstrate that it is at best problematic for developing countries to adopt a comprehensive, formalized property rights system. In fact, it is almost impossible in certain nations. Colonel Gadhafi burned all

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<sup>289</sup> *Id.* at 48.

<sup>290</sup> *See, e.g., Common Law v. Civil Law Systems*, U.S. DEP'T OF ST., <http://usinfo.org/enus/government/branches/messitte.html> (last visited Feb. 19, 2014); *Legal Systems*, [http://www.law.cornell.edu/wex/legal\\_systems](http://www.law.cornell.edu/wex/legal_systems) (last visited Feb. 19, 2014).

<sup>291</sup> *See* WILLIAM G. ROBBINS & JAMES CARL FOSTER, *LAND IN THE AMERICAN WEST: PRIVATE CLAIMS AND THE COMMON GOOD* 4 (2000) (“The struggle for control over western land has often been violent and tumultuous.”).

<sup>292</sup> DE SOTO, *supra* note 10, at 136.

<sup>293</sup> *Id.* at 54.

<sup>294</sup> *Id.* at 109.

<sup>295</sup> *Id.* at 92.

<sup>296</sup> *Id.* at 106.

Libyan land titles in 1992,<sup>297</sup> placing the future of property law in post-Gadhafi Libya in question. And the problem is daunting in other nations. Only 7 percent of Indonesian land has a clear owner, as is discussed below.<sup>298</sup>

Besides the sheer difficulty of defining and adopting a comprehensive property system, other glaring differences between the American West and the developing nation experience include the contradictions of rural and urban adverse possessors, and the political mobilization needed to bring about lasting reform. A shantytown surrounding Mexico City is not the American West, where there were immense tracts of open land, not tiny parcels immediately adjacent to urban sprawl.<sup>299</sup> This difference between rural and urban squatters opens up a number of issues for which the U.S. property system does not have adequate analogies. Moreover, there were conflicting claims in the American West, but homesteaders were able to overcome the political power of elites through extensive, organized political opposition. Such grassroots mobilization was critical to the success of squatters in the West, but it is not clear how well marginalized groups in developing countries will be able to similarly overcome these political barriers absent broader rule of law reform incorporating popular sovereignty and free and fair elections. For example, in the United States, the prospectors and farmers enjoyed a favorable federal land policy, “educational opportunities, the right to vote (at least for males), and publicly financed infrastructure”<sup>300</sup>; they were not a socioeconomic group subjugated by an entrenched elite.<sup>301</sup> Not all of these factors are as plentiful, or indeed even present, across the developing world, including Indonesia.

### B. *Analyzing Reform Efforts in Indonesian Land Law*

In order to determine the veracity of the views of the formalizers and their critics and the applicability of the developed

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<sup>297</sup> *Id.* at 90–91; *How Can Post-Gaddafi Libya Best Achieve Justice Without Descending into a Cycle of Vengeance?*, LIBYATV (June 17, 2011), <http://liveword.ca/libya/2011/06/17/8415/>.

<sup>298</sup> DE SOTO, *supra* note 10, at 91.

<sup>299</sup> See Thomas, *supra* note 18, at 189–90 (pointing out that there may be some relevance for the Homestead Act in Brazil with indigenous peoples in Amazonia).

<sup>300</sup> Libecap, *supra* note 86, at 1167.

<sup>301</sup> DE SOTO, *supra* note 10, at 91.



world experience to emerging economies, the performance of the Indonesian titling program is considered as a case study. The Indonesian branch of the U.S. NGO Mercy Corps analyzed urban land implications for low-income urban dwellers in Jakarta.<sup>302</sup> Its report advocates that “[I]and is the catalyst ingredient upon which all other livelihood opportunities depend,”<sup>303</sup> and summarizes how well Indonesia has implemented needed reforms and what barriers to formalization still exist. Consequently, Mercy Corps presupposes the value of property rights formalization, stating in its report that: “[s]ecure land that is capable of being developed assures shelter; shelter allows for some form of housing; housing provides a place in which to live, oversee a family, earn a living; and onward up the ladder of well being.”<sup>304</sup> The report goes on to detail that Indonesia is not optimizing its land to catalyze equitable development. The stated reasons for this failure include “[c]ontradictory land laws, convoluted administration, [and] high certification costs.”<sup>305</sup> But implicit reasons include many of the barriers discussed in Part II, such as varying types of property rights, political elites wanting to maintain the status quo, and the difficulties in formalizing diverse cultural property traditions. Before moving on to discuss these findings, though, a brief outline of reform efforts in Indonesian land law is offered to provide a framework for discussion.

The history of reform of Indonesian land law stretches back decades, and is mirrored in the experience of other nations that

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<sup>302</sup> See *Indonesia*, MERCY CORPS, <http://www.mercycorps.org/indonesia> (last visited Feb. 19, 2014).

<sup>303</sup> *Summary of Land Tenure Research Findings in Jakarta*, MERCY CORPS URBAN BULLETIN NO. 2, 2 (Mar. 2008) [hereinafter MERCY CORPS].

<sup>304</sup> *Id.* The Mercy Corps report notes that informal dwellings are not as bad nor as insecure as they may seem, arguing that Indonesia’s poor enjoy some degree of tenure since land planning and ownership is not enforced. At the same time, they “are vulnerable to loss of livelihoods and assets, threats to security, and human rights violations due to the fact that they occupy unregistered lands, thus lacking formal ownership status.” *Id.* Some scholars have also argued that land formalization helps the labor market in that people “no longer [feel as though] they have to stay at home to protect their property.” Robbins, *supra* note 43, at 176 (citing Durand-Lasserve & Selod, *supra* note 120). Though this claim has been subsequently disputed by survey data, including in Indonesia, showing that many people holding informal property in fact feel relatively secure, citing the fact that in some cases they have squatted for more than twenty years without reprisals. See MERCY CORPS, *supra* note 303, at 4, 17, 23.

<sup>305</sup> MERCY CORPS, *supra* note 303, at 2.

have undertaken to formalize their informal sectors. The first push for formalization occurred when Indonesia enacted the Basic Agrarian Law (BAL) in 1960, which “was intended to bring all land registration under the administrative umbrella of the Indonesian National Land Agency (BPN).”<sup>306</sup> The BAL overruled both colonial and traditional customary laws to void former land registrations “established during the Dutch colonial period.”<sup>307</sup> Yet in practice it failed to simplify the complex land holdings that are the norm in Indonesia. Land administration in Indonesia remains “divided among three principle agencies: the Ministry of Forests oversees all of Indonesia’s forests,” which comprise 70 percent of the total land area; BPN “administers the remaining lands (much of it urban); and the National Development Planning Agency (BAPENAS) maintains responsibility for overall land policy.”<sup>308</sup> Partly as a result of this bureaucratic inefficiency and high barriers to reform, as of 2008 approximately 79 percent of Indonesian land remained unregistered.<sup>309</sup>

The Indonesian example confirms many of the barriers and difficulties in property rights formalization discussed in Part II and which were present in the U.S. context. These include: (1) formalizing property rights is a long and cumbersome process; (2) there are diverse interpretations of property rights dependent on cultural traditions and context; and (3) complicated procedures and high bureaucratic costs promote the growth of informal economies. First, despite extensive legislative attention, it is both a difficult and lengthy process to formalize the informal economy. Though one comprehensive property system was envisioned under BAL, “in practice, a multi-tiered legal system exists” for traditional

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<sup>306</sup> *Id.* at 4; see *The Property Laws of the Republic of Indonesia*, INDOCASA, [http://www.indocasa.com/php/indocasa\\_law.pdf](http://www.indocasa.com/php/indocasa_law.pdf) (last visited Feb. 19, 2014); ERNA HERYANI & CHRIS GRANT, LAND ADMINISTRATION IN INDONESIA 6 (2004), available at [http://www.fig.net/pub/jakarta/papers/ps\\_04/ps\\_04\\_3\\_heryani\\_grant.pdf](http://www.fig.net/pub/jakarta/papers/ps_04/ps_04_3_heryani_grant.pdf).

<sup>307</sup> MERCY CORPS, *supra* note 303, at 4; see *Colonial Period of Indonesia, INDONESIA-INVESTMENTS*, <http://www.indonesia-investments.com/culture/politics/colonial-period/item178> (last visited Feb. 19, 2014) (discussing the history of the Dutch occupation of Indonesia).

<sup>308</sup> MERCY CORPS, *supra* note 303, at 6; HERYANI & GRANT, *supra* note 306, at 7.

<sup>309</sup> See MERCY CORPS, *supra* note 303, at 7; WORLD BANK, LAND POLICY, MANAGEMENT AND ADMINISTRATION 1 (2005).

disputes (*adat*) and colonial property rights.<sup>310</sup> These ongoing contradictions perpetuate unpredictable titling, tenure, and property enforcement, despite more than two thousand pieces of land use legislation aimed at simplifying the system.<sup>311</sup> This figure may be compared with the more than one thousand pieces of legislation that the U.S. Congress passed over more than a century to formalize property rights,<sup>312</sup> demonstrating that quantity alone will not lead to real reform. As a result, formalizing depends not on one or several laws, but rather a complex network of interconnecting customary norms, statutes, and local regulations that together comprise an effective property rights system. Even then, reform requires enforcement and the presence of myriad social factors, as discussed in Part II. As the Indonesian experience confirms, such a system is difficult to replicate in the developing world, despite numerous attempts to do so.

Second, there are many different levels and forms of property rights, and in many situations individual private property rights are antithetical to specific cultural practices. For example, many different levels of property rights are available in Indonesia. *Hak Milik* is a “right of ownership” over land including “the earth underneath, water, and air above it, as long as they are directly required in connection with the land use.”<sup>313</sup> In contrast, *Hak Guna Bangunan* gives the property holder a “right to construct and occupy buildings on state or private land” for a fixed period of time.<sup>314</sup> *Hak Pakai* is a right of use that may be given to individuals but is nontransferable without express permission.<sup>315</sup> Other property rights also exist, such as *Hak Guna Usaha*, which applies to cultivation only, and *Hak Pengelolaan*, which is synonymous with a right of land management “given to

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<sup>310</sup> MERCY CORPS, *supra* note 303, at 4; *see* HERYANI & GRANT, *supra* note 306, at 4.

<sup>311</sup> HUMAN RIGHTS WATCH, CONDEMNED COMMUNITIES: FORCED EVICTIONS IN JAKARTA 20 (2006), *available at* <http://www.hrw.org/en/reports/2006/09/05/condemned-communities>.

<sup>312</sup> *See* DE SOTO, *supra* note 10, at 48.

<sup>313</sup> MERCY CORPS, *supra* note 303, at 5; *see* HERYANI & GRANT, *supra* note 306, at 3 (“[There are] five types of basic tenure with Hak Milik the highest and nearest to freehold tenure.”).

<sup>314</sup> MERCY CORPS, *supra* note 303, at 5; *see* HERYANI & GRANT, *supra* note 306, at 3.

<sup>315</sup> MERCY CORPS, *supra* note 303 at 5; *see* HERYANI & GRANT, *supra* note 306, at 3; *Property Laws of the Republic of Indonesia*, *supra* note 306, at 1.

autonomous regions and public bodies.”<sup>316</sup> Property that is unregistered with the BAL only enjoys *Girik*, derived from colonial law, which allows for a “quasi-legal ownership status which is proven by a tax letter.”<sup>317</sup> This bifurcation of property rights into classifications is distinct from the transfer of property rights in many Western nations including the United States, though even in common law jurisdictions property is far from a singular concept as was discussed in Part I.<sup>318</sup>

As a result of how the BAL is set up, there are relatively few people who enjoy formal property rights in Indonesia, and as a result little property may be used as collateral, limiting the amount of capital available for development purposes.<sup>319</sup> This brings us to the third issue—complicated procedures promote the growth of informal economies. In Indonesia, complex procedures and costly, long processing times curtail the ability of many urban residents to certify their land through the BPN. According to Mercy Corps, “[a] study in 2000 noted that the land registration process in Jakarta involves seventeen steps, eighteen different agencies . . . and an average of two to three years to complete.”<sup>320</sup> Nor is there a standard and predictable fee system in place since processes differ amongst the agencies, and costs depend on the characteristics of each parcel of land.<sup>321</sup> Squatters have no formal right to the land upon which they reside—they may apply for registration, but it is

<sup>316</sup> MERCY CORPS, *supra* note 303, at 5; *see* HERYANI & GRANT, *supra* note 306, at 3.

<sup>317</sup> MERCY CORPS, *supra* note 303, at 5.

<sup>318</sup> *See Introduction to Property Rights: A Historical Perspective*, UNIV. OF ILL., <http://urbanext.illinois.edu/lcr/propertyrights.cfm> (last visited Feb. 19, 2014).

<sup>319</sup> For example, there is evidence suggesting that the urban Indonesian poor in Jakarta are unable to use their land as a formal asset to build collateral. MERCY CORPS, *supra* note 303, at 27. *But see* Hans-Joachim Dübel, *Contractual Savings for Housing*, in HOUSING FINANCE POLICY IN EMERGING MARKETS 93, 122 (Loïc Chiquier & Michael J. Lea eds., 2009) (“Indonesian State Savings Bank [has] implemented a ‘community mortgage loan,’ which is used by low-income persons working in the informal sector to obtain land and construct housing. The credit is granted not to individuals, but to entire communities . . .”). Further research is needed specific to the Indonesia context analyzing the other links in the formalization chain.

<sup>320</sup> MERCY CORPS, *supra* note 303, at 7; HUMAN RIGHTS WATCH, *supra* note 311, at 21(citing Mohammad Zaman, *International Comparative Review: Displacement of People and Resettlement*, NAT’L DEV. PLANNING AGENCY & NAT’L LAND AGENCY 25 (2000)).

<sup>321</sup> *See* HERYANI & GRANT, *supra* note 306, at 3.

rarely granted. Even if the application is approved, poor government enforcement of property rights is common in Indonesia.<sup>322</sup> Due to these high costs, most urban Indonesians “certify their land through *kelurahan* (village) procedures,”<sup>323</sup> promoting the growth of local, informal dispute resolution that the Indonesian government has not attempted to codify, perhaps for the reasons listed above. Such a codification would help promote culturally relative, localized reform that could lead to the establishment of markets for diverse types of property rights, which could then be used for collateral.

Reforming this complex web of property ownership is problematic, made more difficult by the undefined and uncoordinated roles of the various land agencies.<sup>324</sup> The emphasis for reformers has been placed on privatization rather than legitimating localized regimes, which has resulted in little progress towards addressing endemic informality.<sup>325</sup> This state of affairs is compounded by bureaucratic inefficiency of the Indonesian property regime, as discussed in more detail in the next paragraph.

High bureaucratic barriers to property registration have led to an increase in the Indonesian informal economy. Approximately

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<sup>322</sup> See MERCY CORPS, *supra* note 303, at 9; S. Ramesh, *Indonesia Govt Has Strict Laws Against Burning But Has Enforcement Issues: Balakrishnan*, CHANNEL NEWS ASIA (June 16, 2013, 6:46 PM), <http://news.xin.msn.com/en/singapore/indonesia-govt-has-strict-laws-against-burning-but-has-enforcement-t-issues-balakrishnan> (reporting on local-level enforcement issues as being paramount in addressing endemic Indonesian environmental problems); WORLD BANK POLICY RESEARCH REPORT, *supra* note 20, at xxiii (“Failure to give legal backing to land administration institutions that enjoy social legitimacy limits their ability to draw on anything more than informal mechanisms for enforcement.”); see also Jude Wallace, *Indonesian Land Law and Administration*, in *INDONESIA: LAW AND SOCIETY* 191, 209 (Timothy Lindsey ed., 2008) (discussing Indonesian property law in the context of the national commercial law environment).

<sup>323</sup> MERCY CORPS, *supra* note 303, at 5; see Monica Martinez-Bravo, *The Role of Local Officials in New Democracies: Evidence From Indonesia 3* (Cent. for Mon. and Fin. Studies, Working Paper No. 1302, 2013); *Access to Justice Assessment for Indonesia*, AM. BAR ASSOC. 10 (2012), available at [http://www.americanbar.org/content/dam/aba/directories/roli/indonesia/indonesia\\_access\\_to\\_justice\\_assessment\\_2012.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/directories/roli/indonesia/indonesia_access_to_justice_assessment_2012.authcheckdam.pdf).

<sup>324</sup> MERCY CORPS, *supra* note 303, at 6; see WORLD BANK, *CITIES IN TRANSITION* 82–83, 99 (2003), available at <http://elibrary.worldbank.org/content/book/9780821345917>.

<sup>325</sup> See, e.g., Efa Yonnedi, *Privatization, Organizational Change and Performance: Evidence from Indonesia*, 23 J. ORG. CHANGE MGMT. 537, 537 (2010) (reviewing the history of privatization in Indonesia).

80 percent of Indonesia's residential buildings are self-built, according to Mercy Corps.<sup>326</sup> This state of affairs feeds confusion and misinformation. For example, despite the fact that the great majority of land in Indonesia is held illegally, 80 percent of respondents to one survey reported that they "own their land," while 17 percent said that they "occupy land," and 3.5 percent have the "permission of a landowner."<sup>327</sup> Of these respondents, though, only 43 percent actually possess documentation from BPN "that guarantees land ownership . . . ."<sup>328</sup> Of the informal group, 27 percent are quasi-formal requiring "BPN certification before being formally recognized"; 63 percent "hold other informal documentation"; and 11 percent possess no documentation whatsoever.<sup>329</sup> However, of those respondents who do hold documentation, many informal residents only paid for "landmark," a document "stating the land's territorial boundaries" costing \$5.50 USD as of 2008, which often cannot be used as collateral.<sup>330</sup> The respondents to the Mercy Corps survey cited several reasons for not securing formal ownership documentation, including: (1) "[i]nability to obtain formal [titling] documents . . . [to] land [that] is owned by another party"; (2) disregard of "land certification"; (3) the cost of BPN certification; and (4) lack of information.<sup>331</sup>

Whether or not Indonesians actually have a formal right to their property, inside these properties a great deal of commercial activity is taking place. The Mercy Corps survey found that 63 percent of respondents in Jakarta were low-income residents, 33 percent of whom also maintained home businesses.<sup>332</sup> Furthermore, the Mercy Corps report found that property location is predicated on an array of factors including proximity to family.<sup>333</sup> This is in contrast to the methodology of de Soto and his

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<sup>326</sup> *Id.* at 12.

<sup>327</sup> *Id.* at 21.

<sup>328</sup> *Id.*

<sup>329</sup> *Id.* at 22.

<sup>330</sup> *Id.* at 20; see also Dail Umamil Asri, *Participatory Planning Toward an Integrated Transportation Master Plan for Jabodetabek*, 5 PROC. OF THE E. ASIA SOC'Y FOR TRANSP. STUD. 2308, 2308 (2004), available at [http://www.easts.info/on-line/proceedings\\_05/2308.pdf](http://www.easts.info/on-line/proceedings_05/2308.pdf) (discussing the benefits and drawbacks of increasing regional empowerment of property rights in Indonesia in the transportation context).

<sup>331</sup> MERCY CORPS, *supra* note 303, at 22.

<sup>332</sup> *Id.* at 20.

<sup>333</sup> *Id.*

team, who minimized the importance of property location on value.<sup>334</sup> In fact, many Indonesians unsurprisingly choose where they want to live based on proximity to family, workplace, and affordable land prices.<sup>335</sup> This outcome is more in line with Robbins' findings, which suggest that "[t]he physical scale, density and location of . . . settlement[s] . . . have profound effects on the worth, fungibility and use of any property."<sup>336</sup>

These forces have contributed to the huge amount of unregistered Indonesian property, promoting high rates of property disputes, especially in areas of rapid growth such as Jakarta, and a biased land development process favoring private development and instituting high certification costs and frequent evictions.<sup>337</sup> Residential eviction, only occasionally with accompanying compensation, has been used as a mechanism for land clearance by the Jakarta Municipal Government.<sup>338</sup> Since urban residents are typically unable to prove formal ownership, they may be summarily evicted without notice or compensation,<sup>339</sup> which is an increasingly common practice in other nations such as Brazil, as was described in the introduction.<sup>340</sup> From 2001–2005, at least eighty-six cases of eviction occurred, impacting seventy-five thousand Indonesians.<sup>341</sup> In 2006 alone, 146 cases were reported,<sup>342</sup> with "[t]he highest rates . . . [being in] North Jakarta."<sup>343</sup> Consequently, though Indonesians formerly did not perceive security of tenure as a primary problem, they are becoming increasingly worried.<sup>344</sup> So far, though, most

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<sup>334</sup> See Thomas, *supra* note 17, at 189-91.

<sup>335</sup> MERCY CORPS, *supra* note 303, at 20.

<sup>336</sup> Robbins, *supra* note 43, at 185.

<sup>337</sup> MERCY CORPS, *supra* note 303, at 22, 27.

<sup>338</sup> See, e.g., Lenny Tristia Tambun, *Jakarta Govt Will Not Compensate Houses Around Pluit Dam: Basuki*, JAKARTA GLOBE (May 9, 2013, 4:50 PM), <http://www.thejakartaglobe.com/news/jakarta-govt-will-not-compensate-houses-around-pluit-dam-basuki/>.

<sup>339</sup> MERCY CORPS, *supra* note 303, at 12.

<sup>340</sup> See *Brazil Police Storm Landless Settlement*, *supra* note 2.

<sup>341</sup> MERCY CORPS, *supra* note 303, at 12.

<sup>342</sup> *Id.*; Open Letter from Jakarta Residents of Concern to the Rector and Students of Diponegoro University in Semarang (July 3, 2007), <http://ecosocrights.blogspot.com/2007/08/open-letter-to-rector-and-students.html>.

<sup>343</sup> MERCY CORPS, *supra* note 303, at 22.

<sup>344</sup> A large majority of Indonesian respondents to the Mercy Corps survey stated that they felt secure, including 100% "with formal documentation," 95.5% with quasi-title, and 70.5% "with informal documentation . . ." *Id.* at 23. For a

respondents stated that they were primarily concerned with environmental threats, including flooding and fires, followed by eviction and crime.<sup>345</sup> But as the number of evictions increases, so too may the importance of property formalization. If true reform is to occur, it must begin at the grassroots level. Organized groups could deter government or private actors from embarking on eviction programs for fear of sparking unrest and rioting. Above all, localized and culturally relative reforms should be enacted and different types of property rights legitimated if the broken Indonesian property system is to be mended, including addressing the growing autonomy of regional power centers in Indonesia under the ongoing decentralization program.<sup>346</sup>

The implications and urgency of land reform in Indonesia come into sharp relief as a result of the mining boom now underway. A single transaction reportedly moving towards approval by Indonesia's Ministry of Forestry would open some 1.2 million hectares of forest to Aceh, a multinational mining company, "for mining, logging and palm oil production . . ."<sup>347</sup> In total, some "84 million hectares of land have taken the largest portion of the country's land, followed by forest concessions," meaning that, due to overlapping legislation, the Indonesian government has actually granted more land for mining concessions than exists in all of Indonesia.<sup>348</sup> For example, the Indonesian government recently granted a major land concession in Eastern Java to Exxon Mobil for fossil fuel and natural gas exploration.<sup>349</sup> This historic oil-producing region boasts a medley of property regimes, including agricultural lands owned by local citizens,

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now somewhat dated compilation of takings cases in Jakarta, see ADVISORY GRP. ON FORCED EVICTIONS, UN-HABITAT, FORCED EVICTIONS – TOWARDS SOLUTIONS? 54-57 (2005), available at [http://www.unrol.org/files/1806\\_alt.pdf](http://www.unrol.org/files/1806_alt.pdf).

<sup>345</sup> See MERCY CORPS, *supra* note 303, at 24.

<sup>346</sup> See, e.g., HERYANI & GRANT, *supra* note 306, at 11.

<sup>347</sup> *Aceh Claims Deal to Open 1.2M ha of Protected Forest to Logging & Mining*, MONGA BAY (Mar. 14, 2013), <http://print.news.mongabay.com/2013/0314-aceh-spatial-plan.html>.

<sup>348</sup> See Muningsari Saraswati & Musthofid, *Indonesia's Concession Areas Exceed the Country's Total Area*, JAKARTA POST, Sept. 28, 2002, available at <http://www.thejakartapost.com/news/2002/09/28/concession-areas-exceed-country039s-total-area.html>.

<sup>349</sup> See Erwin Suryana & Dianto Bachriadi, *Land Grabbing and Speculation for Energy Business: A Case Study of ExxonMobil Business Expansion in Bojonegoro of East Java, Indonesia*, Global Land Grabbing II Conf., Oct. 17-19, 2012, at 1, 5, 7.



communal property controlled by villages, and forested lands belonging to a state-owned forestry company.<sup>350</sup> But the growing power of the central state in Indonesia, combined with the allure of mining profits, means that oftentimes informal property rights are only provable by a tax payment letter, if that, making it relatively easy for the state to take over land and give it to private businesses.<sup>351</sup> After allegations of corruption and intimidation, public outrage led to campaigns seeking to curtail the sales and enhance local community management.<sup>352</sup> The Eastern Java example is far from an isolated incident—nearly two million hectares of land are threatened in Papua New Guinea alone as a result of turning “forest areas” into state land.<sup>353</sup> In summary, the impact of economic growth in Indonesia, particularly the rapid expansion of its mining sector, is taking advantage of already malleable local land laws to facilitate takings, at times without “just compensation.”<sup>354</sup> Over time, these takings will likely have significant environmental and human costs. This situation will likely not be dramatically improved without deeper property rights and broader legal reform efforts to help ensure a more sustainable path to economic development and clarified requirements for what

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<sup>350</sup> *Id.* at 10.

<sup>351</sup> *Id.* at 10-11. According to Suryana and Bachriadi, the acquisition process itself was undertaken at the local level through villages and sub-districts. *Id.* at 14-16. The land itself stays registered under the seller to avoid suspicion through the acquisition process, which can take five-to-six years. *Id.* at 15. This long process provides a disincentive to go through formal institutions, causing some farmers to prefer to deal directly with speculators who pay cash quickly. *Id.* at 16-17.

<sup>352</sup> *Id.* at 19-22.

<sup>353</sup> See UNIV. OF SYDNEY CENTER FOR PEACE & CONFLICT STUDIES: WEST PAPUA DESK, *The New Threat to West Papua's Forests: Oil Palm Plantations*, at 1, [http://sydney.edu.au/arts/peace\\_conflict/docs/Papua\\_Desk\\_the\\_New\\_threat\\_to\\_West\\_Papua\\_forests\\_Oil\\_Palm.pdf](http://sydney.edu.au/arts/peace_conflict/docs/Papua_Desk_the_New_threat_to_West_Papua_forests_Oil_Palm.pdf) (last visited Feb. 19, 2014).

<sup>354</sup> See Law No. 25 of 2007 art. 7 (1); I.B.R. Supancana, *Legal Issues Regarding Foreign Investment and the Implementation of the Japan-Indonesia Economic Partnership Agreement*, 4 JEAIL 131, 138 (2011). It is worth comparing the U.S. and Australian takings laws to the Indonesian example, given that these regimes are well developed and the latter is one of Indonesia's regional neighbors. U.S. CONST. amend. V. (“No person shall . . . be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.”); see AUSTRALIAN CONSTITUTION s 51(xxxi) (“The Parliament shall . . . have power to make laws . . . with respect to . . . the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.”).

constitutes just compensation.

The Eastern Java example in particular illustrates the myriad difficulties associated with reforming Indonesian property law. First, local land use traditions, including community property, were largely ignored in this sale.<sup>355</sup> Takings are not a new phenomenon in Indonesia—indeed they were prevalent during the colonial area such as with the 1870 Act,<sup>356</sup> and again following independence in 1957.<sup>357</sup> Contemporary takings, though, are made easier by informal land ownership and driven in part by the profits to be made from mining. Despite a coalition of farmers unions and civil society groups and a reform era from roughly 1998 to 2004, the procedure of mass takings has not yet been arrested—in fact, it has been reinforced with Act No. 2012.<sup>358</sup> Indeed, in some ways this ongoing debate in Indonesia is reminiscent of the takings reform aftermath of *Kelo v. City of New London*, which dealt with the taking of private property for economic development purposes.<sup>359</sup> The open, and as yet largely unaddressed question, is whether formalization might help curtail these practices or at least make it easier to attain just compensation by enforcing property rights against both the state and private sector interests.

The non-profit HuMa, active in myriad community building and environmental causes, provides some final helpful perspectives on reform efforts. For one, national property laws have not been friendly to custom, often preferring instead a one-size-fits-all approach largely ignoring the diverse cultural traditions that may be illustrated by the more than seven hundred languages and dialects spoken throughout Indonesia.<sup>360</sup> Reform at multiple scales is needed, including addressing forest issues, agrarian problems, and urban property rights concerns. A reform

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<sup>355</sup> See Suryana & Bachriadi, *supra* note 349, at 2.

<sup>356</sup> See *id.* at 4.

<sup>357</sup> See G. C. Christie, *What Constitutes Taking of Property in International Law*, 38 BYIL 307, 308 (1962) (“The property of Dutch nationals in Indonesia was first seized in December 1957 under the authority of various provisions of Dutch law, retained by Indonesia, which authorized seizure of property in times of national emergency.”).

<sup>358</sup> See Suryana & Bachriadi, *supra* note 349, at 2.

<sup>359</sup> See *Kelo v. City of New London*, 545 U.S. 469, 480-83 (2005) (construing “public purpose” broadly under the Fifth Amendment).

<sup>360</sup> See *A Diverse Nation, About Indonesia*, EMBASSY OF INDONESIA, <http://www.embassyofindonesia.org/about/people.htm> (last visited Feb. 19, 2014).

roadmap is being undertaken in part by the Ministry of Forests in consultation with civil society groups including HuMa, but this remains in the planning stages.<sup>361</sup> This is partly because of political barriers put up by the mining industry and other key stakeholders that benefit from maintaining the property status quo, applying the discussion from Part II regarding vested elites in the Indonesian context.<sup>362</sup>

Instead of top-down reform, HuMa is working to foster local good governance through ecologically based legal reformation.<sup>363</sup> HuMa provides an example of an active civil-society program attempting to instill best practices from the bottom up consistent with polycentric principles. HuMa is currently working on the need for greater recognition of communal ownership and property transfer practices.<sup>364</sup> The organization is making some headway, but problems persist inhibiting reform, such as efforts regarding dispute resolution. Bringing cases is difficult since evidence of land tenure is often lacking due to informal local practice and periods of turmoil in which records were burned as discussed above. If evidence does exist, then criminal, civil, administrative, and even constitutional remedies may be available.<sup>365</sup> Otherwise, dispute resolution in the tradition of *adat* is often used.<sup>366</sup>

Ultimately at stake in Indonesia is not only the survival of local cultural practices, but the sustainable development of resources, and even Indonesia's contribution to global climate change, given that deforestation makes the country the third largest carbon polluter in the world.<sup>367</sup> The poor remain vulnerable to

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<sup>361</sup> See ARNOLDO CONTRERAS-HERMOSILLA & CHIP FAY, STRENGTHENING FOREST MANAGEMENT IN INDONESIA THROUGH LAND TENURE REFORM: ISSUES AND FRAMEWORK FOR ACTION iii, 1-9 (2005), available at [http://www.forest-trends.org/documents/files/doc\\_107.pdf](http://www.forest-trends.org/documents/files/doc_107.pdf); Andiko, *Forest Conflict and Case Studies of Conflict Resolution, Role and Perspective of Forest Communities in the Indonesian Reform Process* (July 12, 2011), available at [http://www.rightsandresources.org/documents/files/doc\\_2552.pdf](http://www.rightsandresources.org/documents/files/doc_2552.pdf).

<sup>362</sup> See Deininger & Feder, *supra* note 87, at 238-39, 257.

<sup>363</sup> See *About Us*, HUMA, <http://huma.or.id/en/tentang-huma> (last visited Feb. 19, 2014).

<sup>364</sup> See *id.*

<sup>365</sup> Act No. 18 (2004); Act No. 41/199.

<sup>366</sup> See, e.g., Sayaka Takano, *The Development of ADR in Post-Suharto Indonesia: Adat and Dispute Resolution in Medan District Court*, L. & SOC. ASSOC. CONF. (June 3, 2012), [http://citation.allacademic.com/meta/p558980\\_index.html](http://citation.allacademic.com/meta/p558980_index.html).

<sup>367</sup> See Jesse Zwick, *And The World's Third-Largest Carbon Polluter Is...*,

public- and private-sector interventions in Indonesia despite decades of land reform efforts. As has been shown, due process protections are lacking, while property holders are often subject to biased conflict resolution should their ownership be contested, and face myriad challenges to their security and well-being. The Indonesian case study has thus demonstrated the difficulties of informal land tenure, as well as the barriers to reform discussed in Part II. To help further consider the lessons from the Indonesian property regime, let us consider an illustrative example from another region of the world: South Africa.

### C. *The South African Land Titling Experience*

As is the case in Indonesia, “there is considerable debate about the wisdom of formalizing property rights in Africa via titling efforts.”<sup>368</sup> In particular, there is criticism “of state-led initiatives that create more individualized property rights in situations where communal rights may be more appropriate.”<sup>369</sup> A new system of formalized individual property rights can undermine the governance of traditional communities that rely on a custom of shared ownership.<sup>370</sup> In South Africa, for example, a characteristic of certain communities of homeowners who occupy older homes is that they rely on informal savings clubs (“stokvel” or “umgalelo”)<sup>371</sup> rather than commercial banking institutions to finance needed improvements. Professors Richard Barrows and Michael Roth from the University of Wisconsin-Madison succinctly summarize the situation:

Economists using a narrowly defined neo-classical model

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NEW REPUBLIC (Oct. 27, 2009), <http://www.newrepublic.com/blog/the-vine/copenhagen-not-just-about-us-and-china#>; see also *Property Rights and Land Policy*, MCC, <http://www.mcc.gov/pages/sectors/sector/property-rights-and-land-policy> (last visited Feb. 19, 2014) (“In Indonesia, lack of clarity regarding licensing of rights to use land and other natural resources and unsettled village boundaries contribute to ‘spatial uncertainty’ which significantly hinders government land use planners and service agencies from effectively managing critical natural resources and deters sustainable investments.”).

<sup>368</sup> Boudreaux, *supra* note 73, at 318.

<sup>369</sup> *Id.*

<sup>370</sup> See Rose, *supra* note 239, at 32-34.

<sup>371</sup> Boudreaux, *supra* note 73, at 331; Laura du Preez & Charlene Clayton, *You Can Bank on High Costs*, PERS. FIN., Aug. 21, 2004. See also Financial Diaries Project, available at <http://www.yearofmicrocredit.org/docs/diaries/> UNDP (discussing how one South African woman used an umgalelo to save money to build a home).

have derived the hypothesis, often treated as an empirically demonstrated proposition, that traditional African systems of “communal” land tenure are inefficient when land has scarcity value. By way of contrast, individualized tenure, typically defined as demarcation and registration of freehold title, is viewed as superior because owners are given incentives to use land most efficiently and thereby maximize agriculture’s contribution to social well-being.<sup>372</sup>

This passage evokes the contested theoretical arguments that form the basis of titling projects for the poor in that some argue that a communal property system, “which is owned jointly by all members of a given society—each of whom holds rights to use the group’s resources— . . . may not effectively internalize gains resulting from a rise in property values.”<sup>373</sup> But that is not necessarily the case, as has been shown.<sup>374</sup> According to Karol Boudreaux, “[t]itling projects may be most effective where land values and returns on land are high and where collateral-based lending already exists.”<sup>375</sup> But for the rural poor, formal titling may be less valuable due in part to transaction costs associated with implementing such a complex undertaking.<sup>376</sup> Moreover, the history of property reform in Africa, including in Ghana, Sierra Leone, and Liberia, shows how communal property rights have been subsumed to the state such that corporate investors now no longer must deal with indigenous communities.<sup>377</sup> As a compromise, “different legal tools, such as secure certificates . . .

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<sup>372</sup> Boudreaux, *supra* note 73, at 316 (citing Richard Barrows & Michael Roth, *Land Tenure & Investment in African Agriculture*, 28 (2) J. MODERN AFR. STUD. 265, 265 (1990)).

<sup>373</sup> *Id.*

<sup>374</sup> *See infra* Part II.B.

<sup>375</sup> Boudreaux, *supra* note 73, at 318.

<sup>376</sup> *See id.*

<sup>377</sup> *See, e.g.,* Jide James-Eluyode, *Collective Rights to Lands and Resources: Exploring the Comparative Natural Resource Revenue Allocation Model of Native American Tribes and Indigenous African Tribes*, 29 ARIZ. J. INT’L & COMP. L. 175, 186–87 (2012) (citing CONSTITUTION OF LIBERIA (1986), art. 22(b) (“[P]rivate property rights, however, shall not extend to any mineral resources on or beneath any land or to any land under the seas and water ways of the Republic of Liberia. All mineral resources in and under the seas and waterways shall belong to the Republic and be used by and for the entire Republic.”); New Petroleum Law (2002), Ch. III. § 3.1 (Republic of Liberia) (reemphasizing state ownership rights by affirming that “[a]ll Hydrocarbon deposits belong to and are the properties of the Republic of Liberia . . . .”)).

may provide many of the benefits of titling without the high costs.”<sup>378</sup> The diverse array of property rights, especially communal relationships, shows that instituting a one-size-fits-all formalization program divorced from social norms and mores is ill-advised, as is explored further in Part IV.

#### IV. NEITHER MAGIC BULLET NOR LOST CAUSE: THE NEED FOR A DEEPER CONTEXTUAL UNDERSTANDING OF PROPERTY RIGHTS

As is made evident by the Indonesian case study and South African example, a single, neo-liberal, market-based definition of property is constricting, and can lead to biased implementation and local resistance.<sup>379</sup> At their core, Western markets treat property as a commodity, and thus ownership is predicated on having a claim to that property.<sup>380</sup> Despite the insistence of some formalizers, this is not a universally accepted view of property. There is a need for a more nuanced understanding of property allocation and ownership.<sup>381</sup> As has been shown, in some instances, informal property relations provide the basis for an active, functioning economy.<sup>382</sup> Moreover, certain areas may be economically suitable for economic development but socially or environmentally inappropriate, and the community may manage that property collectively.<sup>383</sup> Commentators attempt to answer the question of which system is preferable, informal or formal, without stepping back to ask whether our current knowledge of property rights is as universally applicable as some make it seem.<sup>384</sup> This final Part attempts to find common ground between competing camps and more fully explore the lessons of polycentric governance for designing titling interventions.

Before an intervention is undertaken, it is necessary to

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<sup>378</sup> *Id.* (citing Geoffrey Payne, *Contribution at Global Land Tool Networking Meeting: Reviewing Titling & Other Tenure Options* (Nov. 24–25, 2005), available at <http://www.gpa.org.uk/Publications/ConferencePapers/Papers/Stockholm.pdf>).

<sup>379</sup> See A. Saith, *From Universal Values to Millennium Development Goals: Lost in Translation*, 37 DEV. & CHANGE 1167, 1167 (2006).

<sup>380</sup> Robbins, *supra* note 44, at 190.

<sup>381</sup> See *id.* at 186–87 (citing F. VON BENDA-BECKMANN, *THE PROPERTIES OF PROPERTY 2* (2006)).

<sup>382</sup> See *id.* at 178 n.6.

<sup>383</sup> *Id.* at 178.

<sup>384</sup> *Id.* at 186.

consider the complexity of various forms of property rights and ownership practices in each society in which formalization is proposed.<sup>385</sup> Property rights and claims may “include everything from perceived tenure to registered freehold” to group tenure and joint leases,<sup>386</sup> families, kin groups,<sup>387</sup> corporate groups like clans or companies, settlement councils, voluntary groups, savings societies, and collective farming.<sup>388</sup> Decisions to transform these varying, collective property rights must be understood in reference to the local cultural traditions in play.<sup>389</sup> Land tenure is complex. It is rarely vested in only one property holder, and is subject to competing sets of rights and claims. For example, a person may inhabit, occupy, build on, or otherwise use a property, and each of these activities comes with rights and claims that vary by culture and that may be organized formally or informally, be strong or weak, and be individual or communal. The property rights spectrum goes from formalized private land title, to longstanding and well-respected customary relationships. Reforming such complex systems in culturally relative terms is an exceedingly difficult but important proposition if real progress towards widespread poverty alleviation is to be made and the promise of titling be fulfilled. Toward this end, more research needs to be done to study formalizing group rights land management rather than solely studying individual property rights, in keeping with the findings of polycentric governance.

A polycentric approach envisions more than simply competing systems of multilevel regulations, or “a collective of partially overlapping and nonhierarchical regimes” that vary in

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<sup>385</sup> *Id.* at 182 (arguing that the three forms of property, at their simplest, are: (1) Absolute—the institution, including the state, “or customary body (clan, tribe, etc.), that” ultimately defines property, how it “may be used,” and what rights attach to it; (2) Residual—“the right, understanding, or claim most often associated with tenure . . . [and] is a freehold” including “the right to alienate property . . . [or] to use it as collateral”; and (3) Usufruct—a limited “right, understanding or claim to a property . . . limited by the nature of the use right as defined by either the residual and/or absolute holder of property rights” and may vary substantially between cultures).

<sup>386</sup> See Clarissa Augustinus & Klaus Deininger, *Innovations in Land Tenure, Reform and Administration*, in *LAND RIGHTS FOR AFRICAN DEVELOPMENT: FROM KNOWLEDGE TO ACTION* 14, 14 (Esther Mwangi ed., 2005), available at [http://www.capri.cgiar.org/wp/brief\\_land.asp](http://www.capri.cgiar.org/wp/brief_land.asp).

<sup>387</sup> Robbins, *supra* note 43, at 186.

<sup>388</sup> *Id.*

<sup>389</sup> *Id.*

extent and purpose.<sup>390</sup> It may be understood as an effort to marry elements of the interdisciplinary concepts of regime complexes and clusters, multilevel governance, and global governance together under a single conceptual framework so as to better study multidimensional problems such as property rights reform. Professor Ostrom created an informative framework of eight design principles for the management of common pool resources that helps to guide discussion. These include the importance of: (1) “clearly defined boundaries for the user pool . . . and the resource domain”;<sup>391</sup> (2) “proportional equivalence between benefits and costs”;<sup>392</sup> (3) “collective choice arrangements” ensuring “that the resource users participate in setting . . . rules”;<sup>393</sup> (4) “monitoring . . . by the appropriators or by their agents”;<sup>394</sup> (5) “graduated sanctions” for rule violators;<sup>395</sup> (6) “conflict-resolution mechanisms [that] are readily available, low cost, and legitimate”;<sup>396</sup> (7) “minimal recognition of rights to organize”;<sup>397</sup> and (8) “governance activities [being] . . . organized in multiple layers of nested enterprises.”<sup>398</sup> Not all of Professor Ostrom’s design principles are applicable in the property rights reform context given that they were designed primarily for managing small-scale resources, such as forests and lakes.<sup>399</sup> However, some do have salience. Examples from the American West and Indonesia point to the need for effective, low-cost conflict resolution that can clearly establish group boundaries with graduated sanctions in place for rule violators. Moreover, these principles speak to the importance of recognizing and, in some cases, codifying group norms.

<sup>390</sup> Kal Raustiala & David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 INT’L ORG. 277, 277 (2004).

<sup>391</sup> SUSAN J. BUCK, *THE GLOBAL COMMONS: AN INTRODUCTION* 32 (1998).

<sup>392</sup> Elinor Ostrom, *Polycentric Systems: Multilevel Governance Involving a Diversity of Organizations*, in *GLOBAL ENVIRONMENTAL COMMONS: ANALYTICAL AND POLITICAL CHALLENGES INVOLVING A DIVERSITY OF ORGANIZATIONS* 105, 118 tbl. 5.3 (Eric Brousseau et al. eds., 2012) (citing ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 90 (1990)).

<sup>393</sup> BUCK, *supra* note 393, at 32.

<sup>394</sup> *Id.*

<sup>395</sup> *Id.*

<sup>396</sup> *Id.*

<sup>397</sup> Ostrom, *Multilevel Governance*, *supra* note 392, at 118 tbl.5.3.

<sup>398</sup> *Id.*

<sup>399</sup> *See id.* at 107.



An effective polycentric management system for property rights would employ a system of nested enterprises using the tools of law and norms, market-based incentives, self-regulation, and public-private partnerships—some of which are alluded to in Professor Ostrom’s principles—to design property rights reform.<sup>400</sup> The move toward regionalization in Indonesian property law may be seen as a step in this direction. But there are also important drawbacks of polycentric governance to consider, such as the fact that a highly fragmented system may “yield gridlock rather than innovation” because, in part, of a “lack of hierarchy.”<sup>401</sup> Because such systems must meet standards of coherence, effectiveness, and sustainability, an unclear hierarchy may lead to inconsistency and systemic failures.<sup>402</sup> There is thus an important coordinating role for the state in property reform, as the formalizers maintain, including guaranteeing human rights protections. But there must be a balancing act maintaining a culturally relative design that recognizes, for example, the prevalence and utility of communal property rights so as not to crowd out potentially innovative bottom-up management efforts.

The rationale for formalization cannot be divorced from cultural context.<sup>403</sup> Property is “more than just an unconditional set of rights; it is a universe of social perceptions, values and practices that differ across cultures.”<sup>404</sup> Again, the benefits from land registration depend on the quality of governance and the nature of the intervention.<sup>405</sup> As Robbins argues, “[w]hat informality references, whether and how it creates wealth . . . is more a function of the overall social relationships and context in which it is found than it is a function of some purported contrast with an abstract notion of formality.”<sup>406</sup> This is particularly true in certain

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<sup>400</sup> This list was inspired by LESSIG, *supra* note 60, at 94.

<sup>401</sup> Robert O. Keohane & David G. Victor, *The Regime Complex for Climate Change*, 9 *PERSP. ON POL.* 7, 15 (2011).

<sup>402</sup> *Id.* at 3, 19–20.

<sup>403</sup> See Claudio Acioly, Jr., *The Challenge of Slum Formation in the Developing World*, *LAND LINES*, Apr. 2007; Robbins, *supra* note 43, at 187.

<sup>404</sup> Property is rarely unconditional, as seen in the United States takings context. *E.g.*, *Kelo v. City of New London*, 545 U.S. 469 (2005). Moreover, many conditions exist on land tenure, including “zoning laws, health and safety regulations, and eminent domain,” to name a few. Robbins, *supra* note 43, at 182.

<sup>405</sup> See Deininger & Feder, *supra* note 87, at 256.

<sup>406</sup> Robbins, *supra* note 43, at 179.

developing nations in which property is embedded in complex, social-ecological systems composed of multiple levels.<sup>407</sup> Thus, the range of possibilities and the implications of formalizing property rights can be more nuanced and profound than either side of the debate contends, given the different meanings and understandings associated with various forms of property.

Critics of formalization argue that property is more a social and political relationship than it is a right or a thing.<sup>408</sup> The maintenance of property itself is a part of social relations that are inseparable from the larger social and legal context.<sup>409</sup> As a result, property is increasingly the focus of “struggles at all levels of social organization, within and between families, communities, classes and states.”<sup>410</sup> In other words, it is becoming a polycentric system featuring overlapping regimes and multiple levels of authority. To understand the practices and rights embedded in property formalization, we must analyze how the system behaves and how it affects the larger social, political, and economic contexts. This broader perspective is important for determining the likelihood that a given population will accept, or seek out, formalization. Undeniably, a community’s willingness to embark on property rights formalization is dependent on its underlying organization—legal property holders are more likely than renters to accept formalization, and individual owners are often less willing to organize as a community than those holding communal, informal claims.<sup>411</sup>

The meaning of property changes along with the purposes that a society expects it to serve.<sup>412</sup> Property is never free from social or political considerations, and “fostering one or another policy prescription for property forms is in effect favoring one or another

<sup>407</sup> See Ostrom, *Polycentric Approach for Coping*, *supra* note 109, at 420.

<sup>408</sup> Robbins, *supra* note 43, at 181, 194.

<sup>409</sup> *Id.* at 179.

<sup>410</sup> VON BENDA-BECKMANN, *supra* note 381, at 2.

<sup>411</sup> Robbins, *supra* note 43, at 188 (citing UN HUMAN SETTLEMENTS PROGRAMME, *supra* note 7, at 94) (“[P]eople may be located in Inner city slums . . . . They may form different spatial types even in slums; e.g. they can be communities sited legally on public or private land as owner-occupiers or tenants; illegally sited on either public or private land as occupiers of self built homes and with perceptions or claims of some form of ownership or as tenants among other possibilities.”).

<sup>412</sup> See Robbins, *supra* note 43, at 180.

vision of what the world should be.”<sup>413</sup> The evolution of Western notions of property beginning in seventeenth century Europe mirrors this fact, showing that a collectivist interpretation became increasingly cumbersome in a more market-oriented economy in which joint ownership impeded the unfettered exchange of goods.<sup>414</sup> Public property rights gradually gave way to private property rights,<sup>415</sup> though this did not happen at the same rate universally.<sup>416</sup> Thus began the transition from property as a communal habitat in the West to a thing to be commercially exploited.<sup>417</sup> Such an interpretation has worked well for some nations but should not necessarily be a guide for others. This evokes the importance of a concept called *juriculture* in analyzing property rights, which is defined as the “axiological and behavioral formula” pertaining to the law, and which provides a comparative tool that “focuses on ontological and epistemological bases of law and concomitant legal theories.”<sup>418</sup> Using *juriculture* as a conceptual framework could lead to a consensus-building model for property rights across cultures, but further research is needed to define implementation and best practices.

Summing up, those claims favoring formal titling are rooted in the notion that the more formal property is, the more growth results, and thus greater equality can be achieved.<sup>419</sup> But property is not only a thing or a concept based on exclusion—it is also a place, with real, and often conflicting, claims to it. Advocates for property rights formalization sometimes ignore the fact that those who are granted formal title over informal property do not have a level playing field, are at a disadvantage to repeat players, and may not even want individualized private property rights. “Even Adam Smith argued” that economic actors should “enter in positions of relative equality[,]” and that if this is not the case, then interventions are warranted.<sup>420</sup> Consequently, “[t]itling,

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<sup>413</sup> *Id.*

<sup>414</sup> *Id.*

<sup>415</sup> See KLAUS BOSSELMANN, *THE PRINCIPLE OF SUSTAINABILITY: TRANSFORMING LAW AND GOVERNANCE* 14-15 (2008).

<sup>416</sup> See *id.* at 15–16.

<sup>417</sup> See N. Geras, *Essence and Appearance: Aspects of Fetishism in Marx's Capital*, *NEW LEFT ESSAYS*, Jan. –Feb. 1971, at 69–80.

<sup>418</sup> See SANDRA BUNN-LIVINGSTONE, *JURICULTURAL PLURALISM VIS-À-VIS TREATY LAW* 9, 35, 59 (2002).

<sup>419</sup> Robbins, *supra* note 43, at 194.

<sup>420</sup> See EMMA ROTHSCHILD, *ECONOMIC SENTIMENTS: ADAM SMITH*,

registering, providing new forms of property rights without a clear understanding of the risks to those newly entering this system is irresponsible without knowledge of the context and market practices into which those newly owning property like housing are being placed.”<sup>421</sup> At the same time, local property regimes are not always best since, in some cases, powerful political interests have distorted them or local practices do not respect certain base human rights as defined under international law. As a result, “just as there is a tendency among some commentators to privilege the rationality of the market, there is also a tendency among others to romanticize the local and the native.”<sup>422</sup> The trick then is balancing local, culturally relative reform based on polycentric principles with formalized titling backed by the coercive power of the state acting as an umbrella institution. This is a difficult proposition, but a broader understanding about the nature of different forms of property claims, rights, and tenure systems within a juriculture framework is essential towards this end.<sup>423</sup> The formalizing of property rights even after titling is enacted is not automatic and is influenced by political, social, and economic factors as well as by the strength of local governance. Even minor revisions of property rights regimes can have far-reaching impacts on vulnerable groups.<sup>424</sup> Determining the appropriate distribution of property rights, whether they be to an individual or a group,<sup>425</sup> should depend on the nature of the resource and on existing social relationships,<sup>426</sup> not on a universalized set of reforms that may or may not conform with local conditions.

#### CONCLUSION

Classic titling by itself will not give birth to capital markets,

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CONDORCET AND THE ENLIGHTENMENT 1, 4, 250 (2002).

<sup>421</sup> Robbins, *supra* note 43, at 194.

<sup>422</sup> *Id.* at 195.

<sup>423</sup> *Id.*

<sup>424</sup> See WORLD BANK POLICY RESEARCH REPORT, *supra* note 20, at xxiv–xxv.

<sup>425</sup> *Id.* at xxiv (arguing that group rights “are more appropriate in situations characterized by economies of scale in resource management or if externalities exist that” are better managed at the collective level. But these rights must be tempered by “a clear definition of membership” in the group, well-defined responsibilities of group members, and a clear understanding regarding how decisions to modify rules may be made).

<sup>426</sup> *Id.* at xxiv.

nor will it end poverty or informal markets. No one form of property is ideal across all contexts, but there is merit in the property rights formalization thesis. Studies across a number of countries suggest that registration of land leads to a number of positive outcomes, such as increased government revenue, decreases in private spending associated with protecting property, increased investment by owners into their properties, and empowerment of women.<sup>427</sup> Formalizers such as de Soto have made a critical impact on development economics by shifting the discussion to regulation and informality.<sup>428</sup> That being said, nations around the world have adopted the formalization hypothesis with varying degrees of success, as seen in Indonesia and South Africa.

The pace at which property rights formalization occurs may be dictated as “a simple cost-benefit calculus of the costs of devising and enforcing the rights, as compared to the alternatives under the status quo.”<sup>429</sup> But this is too narrow a view since some of the gains are internal to the property owner (increased credit) while others are external (trading relationships and property registration systems). In the view of formalizers, even though “[t]he benefits of universal titling might exceed the costs,” the system may still fail to spontaneously develop.<sup>430</sup> Thus, there is an important role for government action to “determine who the owner of a given property is” and to enforce that claim by creating the “registration and information systems that are the backbone of formal property rights” systems.<sup>431</sup> As this Article has explained, however, this strategy is an oversimplification ignoring many important caveats, including: political opposition, diverse (and often unwritten) cultural practices, natural resource endowments, adherence to human rights, and the various levels and combinations of property rights that exist around the world. Instead of a single approach, the case has been made for a localized, culturally-relative design to titling in keeping with polycentric principles and the conceptual framework of juriculture.

De Soto claims to have “closed his books, and opened his

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<sup>427</sup> See Deininger & Feder, *supra* note 87, at 239, 256.

<sup>428</sup> Woodruff, *supra* note 115, at 1216.

<sup>429</sup> DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 51 (1990).

<sup>430</sup> Woodruff, *supra* note 115, at 1217.

<sup>431</sup> *Id.*

eyes.”<sup>432</sup> That is his prerogative, but we should strive to have both our books and our eyes open. Empirical evidence has modified classic land titling, much as it has the tragedy of the commons model. Studies have shown that titling alone is not enough; it must be followed by improved judicial efficiency, re-writing bankruptcy codes, and restructuring financial markets, among much else. Professor Jagdish Bhagwati, for example, argues that property titling by itself is insufficient to bring prosperity to places of chronic poverty.<sup>433</sup> The results from Indonesia and South Africa indicate that formalization can bring about increased housing values, some job creation, and a degree of poverty alleviation. However, the policy represents only the beginning phases of a long journey to a world without poverty.<sup>434</sup> Further efforts are needed, such as deregulating leasing markets, lowering registration fees, empowering local communities, and limiting bureaucracy for property rights and business registration.

“For titling policies to have the greatest usefulness as tool[s] to empower the poor, they should be accompanied by complementary institutional reforms that reduce the costs of property transfers, make it easier to grow small businesses, and generate increased accountability and improved service provision at the local level.”<sup>435</sup> Indeed, studies suggest that legal reform is only effective when the government can be held accountable.<sup>436</sup> Former U.S. Secretary of State Madeleine Albright agrees, arguing that if providing legal rights to land and property is insufficient, it is a necessary element in alleviating poverty.<sup>437</sup> There are also larger geopolitical reasons for why U.S. administrations have lauded formalization. Given a rising China featuring a state-led approach to economic development, propounding free market

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<sup>432</sup> *Id.*

<sup>433</sup> Dolan, *supra* note 85.

<sup>434</sup> For a discussion of the benefits of property rights to economic development, see John Mukum Mbaku, *Providing a Foundation for Wealth Creation and Development in Africa: The Role of the Rule of Law*, 38 BROOK. J. INT’L L. 959, 1037 n.262 (2013) (citing JAMES GWARTNEY & ROBERT LAWSON, FRASER INST., ECONOMIC FREEDOM OF THE WORLD: 2004 ANNUAL REPORT 35-37 (2004)).

<sup>435</sup> Boudreaux, *supra* note 73, at 310.

<sup>436</sup> See Deininger & Feder, *supra* note 87, at 257-58.

<sup>437</sup> Robbins, *supra* note 43, at 176 (citing Madeline Albright, *It’s Time for Empowerment*, in LEGAL EMPOWERMENT: A WAY OUT OF POVERTY 9 (M.E. Broder & J.A. Solberg eds., 2006)).

solutions such as formalization is important to give new life to the Washington Consensus and the virtues of private property rights.<sup>438</sup>

Legal scholars and economists recognize that property rights are a vital component of the legal environment for purposes of economic development.<sup>439</sup> It is now uncontroversial that countries with secure, clearly defined property rights experience more economic growth than do countries that lack these rights.<sup>440</sup> Thus, strengthening local property environments is critical to long-term economic success.<sup>441</sup> Institutional economists argue that legal institutions are the way to do this, and are crucial determinants of capitalism's success. Institutions do matter, as Professor Douglass North among others would agree, but they are not the whole story.<sup>442</sup> Other problems in developing countries must not be overlooked in the rush to formalization; addressing inadequate infrastructure, for example, would help address some of the worst vulnerabilities associated with the world's poor.<sup>443</sup> Corrupt, authoritarian government should be confronted, and civil society should be energized to build political coalitions that will institute

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<sup>438</sup> See, e.g., *China in Laos*, ECONOMIST, May 28, 2011, at 46; Peter F. Schaefer, *China's New Property Rights*, CATO INST., Apr. 14, 2004, available at <http://www.cato.org/publications/commentary/chinas-new-property-rights>.

<sup>439</sup> See, e.g., THE WORLD BANK, WORLD DEVELOPMENT REPORT 2005: A BETTER INVESTMENT CLIMATE FOR EVERYONE (2004), available at [http://siteresources.worldbank.org/INTWDR2005/Resources/complete\\_report.pdf](http://siteresources.worldbank.org/INTWDR2005/Resources/complete_report.pdf) (stating that property rights are "one of the basic requirements for a healthy investment climate and for economic growth").

<sup>440</sup> See Daron Acemoglu & Fabrizio Zilibotti, *Productivity Differences*, 116 Q. J. ECON. 563 (2001); Simeon Djankov et al., *The New Comparative Economics*, 31 J. COMP. ECON. 595 (2003); Erica Field, *Property Rights & Investment in Urban Slums*, 3 J. EUR. ECON. ASS'N 279 (2005).

<sup>441</sup> Boudreaux, *supra* note 73, at 311; cf. Hanan G. Jacoby & Bart Minten, *Is Land Titling in Sub-Saharan Africa Cost-Effective?: Evidence from Madagascar*, 21 WORLD BANK ECON. REV. 461, 461 (2007) (finding that land titling has not been cost-effective); Camilla Toulmin, *Securing Land & Property Rights in Sub-Saharan Africa: The Role of Local Institutions*, in HOW TO MAKE POVERTY HISTORY: THE CENTRAL ROLE OF LOCAL INSTITUTIONS IN MEETING THE MDGS 51 (Tom Bigg & David Satherwaite eds., 2005), available at <http://pubs.iied.org/pdfs/11000IIED.pdf>.

<sup>442</sup> See Dugger, *supra* note 39, at 453.

<sup>443</sup> See, e.g., *Infrastructure*, USAID, <http://www.usaid.gov/what-we-do/economic-growth-and-trade/infrastructure> (last visited Feb. 19, 2014) ("In many developing countries, basic infrastructure—power, water, sanitation, information and communications technologies, and roads—is failing, insufficient, or non-existent.").

lasting, comprehensive property reform.<sup>444</sup> Rather than generalized strategies, we need poverty alleviation driven by local, grounded, sustained, and context-specific polycentric efforts that promote economic growth and increased welfare, thereby realizing the promise, while avoiding the perils, of property rights formalization.

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<sup>444</sup> Robbins, *supra* note 43, at 196.