Neither Magic Bullet nor Lost Cause: Land Titling and the Wealth of Nations

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NEITHER MAGIC BULLET NOR LOST CAUSE: LAND TITLING AND THE WEALTH OF NATIONS
by Scott J. Shackelford*

Abstract

This Article offers a critique of land titling movements. Formalizing property rights is a popular idea. Endorsements range from Ronald Coase, Milton Friedman, Francis Fukayama, and Jeanne Kirkpatrick, to David Owen, and Margaret Thatcher. This Article seeks to determine whether such widespread praise is justified based on an analysis of the available empirical literature on the subject. I argue that instead of property rights formalization being a panacea cure for alleviating poverty in the developing world, it 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 and juriculture, 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.

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Introduction

On January 22, 2012, over 2,000 Brazilian riot police stormed an illegal settlement of landless workers in the outskirts of Sao Paulo to reclaim the property for its private owners.¹ Sixteen people were arrested as they tried to defend their homes, and over 6,000 others were evicted following a legal dispute over their rights to the land that since 2002 had developed into a settled neighborhood boasting shops and churches.² This episode in Brazil is being repeated around the world as urban populations explode.³ 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.⁴ But this “triumph of the urban” is not without its costs.⁵ Approximately 900 million people currently live in slums throughout the developing world, a figure that is expected to grow to more than 1.7 billion by 2030.⁶ Life in these slums can be unbearable.⁷ The Mathare slum in Nairobi, Kenya extends some seven miles and is home to 500,000 people, who are among the poorest people in sub-Saharan Africa.⁸ But where many people see poverty without hope, others see the makings of an economic revolution.

Free trade, free markets, and international investment are often lauded as the path to prosperity, but despite widespread adoption of these staples of the Washington Consensus more

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³ Id.
⁴ Id.
⁸ See Slum Living, supra note 5.
than 1.2 billion people still live on less than $1 per day.\(^9\) Since World War II, developed nations have spent a staggering amount on targeted foreign aid for poverty alleviation, such as for improving infrastructure and enhancing the prospect of long-term economic growth.\(^10\) But macroeconomic evidence does not support the notion that this aid is catalyzing significant economic growth in many of the world’s poorest countries.\(^11\) The search for determining the missing factor 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 to take advantage of these resources.\(^12\) In particular, Professor Olson singles out the need for institutions to impartially enforce contracts and secure property rights.\(^13\) Other institutional economists, such as Hernando de Soto who has done much to popularize the field, have built from Professor Olson’s work arguing that the key to economic development is the growth of local capital markets built on robust, formalized property rights regimes.\(^14\) Their central thesis is that formalized, state-sanctioned property rights generate capital and promote economic development, as seen in the relative success of the legal systems of developed countries that have formalized their informal economies allowing property

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\(^9\) Robert J. Samuelson, *The Spirit of Capitalism*, FOR. AFF. (Jan. 2001) (noting that from 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, in which 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).


\(^12\) Mancur Olson Jr., *Big Bills Left on the Sidewalk: Why Some Nations are Rich, and Others Poor*. 10(2) J. ECON. PERSPECTIVES 3, 7 (1996) (observing that “variations in institutions and policies are surely the main determinants of international differences in per capita incomes.”).

\(^13\) Id. at 22.

to generate capital.\textsuperscript{15} The argument then is; if it worked for the West, it will work for the rest.\textsuperscript{16} This Article offers a critique of the hypothesis that formalized private property rights are a key determinant of the wealth of nations.

Formalizing property rights is a popular idea. Endorsements range from Ronald Coase, Milton Friedman, Francis Fukayama, Jeanne Kirkpatrick, to David Owen, and Margaret Thatcher. Bill Clinton publicly declared that de Soto was “probably the world’s most important living economist” for his work on property rights formalization.\textsuperscript{17} Even the World Bank has supported the formalized thesis stating, “Land is a key asset for the rural and urban poor.”\textsuperscript{18} But in order to be successful, formalized property rights regimes must be culturally relative. This fact may be illustrated by considering the experience of Native American communities.\textsuperscript{19} The U.S. Congress began privatizing commonly held Native American land in 1887, a process known as “allotment” that eventually would cost Native Americans two-thirds of their property and devastate communities.\textsuperscript{20} According to Professor Kenneth Bobroff, “Allotment failed…because it attempted to impose private property on the indigenous peoples who had no conception of the


\textsuperscript{16} See Kevin E. Davis, \textit{reviewing} HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE, 22(4) THIRD WORLD QUARTERLY 675-82 (2001) (noting that both de Soto’s books, \textit{The Other Path} and \textit{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). In \textit{The Other Path}, argued 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 be untitled. \textit{See generally} HERNANDO DE SOTO, THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD (1989).

\textsuperscript{17} John Gravois, \textit{The De Soto Delusion}, SLATE, Jan. 29, 2005.

\textsuperscript{18} \textit{Land Policies for Growth and Property Reduction}, WORLD BANK POLICY RESEARCH REPORT xvii (2008) [hereinafter WORLD BANK POLICY RESEARCH REPORT].


\textsuperscript{20} 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. \textit{Id.} at 1560, n.2 (citing to STEPHEN CORNELL, THE RETURN OF THE NATIVE: AMERICAN INDIAN POLITICAL RESURGENCE vi (1988).
private ownership of land." But contrary to the conventional wisdom of the time, Native Americans had a complex system of fluid tribal property rights systems prior to the Congressional-mandated and static system of allotments. Subsequent to the enactment of the 1887 Dawes Act though, an act of Congress was required to amend Native American property law. Thus, the disastrous consequences to the welfare of Native Americans was not caused by instituting a property rights system, but rather by instituting a single rigid system that failed to account for traditional property rights regimes based on cultural norms that were 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. Despite life-threatening travails, emigrants respected a complex system of ownership on the trail from Ohio to California under horrific conditions.

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. Particular attention is paid to the importance of considering the various derivations of property rights in culturally relative terms. In essence, I argue that land titling in the form of a single, externally-imposed and static system of private property rights should not be viewed as a one-sized-fits-all solution to creating capital and building wealth due to the difficulty of setting up adequate legal systems that are sensitive to cultural norms and thus the common good. I am not arguing that private property rights are a failure—far from it. The incentives created by private property

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21 Id. at 1561 (citing to Babbitt v. Youpee, 519 U.S. 234, 238 (1997)).
22 Id. at 1563.
23 General Allotment Act, ch. 119, 24 Stat. 388 (1887); and Bobroff, supra note 19, at 1563.
24 See John Phillip Reid, Paying for the Elephant: Property Rights and Civil Order on the Overland Trail, 41(1) HUNTINGTON LIBRARY Q. 37, 56-58 (1977). See also AMELIA CLEWLEY FORD, COLONIAL PRECEDENTS OF OUR NATIONAL LAND SYSTEM 432, 462 (1908) (noting that “squating” was “one of the oldest traditions in the colonies” and detailing how widespread it was throughout colonial America through the 19th century, and 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).
25 Id. at 58.
rights are critical to incentivize individuals to work to maximize the benefit of their land without worrying about free riders, assuming perfect enforcement. While most if not all cultures practice some form of private property in the context of exclusive right to an object, 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 Western systems. But the boundaries for exclusive use must be set according to commonly accepted norms if they are to be self-sustaining and successful with a minimum of disruption to local communities. This emphasis on local governance to sustainably manage resources evokes Nobel Laureate Elinor Ostrom’s framework of polycentric governance, which argues that top-down planning by national officials is oftentimes unnecessary to build efficient regimes. Rather by recognizing and reinforcing local rules, a bottom-up polycentric management approach can lower transaction (rule enforcement) costs relative to a monocentric hierarchy. This framework will be applied to titling efforts; in particular 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 what to do in foreign private property systems can strain local communities. 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

29 See Jude Wallace, Making Land Markets Work for All, INT’L FED. SURVEYORS (May 2009), available at 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.
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 both help safeguard human rights and build the wealth of nations.  

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 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, I argue that property rights formalization does hold the promise of unlocking capital and enhancing the wealth of nations, but note that legal reform must be both comprehensive and culturally relative to be consistent with the unique sociopolitical heritages of the societies in question. This is consistent with both polycentric theory and the corpus of human rights giving the extent to which informality is problematic for both economic and social development.

1. 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 successful in the developing

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world, in some cases breeding discontent, insecurity, and contributing to an explosion of unplanned urban sprawl.  

As of 2007, more than half of the urban population in Africa and more than 40 percent in Asia lived under informal tenure, i.e., living on land to which one does not have any formal title. This unregistered sprawl is the central conundrum with which institutional economists such as de Soto grapple. But de Soto is only the most prominent of the institutional economists, and certainly not the most academic having been called “the global guru of neo-liberal populism.”

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 three decades ago the first law and development movement disintegrated as its leaders renounced their conviction that legal institutions alone were central to a society’s development prospects. But more recently, partly inspired by the work of Douglass North among others, there has been a resurgent belief that rule of law institutions do matter. 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. 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. 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 be available and that legal institutions are critical to economic development by promoting the

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33 See WORLD BANK POLICY RESEARCH REPORT, supra note 18, at xxv.
35 Davis, supra note 16.
growth of capital markets. It is worth analyzing this argument in some detail given its centrality in land titling efforts.

1.1. The Central Role of Capital to the Formalization Thesis

Capital is the force that raises the productivity of labor and creates the wealth of nations according to de Soto.\(^{37}\) It is the starting point of credit history, of the creation of securities that are then sold on secondary markets.\(^ {38}\) 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. In contrast, capital is an asset that is fixed and realized in a particular subject, and is “the most tangible and detectable of assets.”\(^ {39}\) 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. Capital then is not the house itself, but rather an economic concept about the house, embodied in a consensual legal representation.\(^ {40}\) In this manner, capital is the potential that an accumulated stock of assets has to deploy new production.\(^ {41}\)

\(^{37}\) DE SOTO, supra note 14, at 5.

\(^{38}\) Id. at 7.

\(^{39}\) Id. at 30 (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 that 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(5) J. POL. ECON. 912 (Oct 1994); and Simon Johnson et al., Entrepreneurs and the Ordering of Institutional Reform: Poland, Slovakia, Romania, Russia and Ukraine Compared, The Economics of Transition, 8(1) EUROPEAN BANK FOR RECONSTRUCTION & DEV. 1 (Mar. 2000) (discussing similar limitations when trading is confined to closed circles.).

\(^{40}\) DE SOTO, supra note 14, at 50.

\(^{41}\) Davis, supra note 16.
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 capital as well as its capacity to generate surplus value. For this surplus value to be unlocked it is necessary to have a right to the livestock such that other people cannot take the food, hides, or offspring, i.e., a right of exclusion is imperative for capital to produce surplus value. In essence then, proponents such as de Soto claim that property rights are a prerequisite of capital—to put it bluntly, you need a property right before you can make money. But institutional economists such as de Soto and his followers, who are collectively referred to here as “formalizers,” argue that informal property rights do not unlock the capital held in property such as small businesses, street vendors, taxicabs, bus services, shops, tiny factories, and urban marketplaces. To accomplish that feat, they argue that 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.

1.2. Defining “Property” in the Context of Formalization

Theorists from Cicero to John Locke have failed to reach a common definition of “property,” and “to some scholars it is merely considered ‘a contested concept and one that evolves historically.’” A common dictionary entry defines property as “a thing or collection of things that one owns,” or as “a bundle of ‘sticklike rights.’” The positive rights making up this

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42 De Soto, supra note 14, at 64.
43 Samuelson, supra note 9.
45 Reed, supra note 44, at 470, n.34 (citing Margaret Jane Radin, Reinterpreting Property 245, n.45 (1993)).
46 Reed, supra note 44, 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”).
bundle include the rights to possess, to use, consume or to alienate property. The English word derives from the Latin *proprietas,* or “ownership.48

Depending with whom you confer, property may connote theft, murder, slavery, and liberty.52 Some contend that property rights exploit the poor, while others, such as de Soto, believe that formalized property rights is the salvation of the poor. It is not even agreed whether property is a natural right, or an artificial creation of the state, and whether property rights lead to environmental degradation, or are a primary way to stave off collective harm. The amorphous, contradictory definitions of property demonstrate the variety of meanings that may be attributed to property, from “that which is owned” that the U.S. Supreme Court has referred to as property “in its vulgar …sense,” to ownership over resources, complicating the arguments for and against formalizing property rights that will be returned to in Parts II-IV. As

51 Reed, supra note 44, at n.5 (citing to Richard Schlatter, *Private Property, the History of an Idea* 19 (1951)).
52 Reed, supra note 44, at 459-60, n.5; see also John Phillip Reid, *Constitutional History of the American Revolution: The Authority of Rights* 31-32 (1986).
53 Reed, supra note 42, at n.9; see also Proudhon, supra note 49, at 97.
59 Reed, supra note 44, at 461-62.
62 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,
Professor O. Lee Reed has argued though, exclusion is at the heart of property, which means that private property may be understood as a system of exclusive rights to resources that that may be used or transferred.63

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 legal institutions formalizing property rights.64 If this is indeed correct, then property rights, particularly those that advance a right of exclusion to maximize resources, may place “law alongside economics as foundational for studying the wealth of nations.”65 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 to what extent formalized property rights do in fact promote economic development, and what if any sociopolitical pitfalls exist in formalizing hitherto informal economies.

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

There is a school of thought among scholars that maintains that coupling an efficient contract law system with private property rights provides a solid foundation for successful market economies.66 In some ways this tradition dates back to William Blackstone who argued

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63 See Reed, supra note 44, at 461, n.8.
64 Id. 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; and (4) make resources easily divisible so that those who value them most highly can transfer them by contract.”).
65 Id. at 501.
that enforcing property rights through contracts incentivizes individuals to make socially desirable investment in improving assets.\textsuperscript{67} A contract law system then enforces the transfer of such rights, creating a market backed by the coercive power of the state. This market then allows individuals to enter into mutually beneficial exchanges promoting trade, investment, and economic growth.\textsuperscript{68}

Today, three main questions that are typically addressed in discussing the role of property rights in development, including: (1) what role do legal institutions play in development?; (2) why have some countries failed to develop necessary institutions; and (3) what steps may be taken to foster the development of such institutions?\textsuperscript{69} Two primary camps have attempted to answer these questions. The first is made up the 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-scale poverty alleviation.\textsuperscript{70} The case for formalization is laid out below and critiqued in Part II. Parts III then uses case studies to examine on the ground realities and IV analyzes grounds for compromise between these competing camps.

The work of modern formalizers is in large part built off of the foundation laid by John Turner and Hans Harms who in the 1960s and 1970s began arguing for the importance of formalizing property rights, which they termed “land regularization.”\textsuperscript{71} They, and now formalizers generally, succinctly argue that “titling,” i.e. formalization, improves land market efficiencies, reduces uncertainty, conveys useful information to creditors, and provides

\begin{itemize}
\item \textsuperscript{67} W. BLACKSTONE COMMENTARIES ON THE LAWS OF ENGLAND, VOL. 2 OF THE RIGHTS OF THINGS 979 (1766).
\item \textsuperscript{68} See generally DOUGLAS NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990); and Davis, supra note 16.
\item \textsuperscript{69} See Davis, supra note 16.
\item \textsuperscript{70} See, e.g., Edward Robbins, Formalisation of Land and Housing Tenure to Empower the Poor: Simple Nostrum or Complex Challenge\textsuperscript{5}, in DAN BANIK, RIGHTS AND LEGAL EMPOWERMENT IN ERADICATING POVERTY 175 (2008).
\item \textsuperscript{71} Robbins, supra note 70, at n.3.
\end{itemize}
incentives to develop property thus catalyzing capital markets.\footnote{Titling property is a legal act documenting the ownership of an asset as well as legal claims on the asset. \textit{See} Karol C. Boudreau, \textit{The Legal Empowerment of the Poor: Titling and Poverty Alleviation in Post-Apartheid South Africa}, 5 HASTINGS RACE & POVERTY L.J. 309 (2008).} 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.\footnote{\textit{See} Christopher Clague et al., \textit{Contract-Intensive Money: Contract Enforcement, Property Rights, and Economic Performance}, 4(2) J. ECON. GROWTH 185, 185-86 (1999) (analyzing the importance of secure property rights to economic growth and investment).} In other words, property makes people accountable and assets fungible by tracking transactions,\footnote{\textit{See} World Bank Policy Research Report, \textit{supra} note 18, at xxi (arguing that widespread land ownership strengthens democratic accountability).} and so providing all the mechanisms required for the monetary and banking system to function and investments to grow.\footnote{\textit{De Soto}, \textit{supra} note 14, at 63. \textit{De Soto} states two ways in which formalized property rights make people more accountable. First, he discusses the importance of enabling the state to enforce obligations by depriving defaulting citizens of their property. Second, he argues that formalized property make people who incur obligations identifiable. In other words, reducing anonymity facilitates reputational sanctions. Formalized property rights may be important to achieve one form of accountability but not the other. There are many ways to reduce anonymity that have nothing to do with formalized property rights—for example, making registration for names and addresses mandatory. \textit{See} Davis, \textit{supra} note 16. Moreover, the empirical studies that have been done do not provide significant support for the notion that reputational sanctions alone represent viable substitutes for legal enforcement mechanisms. \textit{See} John McMillan & Christopher Woodruff, \textit{Interfirm relationships and informal credit in Vietnam}, 114(4) Q. J. ECON. 1285, 1286 (1999); J. John McMillan & Christopher Woodruff, \textit{Dispute prevention without courts in Vietnam}, 15(3) J. L., ECON. & ORG. 637 (1999); and Marcel Fafchamps, \textit{The enforcement of commercial contracts in Ghana}, 24(3) WORLD DEVELOPMENT 427 (1996).} 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.\footnote{\textit{See}, e.g., Christian E. Weller & Amanda Logan, \textit{Wall Street Leads to Your Street}, CTR. AM. PROGRESS, Oct. 1, 2008, available at http://www.americanprogress.org/issues/2008/10/wall_street_leads.html; and \textit{De Soto}, \textit{supra} note 14, at 7.} Without property rights, innovative businessmen and businesswomen would be unable to take out loans to turn their ideas into reality, curtailing growth. Beyond funding new enterprise, half of the credit in the U.S. is tied to some form of personal property.\footnote{\textit{Heywood Fleisig}, \textit{Secured transactions: the power of collateral}, 33(2) FINANCE & DEV. 44, 44-46 (1996). A question arises though 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. \textit{See} Davis, \textit{supra} note 16.} Indeed, up to half of the wealth of the developed world is in
some form of real estate, although these figures changed beginning in 2008 to an extent as a result of the global financial crisis. Property, then, is a crucial driver of capital creation in developed economies. 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.

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. For example, de Soto and his team estimate that fully 85 percent of urban inhabitants, and 53 percent of rural dwellers, do not legally own their property in the developing world. Instead, informal, local systems manage property claims and disputes. These systems are so widespread that as much as 90 percent of the population in some developing nations now operates outside the formal economy. Beyond facing a number of threats to their wellbeing, these people have no opportunity to leverage their assets. Tax revenues are also lost, and capital growth is curbed. 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 seen in the Brazil example, as well as bureaucratic arbitrariness and corruption.\textsuperscript{85} As a result, entrepreneurs in developing nations cannot use their property as collateral (capital held in escrow) to start new businesses or take out mortgages to improve their land, resulting in dampened incentives, stymied capital markets, and limiting economic growth.\textsuperscript{86} Accordingly, formalizers argue that the substantial 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.\textsuperscript{87}

A system is needed to translate the invisible savings of the developing world into capital, making illegality the exception rather than the norm.\textsuperscript{88} To accomplish this feat, formalizers argue that formal property institutions are required to free the energy of entrepreneurs and expand opportunities to generate capital.\textsuperscript{89} A 2002 World Bank Development Report states that such an effective property law system would lower transaction costs across the developing world.\textsuperscript{90} Currently, high transaction costs in land markets make it more difficult to provide credit, constrain the private sector, and decrease overall development rates.\textsuperscript{91} In fact, a 2008 World Bank study found that in India such distortions reduce the annual GDP growth rate by as much as 1.3 percent.\textsuperscript{92} Property formalization could lower these costs creating savings that


\textsuperscript{86} But see Klaus Deininger & Gershon Feder, Land Registration, Governance and Development: Evidence and Implications for Policy, 24(2) THE WORLD BANK RESEARCH OBSERVER 233, 236 (Aug. 2009) (arguing that the natural “social contract” prevents land from being used as collateral, limiting access to credit for low-income individuals in these communities).

\textsuperscript{87} DE SOTO, supra note 14, at 6.

\textsuperscript{88} Id. at 30.

\textsuperscript{89} Libecap, supra note 85.


\textsuperscript{91} WORLD BANK POLICY RESEARCH REPORT, supra note 18, at xix.

\textsuperscript{92} Id.
would then be passed on to property holders who then possess more capital to make improvements and establish credit.\footnote{See Matthew Rosenberg, reviewing HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE, 78(1) INT’L AFF. 174 (2002) (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 tells of a veteran who crossed America narrating a story about an Indian merchant who had been promised by a prophet that he would be rich beyond his wildest dreams. Motivated, the merchant traveled the world in search of his fortune. Finding nothing, he returned home dejected, but when digging a new well on his property struck the Golconda load, the world’s greatest diamond mine.\footnote{DE SOTO, supra note 14, at 31.} 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: “[E]ven those who live under the most grossly unequal regimes possess far more than anybody has ever understood.”\footnote{Id. at 16.} Thus, if these people had their property rights formalized, property values would increase, in turn galvanizing weak financial systems and consequently economic development. The question becomes, how might such dramatic 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 Sao Paulo discussed in the introduction.\footnote{See supra p.2.} In particular, communal property rights systems reminiscent of Native American regimes remain prevalent around the world in the twenty-first century.\footnote{See Elinor Ostrom & Charlotte Hess, Private and Common Property Rights, LIBRARY PUBLICATIONS at 2 (Paper 24, Jan. 1, 2007), available at http://surface.syr.edu/sul/24.} Myriad examples are explored below,\footnote{See infra pp.25-30.} but 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.\textsuperscript{99}

The question then becomes whether imposing a private property regime on top of preexisting communal relationships will function the way formalizers intend. A powerful example is the Maasai Pastoralists of Kenya as is explored by Professor Ostrom and Esther Mwangi.\textsuperscript{100} They explain how these pastoralists maintained seasonal herd movements between dry and wet season pastures within and outside Massai territory.\textsuperscript{101} During the colonial period, the British replaced with communal system with individual ownership of specific parcels of land. This legacy of privatization continued through the 1980s, and is thought to have led to changing land use patterns and escalating conflicts over scarce resources. The authors 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 will likely result.”\textsuperscript{102} This evokes Garrett Hardin’s classic tragedy of the commons model predicting the eventual overexploitation and degradation of all common pool resources.\textsuperscript{103} This model has become part of the conventional wisdom in diverse fields ranging from economics and ecology, to political science and law.\textsuperscript{104} Hardin called for either nationalization or privatization to avoid this tragedy.\textsuperscript{105} But since its introduction more than 40 years ago, the theory has been critiqued and modified notably

\begin{footnotesize}
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  \item \textsuperscript{99} Ostrom & Hess, supra note 97 (arguing that “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.”)
  \item \textsuperscript{101} Id.
  \item \textsuperscript{102} Id.
  \item \textsuperscript{103} Garret Hardin, The Tragedy of the Commons, 162 Sci. 1244, 1244-45 (1968).
  \item \textsuperscript{104} See e.g., ARTHUR F. MCEVOY, THE FISHERMAN’S PROBLEM: ECOSYSTEM AND LAW IN THE CALIFORNIA FISHERIES, 1850–1980 214 (1986).
  \item \textsuperscript{105} Hardin, supra note 103.
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by Professor Ostrom.\textsuperscript{106} Rather than seeing all common pool resources as being open access in an anarchic state of overexploitation, Ostrom posits that resources are embedded in complex, social-ecological systems operating on multiple levels. Her work has identified numerous examples of such “polycentric” systems in which local communities have successfully managed community resources for the common good,\textsuperscript{107} underscoring the need for culturally relative, community-driven property rights regimes applicable to critiquing the formalization thesis.

In an ideal scenario, freeing “dead capital”\textsuperscript{108} 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.\textsuperscript{109} Without reform, the “legal apartheid” in which 80 percent of property is held informally could continue—by 2015, one half to one third of the total output from the developing world may be ‘extralegal’ according to de Soto.\textsuperscript{110} If formalization may 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.

2. 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 important evidence about precisely how these

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\textsuperscript{108} Davis, supra note 16 (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).
\textsuperscript{109} Libecap, supra note 85.
\textsuperscript{110} De Soto, supra note 14, at 83.
\textsuperscript{111} Id. at 84.
\end{footnotesize}
programs accomplish the goal of empowerment. Developing countries have been experimenting with titling programs for decades, often with mixed results. But some proponents such as de Soto dismiss these efforts, noting: “[A]n extraordinary number of them had been prematurely abandoned 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.” But early abandonment was not the problem that prevented the full unlocking of capital in Peru after formalization in the early 1990s, yet that program also had mixed results. 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. 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. 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. 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. Before analyzing the efficacy of the available empirical data on land titling, it is worth considering de Soto’s thesis to frame the discussion given that his work is credited with jumpstarting popular attention in the field.

112 Boudreau, supra note 72.
113 Woodruff, supra note 119.
114 DE SOTO, supra note 14, at 169.
115 See Woodruff, supra note 119.
117 Dolan, supra note 84 (arguing that titling meant that Peru’s poor could deal with just one agency to obtain title, rather than up to 14, thus lowering the cost of registering a business to $174).
118 Gravois, supra note 17. 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 $800m in new mortgages annually. Dolan, supra note 84.
2.1. 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. Still, the examples de Soto evokes are powerful. Consider his finding that obtaining a formal property title in the Philippines takes 168 steps through 53 public agencies, and may take on average anywhere between 13 and 25 years. Or the fact that it is so expensive to register a business in Mexico that there are approximately 2.65 million unregistered microbusinesses in Mexico City alone. If the 1.5 million informal food stands were put together, they would stretch over 100 miles. Together, these examples effectively illustrate a culture of illegality, corruption, and excessive risk-taking that develop in nations with large informal economies in which homes are insecure, and property is illiquid. 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.” 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. That figure is roughly 40 times all of the foreign aid

120 DE SOTO, supra note 14, at 20.
122 Libecap, supra note 85. 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 since 2008. See New Home Sales Dip in May as Prices Rise, NAT’L PUB. RADIO, June 23, 2011, available at http://www.npr.org/2011/06/23/137366370/new-home-sales-dip-in-may-as-prices-rise. This is impossible in an informal system of land ownership. Woodruff, supra note 119.
123 Woodruff, supra note 119.
sent to developing countries since 1945. How did de Soto make this estimate of dead capital? Their methodology is opaque. Using surveys from just five cities—Cairo, Lima, Manila, Mexico City, and Port-au-Prince—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. It is by multiplying these extralegal holdings by their fair market value that de Soto arrives at $9.3 trillion. The problems with this methodology are apparent, and have been well documented, including not taking into account the location of properties, and abstracting out results from a small, unrepresentative sample. Given these shortcomings, several authors have attempted to gauge a more accurate figure for the value of informal property in the developing world. Christopher Woodruff, for example, estimates a total a figure of $3.6 trillion. The salient point, though, is that even a low-end estimate of $3 trillion is still $5,000 per developing country household, which is enough to make a significant difference in peoples’ lives. Matthew Rosenberg agrees, arguing that even if de Soto’s numbers are not accurate, they still point to the bulk of the developing world’s property being held informally and this land is worth a significant amount of money that could be used to jump start developing economies. 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.

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125 See De Soto, supra note 14, at 33.
126 Id. at 24 & 31.
127 The figure of 85 percent is far lower than the three countries that de Soto provides any detail—Peru (53 percent); the Philippines (57 percent); Haiti (68 percent). See Woodruff, supra note 119.
128 De Soto, supra note 14, at 29.
129 See, e.g., Thomas, supra note 15.
131 Woodruff, supra note 119.
132 Rosenberg, supra note 93.
133 See infra p.45.
None of this is meant to detract from the importance of neither this work, nor to ignore de Soto’s other ongoing projects through the Institute for Liberty and Democracy which is active in more than 14 nations.\textsuperscript{134} In some ways, that is the downside of “pop academics” who’s scholarly work can be oversimplified to a thesis that 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 \textit{The Mystery of Capital}, for example, that broader legal reforms are critical to property reform. Yes, there are significant problems with de Soto’s data and methodology in \textit{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.\textsuperscript{135} In Peru, for example, one study determined that bribes alone already raise the cost of running a small business by 15 percent.\textsuperscript{136} Thus, the formalization thesis does have some merit. However, as with the subsequent modifications of Hardin’s classic tragedy of the commons,\textsuperscript{137} the wider literature on formalizing property rights has modified the classic formalization thesis, but not 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) considering the social cost and environmental degradation of titling; (4) the efficacy of previous titling efforts challenges the central claim of formalizers that land titling leads to capital growth; (5) the necessity of considering the benefits and drawbacks of property formalization, such as gains from trade and

\textsuperscript{135} See \textit{De Soto}, supra note 14, at 195; and \textit{A Man and a Morass}, supra note 83.
\textsuperscript{136} See Samuelson, supra note 9.
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.

2.2. 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.” 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 due to cultural considerations as untrue and inhumane, 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. But human nature is not quite so uniform. Different values, beliefs, and customs are replete around the world. Economic incentives and cultural imperatives are constantly interacting with and impacting one another. Leading scholars such as Professor Robert Samuelson have recognized this fact, arguing against this “single bullet” approach to land titling and for a degree of cultural relativism. Similarly, John Phillip Reid has made the case that the specific legal boundaries of property rights must come from cultural norms in order to have the force necessary

138 WORLD BANK POLICY RESEARCH REPORT, supra note 18, at xvii.
139 See DE SOTO, supra note 14, at 4.
140 HARRISON & HUNTINGTON, supra note 237.
141 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 20 traits are present, including competition, innovation, hard work, and trust in the individual. Samuelson, supra note 9. Carlos Montaner maintains that in large parts of Latin America people nurture relationships in which personal loyalty is awarded and merit is largely ignored. He goes on to note that the Catholic clergy undermine the psychology of success through intoning against the profit motive as a means to itself. HARRISON & HUNTINGTON, supra note 237.
142 See Samuelson, supra note 9.
for wealth creation. Cultural considerations thus modify the overall formalization hypothesis. Property has a different meaning and importance in different parts of the world. Even within countries, diverse regions and groups can have dissimilar experiences. Property then may be best understood as the distribution of social entitlements that vary in form and substance in and among states and cultures. 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 “International law treats the property rights of individuals as more sacred than the sovereignty of states,” in that a Western, market-based view of property rights is favored in many international instruments. But on the ground realities differ. Thus, while it may well be true that “Private property is arguably the single most important institution of social and political integration,” 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. As an example of the various types of property rights that should be considered in the formalization analysis, consider the prevalence of leasing relationships.

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143 See generally John Philip Reid, Law for the Elephant: Property and Social Behavior on the Overland Trail (1997).

144 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. HARRISON & HUNTINGTON, supra note 237.

145 Robbins, supra note 70; see generally C.M. Hann, Property Relations: Renewing the Anthropological Tradition (1998).

146 De Soto, supra note 14, at 165.

147 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 toward protecting ownership.” Id. at 62.

148 Id. at 191.

149 See Thomas, supra note 15.
An increasingly common facet of life in developing and developed nations alike is the rise of rental markets. More than 70 percent of land in some developed nations, for example, is rented or leased. Yet leasing relationships are commonly ignored in titling schemes that expound the virtues of individual, private property rights over local cultural considerations. Titling may have dire effects on these leasing relationships. How would sub-leasers 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. 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 leasers. In particular, the free, uninhibited operation of rental markets has been shown to lead to more secure property rights. 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. Studies focusing on Ethiopia indicate that restrictions on the operation of rental markets tend to undermine the emergence of non-farm enterprises. 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 legislation restricting land rentals to avoid exploitation. The case for gradual abolition of such restrictions is bolstered by evidence from Southeast Asian

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150 [World Bank Policy Research Report, supra note 18, at xxxii.](#)
151 Id. at xliii.
153 See [World Bank Policy Research Report, supra note 18, at xxxvii.](#)
154 Id. at xxxiv.
countries that illustrate how quickly active markets in use rights can develop in the absence of burdensome restrictions.\textsuperscript{155} Similar arguments apply to Latin America, which also has a history of weak land rental markets with many restrictions, leading to high transaction costs. There are rich layers of institutions, from individuals, to groups to governments that claim property,\textsuperscript{156} but large numbers of people in the developing world may be helped not through formalization of property rights, but through the far less burdensome route of leasing reform.\textsuperscript{157}

Beyond leasing reform, 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.\textsuperscript{158} Common property comes in many forms, but often involves group control over a resource leading to the balancing of costs and benefits.\textsuperscript{159} 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.\textsuperscript{160} Unlike open access areas lacking property rights,\textsuperscript{161} common property involves ex ante rights and duties for non-property holders.\textsuperscript{162} Common property is 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.\textsuperscript{163} But it is unlike private property due to the prevalence of collective ownership.

\textsuperscript{155}Id.
\textsuperscript{156}Robbins, supra note 70, at 187.
\textsuperscript{157}See Reed, supra note 44, at 485 (arguing that “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).
\textsuperscript{158}See infra p.45.
\textsuperscript{160}Id. at 40.
\textsuperscript{161}Id. at 49.
\textsuperscript{162}See WIEZTE LISE, AN ECONOMETRIC AND GAME THEORETIC MODEL OF COMMON POOL RESOURCE MANAGEMENT 22 (2007).
\textsuperscript{163}STEVENSON, supra note 159, at 57.
Self-governing communities may use common property rights in making and adapting rules within collective choice arenas regarding the inclusion or exclusion of participants, appropriation strategies, participants’ obligations, monitoring and sanctioning, and conflict resolution. Some remote areas, such as Swiss alpine meadows, have been so managed for centuries. This stands in contrast to the externally imposed and inflexible property regime from the Dawes Act long governing Native Americans land transactions from the introduction. Effective communal property management is the stuff of grass-roots public participation. Professor Ostrom in particular 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. Even the medieval English commons from Hardin’s paper was subject to regulation, such as stinting to prevent overgrazing. The same holds true now with meadow commons in Japan. Professor Ostrom postulates that polycentric governance featuring bottom-up governance and common property, depending on the culture at issue, can help

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164 Figure redrawn from STEVENSON, supra note 159, at 58.
165 Ostrom, supra note 27, at 8.
166 See generally ROBERT NETTING, BALANCING ON AN ALP: CHANGE AND CONTINUITY IN A SWISS MOUNTAIN COMMUNITY (1981).
167 Id.
168 See Susan J. Buck Cox, No tragedy on the commons, 7 EVNTL. ETHICS 49, 49-51 (1985).
169 See David Feeny et al., The Tragedy of the Commons: Twenty-Two Years Later, 18(1) HUMAN ECOLOGY 1, 10 (1990).
capitalize on local knowledge and is a viable alternative to outright privatization or nationalization.

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 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. Economists argue that if private property rights are distributed to users of common property, then income for labor and property will eventually exceed income from labor alone, so long as private ownership is not concentrated into a monopoly. Using the labor theory of value popularized by David Ricardo among others, socialists have critiqued the relation of property to other economic issues, notably profit. Socialism is concerned with addressing income disparity, arguing that even if property rights encourage property-holders to develop their properties, they will only do so for private benefit, which may not coincide with societal interest. Communism goes one step further, denying any benefits of private property. If these claims are illegitimate, then it follows that the concept of private property is illegitimate. In practice, property rights are sometimes applied in combinations that incorporate these overarching ideologies. For instance, many tribal cultures

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171 R. Peter Terrebonne, Privatizing the Commons: The Distribution of Total Product, 19(2) Eastern Econ. J. 165, 165 (Spring 1993).
173 Id at 133.
balance individual ownership with the norms of collective groups.\textsuperscript{174} A contemporary example is China, where Deng Xiaoping’s reforms have pushed China towards transforming property rights such as through the creation of special economic zones and leasing what had been communal land.\textsuperscript{175} These reforms provide a vivid illustration for how fundamentally different types of property rights may coexist within a single society and in fact contribute to its rapid economic development.\textsuperscript{176}

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. This situation is one in which private ownership leads to underuse or development that is detrimental to both individual owners and the public. The anticommons is the reverse of the tragedy of the commons, which occurs when collective ownership of natural resources results in their depletion.\textsuperscript{177} Under this conceptualization, multiple owners each have a right to exclude others and no one has an effective privilege of use stifling innovation and effective use.\textsuperscript{178} This situation is rare, owing to the fact that one individual can typically buy out other property owners and develop the resource in the absence of high transaction costs, but it has been documented for example in biomedical research where patent ownership is divided precluding the end use.\textsuperscript{179} Land titling has been described as a type of anticommons, in that a multitude of owners means that no one person has

\textsuperscript{177} See Mark A. Rodwin, Patient Data: Property, Privacy & the Public Interest, 36 AM. J. L. & MED. 586, 603 (2010).
a veto over management decisions resulting in gridlock.  But this application has been critiqued, such as by D. Benjamin Barros, since not all “owners” are equal and in fact overlapping authority leads to transaction costs and free riders but not necessarily the formation of an anticommons. This interpretation evokes Professor Ostrom’s work on polycentric self-governance, in particular the fact 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 regions though 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.

2.3. Formalizing the “People’s Law”

Overcoming political opposition is central to formalizing the “peoples’ 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, 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.” 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. Indeed, much of the land now being adversely possessed by the poor is likely held by urban elites, especially in nations with marginal governance. Giving the poor legal title would amount to the uncompensated redistribution of a massive amount of wealth that will be fought by elites across

180 See D. BENJAMIN BARROS, HERNANDO DE SOTO AND PROPERTY IN A MARKET ECONOMY 110 (2010).
181 Id. at 111.
182 Robbins, supra note 70, at 184.
183 Samuelson, supra note 9.
the developing world. But formalizers such as de Soto pay scant attention to how to build the political coalitions necessary to take on powerful vested interests, noting “the poor must make their voices heard in the democratic process,” but emphasizing a top-down approach starting with the Executive. This conclusion runs contrary to the grass roots mobilization envisioned by Professor Ostrom, and stands in contrast to myriad field studies demonstrating the benefits of local self-organization. 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. As Edward 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.”

One of the growing risks for failing to politically mobilize is being unable to protect against mass expropriation. This practice is increasing common given that, as has been shown, land values often increase after formal titling, violating the fundamental right of exclusion that is the basis of property rights as recognized by the U.S. Supreme Court. One study

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184 See Deininger & Feder, supra note 86 (arguing that marginal governance in developing nations often means that instituting more formalized land rights cements the dominance of the elite).
185 De Soto, supra note 14, at 191.
187 Robbins, supra note 70, at 192 (noting that many small businesses operate at a slim margin, and formalization may cut into their profit margin sufficiently to keep them from being profitable leading to a decrease in wealth).
188 Id. at 189.
190 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.” See Reed, supra note 21, at 473 (“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 the 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; and (4) which are originally possessed or have been acquired without coercion, theft, or deception. Id.
estimated that a formal title doubles the price of land in Brazil. Another found that land values are increased by a more modest four percent in Ecuador. Most estimates fall within this range. In Phnom Penh, Cambodia for example, formal titles have increased the value of land by ten times the prior asking price. In this case, the land was so valuable that the slums were cleared out, and the residents relocated so that the urban rich could reap the rewards. In other instances, such as in Manila, “squatters” 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. Thus, land titling may increase the risk that the politically powerful will take, or at least undercompensate, the poor for their land. Studies suggest that legal reform is only effective when the government can be held accountable, which is not necessarily true in all developing nations.

There is also the difficult question to consider of whether an 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 thereby sacrificing the integrity of nascent political coalitions? In response, Geoffrey Payne, a British urban planning consultant,

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.”)).

192 See Alston et al., supra note 240.
193 See Lanjouw et al., supra note 241.
194 See for example Jimenez, Emmanuel, Tenure security and urban squatting, 66 REV. ECON. & STAT. 556-67 (1984) (finding an increase of 58 percent in the value of land after formal titling); and Joseph Friedman, Emmanuel Jimenez, & Stephen Mayo, The demand for tenure security in developing countries, 29 J. DEV. ECON. 185-98 (determining that formal titles increase the value of land in Manila by 25 percent).
195 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.
196 Gravois, supra note 17.
197 See Deininger & Feder, supra note 86.
has recommended temporarily insulating slums from commercial land markets by granting informal neighborhoods land rights for a limited duration. 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, 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.

Realizing the benefits from land registration depend on the quality of governance and the nature of the intervention. Cohesive political organization is essential to bring about lasting property reform enjoying majority support. Such organization should come from the bottom up in keeping with polycentric governance to stand the best chance of enduring success. 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 ramped expropriation. Property titles are by themselves useless without a robust political culture and legal system to enforce them.

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 is not well known. Moreover, formalizers can go too far 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

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198 Id.
199 WORLD BANK POLICY RESEARCH REPORT, supra note 18, at xxii.
200 Deininger & Feder, supra note 86.
201 See for example Elinor Ostrom et al., Revisiting the Commons: Local Lessons, Global Challenges, 284(5412) SCIENCE 282, 282 (1999) (illustrating the benefits of local self-organization to manage common resources).
202 Robbins, supra note 70.
203 See Deininger & Feder, supra note 86.
rules. Some scholars, such as Robert Cooter, have published studies suggesting that customary rules generated by closely-knit groups may be efficient. Yet others, such as Michael Trebilcock, note that some customary law discounts the interests of outsiders, and particularly vulnerable minority groups, tenants, women, indigenous peoples, and nomads. Examples from the U.S. experience are the mining associations in California, which excluded Mexican and Asian miners. Without certain safeguards formalizing these relationships could run the risk of undercutting the informal law that it was the point to formalize in the first place. As an example of exclusion concerns that may arise, there are inheritance considerations. In many cultures women, and certain kin members, are not be eligible to inherit property. 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. This further underscores the need for instilling localized, culturally relative formalization into titling efforts so as to ensure that baseline human rights protections are enjoyed by at-risk populations including the right to development.

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, and there is the larger

205 WORLD BANK POLICY RESEARCH REPORT, supra note 18, 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).
206 M. Trebilcock, comment on Cooter The rule of state law and the rule-of-law state: economic analysis of the legal foundation of development, in M. BRUNO, ANNUAL WORLD BANK CONFERENCE ON DEVELOPMENT ECONOMICS (1996).
207 DE SOTO, supra note 14, at 137-38 & 145.
208 Robbins, supra note 70.
question of how informal property arrangements can be incorporated into a formal body of enforceable law. What is the best mechanism for codifying the unwritten holdings of local, informal dispute resolution bodies? Formalizers such as de Soto argues that such a system could be organically generated given that many local informal dispute resolution bodies use quasi-legal methods for resolving property disputes that share many commonalities and could be codified into such a new system. Efficient conflict resolution is a key if land formalization is to succeed, including ensuring minimum standards for the rapid dispensation of justice, accountability, and transparency. Professor Ostrom’s work on polycentric governance similarly recognizes the critical importance of effective, low-cost dispute resolution. The key for formalizers is to show that informal property arrangements can in fact be incorporated into a formal body of enforceable law. This would require that the people have more direct political and economic control over their property to the extent that their cultures allow.

As with the desire to codify informal dispute resolution systems, encouraging land claims can also hurt society by leading to environmental degradation since at some point the marginal benefit of “entrepreneurship spirit” and economic development drops below the marginal social benefit of land in its unused state. Motivated by potential gains, squatters with a high tolerance of risk will settle on and claim marginal land, such as land needed to prevent erosion, thus

In answer to this issue, De Soto evokes another story, 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 14, at 162.

Rosenberg, supra note 93.

See Anil Divan, Legal and Judicial Reform, NATIONAL CONFERENCE ON LEGAL AND JUDICIAL REFORMS - THE BIRD’S EYE VIEW ON BALANCE SHEET AND PROJECTIONS, Federation of Indian Chambers of Commerce and Industry, Sept. 6, 2002 (discussing the need for legal reform in India); and H.R. Bhardwaj, Legal and Judicial Reforms in India, ICADR, available at http://www.icadr.org/articles/article_1.html (investigating the use of informal Indian alternative dispute resolution systems termed ‘Lok Adalats’ to settle disputes and reduce judicial backlog).


Rosenberg, supra note 93.
increasing social cost. 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 sustainability manage their property. Different cultures maintain varied perspectives and philosophies regarding environmental governance. 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 characterizes identified by Professor Ostrom and others, including the need for robust information sharing, effective conflict resolution, graduated sanctions, and adaptive frameworks that can flex with changing socioeconomic and environmental conditions. 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, which is considered next.

2.4. Empirical Support for the Four Links in the Formalization Chain

The primary assumptions underpinning the formalization hypothesis is that newly granted land titles may be used as collateral to generate loans to make improvements, spur financial

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218 *Id.*
institutions, and increase growth rates.\textsuperscript{220} It is uncontroversial that land is a key element for generating wealth—in Uganda, one World Bank study concluded that land constitutes between 50 and 60 percent of the poorest households’ endowment.\textsuperscript{221} 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?\textsuperscript{222} To parse through these issues, studies have demonstrated that four transfers have to happen for formalization to function as advertised: (1) property has to be transformed into collateral; (2) collateral into credit; and (3) credit into income; and (4) income into capital markets.\textsuperscript{223}

Empirical evidence suggests that there is contradictory evidence for each of the four links of the formalization chain. 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, but studies from other nations, notably Thailand, have reached the opposite conclusion and are reviewed below.\textsuperscript{224} Second, the basic credit model maintains that formalized property rights increases 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 market and without cost to property rights reform.\textsuperscript{225} Yet

\textsuperscript{220} Thomas, supra note 15.
\textsuperscript{221} WORLD BANK POLICY RESEARCH REPORT, supra note 18, at xx.
\textsuperscript{222} Assessing answers to these questions may only be done with reliable information on the distribution of the values of informal dwellings in developing nations. Thomas, supra note 15.
\textsuperscript{224} See infra p.25.
other studies have found that titling does not actually increase access to credit.\textsuperscript{226} 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.\textsuperscript{227} 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.\textsuperscript{228}

The evidence supporting the link between formalization, collateral and demand for credit exists but is attenuated, varying by the nature of the land and by culture. Two studies from Thailand are illustrative. The first by Gershon Feder examines the effects of formal titles in four provinces in rural Thailand, finding that owners of untitled land are as likely to receive credit as farmers with titled land, even from banks.\textsuperscript{229} For those Thai farmers with untitled land, group lending substituted for collateral,\textsuperscript{230} highlighting the more collective conception of property rights common in certain societies and providing further evidence against adopting a one-sized-fits-all approach. But the size of loans obtained from banks by farmers with formalized property is larger by more than 50 percent. The authors explain this result since titled land can be used as collateral, and having a formal title increases the value of land, and hence the value of available collateral.\textsuperscript{231} 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

\textsuperscript{226} But see WORLD BANK POLICY RESEARCH REPORT, supra note 18, at xxvi (noting that in Peru, property rights formalization has led to a 50% increase in the labor market).

\textsuperscript{227} See Besley & Ghatak, supra note 225 (arguing that in inefficient systems, lenders would favor property rights reform, while poor borrowers would lobby against reform).

\textsuperscript{228} See Deininger & Feder, supra note 86.


\textsuperscript{230} Woodruff, supra note 119.

\textsuperscript{231} Id.
due to the common risk factor of weather, large farm owners may be the only ones able to benefit from increased access to credit.\footnote{See Deininger & Feder, supra note 86.}

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 having a formal title had no effect on farmers with less than two hectares of land.\footnote{See M.R. Carter & P. Olinto, Getting Institutions Right for Whom: the Wealth-differentiated Impact of Property Rights Reform, Paper presented for XXI LASA Congress (Sept. 1998); and NICO HEERINK ET AL., ECONOMIC POLICY AND SUSTAINABLE LAND USE (2001).} While Timothy Besley determined that farmers who have transfer rights to their land in Ghana invest more in improvements,\footnote{Besley, supra note 223.} which can raise productivity.\footnote{See Jonathan Morduch, The Microfinance Promise, 37 J. ECON. LIT. 1569 (1999).} Consequently, there is some support for the first two links in the formalization chain, but that evidence is far from definitive. However, where credit is given, the evidence for the third link suggests that earnings are indeed increased by at least 25 percent.\footnote{See LAWRENCE E. HARRISON & SAMUEL P. HUNTINGTON, CULTURE MATTERS: HOW VALUES HAPE HUMAN PROGRESS passim (2000).} These findings show that if collateral could indeed be translated into credit, it would have a significant impact on earnings. But there is relatively little data linking formalizing property titles to increased collateral, credit access, and thus poverty reduction.\footnote{Woodruff, supra note 119.} Nor are there many studies demonstrating how widespread property ownership leads directly to advanced capital markets.\footnote{See Deininger & Feder, supra note 86.} Further research is needed in these areas, as well as in the relation between titling, trade, and entrepreneurship.

**2.4.1. 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 part of the formalization chain. There is a strong empirical link between formalized property rights and trade promotion. As 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.239

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.”240 Other researchers surveyed titled and untitled landowners in Guayaquil, Ecuador and asked whether they would be able to contract with a stranger for the sale or rental of their property. Those with formalized property claims were far more likely to say they could do so.241 Such an efficient titling system can also help prevent abuses of the rule of law.242 Consequently, aside from 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.

2.4.2. Indirect Benefits of Formalization: Entrepreneurship

Like trade, there is also substantial empirical support for the proposition that titling incentivizes home improvements and entrepreneurial activity. For example, one study found that

239 Id. at 70.
242 Id. (illustrating this point with an owner of a footwear factory in Mexico. The owner had a client who did not pay for the delivery of goods, so the owner took the customer to court and was awarded the customer’s car. When the owner went to collect, he found that the customer had already sold the car. This may be relatively commonplace in Mexico, but is rare in the U.S. due to more efficient titling systems).
in South Africa title-holders invest in improving their homes, which often raises property
values.\footnote{See Gina Shoeman, Soweto Property Market Boom, available at http://www.bondsafrica.co.za/BA
news.asp?aid=149. See also Erica Field & Maximo Torero, Do Property Titles Increase Credit Access Among the
http://www.economics.harvard.edu/faculty/field/files/FieldTorerocs.pdf.} Robert Townsend similarly reported data from separate surveys in rural Thailand,
focusing on the formation of household enterprises, noting that households with businesses are
more likely to have titled land and suggesting that titling may encourage entrepreneurship.\footnote{ROBERT M. TOWNSEND, TOWNSEND THAI PROJECT HOUSEHOLD ANNUAL RESURVEY (2010), available at
http://hdl.handle.net/1902.1/16734 UNF:5:14/IRDYdyVm8f3mLC63Dcg== Murray Research Archive [Distributor]
V1 [Version].} Yet other work has found that banks are responsible for less than ten percent of startup funding
to entrepreneurs in developing economies, again demonstrating the reluctance of banks to use
formalized titles as collateral.\footnote{Woodruff, supra note 119.} 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.\footnote{Id.}\footnote{Id.}
In Mexico, for example, banks require collateral averaging three times the principal.\footnote{See Rafael La Porta, Florencio López-de-Silanes, & Guillermo Zamarripa, Related Lending, 118(1) Q. J. ECON.
231 (Feb. 2003).} This is partly due to high foreclosure costs that may be reduced through a comprehensive property rights system.

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 presuppose. For example, “In Bogotá, property titles seem to have brought neither a
healthy housing market nor a regular supply of formal credit.”\footnote{Gravois, supra note 17.} Moreover, some banks
increasingly care more about stable employment than land ownership in making loan
decisions. Thus, it is clear that there are other forces at work beyond simply the presence or absence of titling that explains 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. These include foisting inflexible private property rights regimes on cultures unfamiliar with the concept, a lack of grassroots political coalitions to promote culturally relative and holistic reform, and paying insufficient attention to property relationships that are common in the developing world such as leasing. Each of these factors must be addressed if property reform is to embrace polycentric principles and so become more lasting and culturally relative.

2.5. 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 added on to the classic formalization thesis for it to have more universal resonance. At the least, a distinction should be made between institutions that define property rights (including personal property) and those that govern the circumstances under which people who default upon their obligations may be deprived of their rights. 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

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249 Id.
250 Libecap, supra note 85.
251 Davis, supra note 16.
difficult in fact there has arguably not yet been a single completely successful formalization program to date.\textsuperscript{252}

Given these obstacles, critics of the formalization movement consider the daunting problems of the developing world and argue land tenure has proven to be too complex, controversial, costly, and time consuming to promote large-scale poverty alleviation.\textsuperscript{253} 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 demands of the poor, posing a serious equity and governance issue.”\textsuperscript{254} Formalization critics note that there is only weak evidence that property security is benefited by titling, and little support for the proposition that there is expanded access to credit, or better jobs and more labor time away from home. Nor is there a proven increase in transaction certainty, the ability to transfer property, or less displacement of the poor.\textsuperscript{255} In fact, certain studies in South Africa have found that land titling actually created more homelessness and disempowered more people than was the case before the program commenced.\textsuperscript{256} Critics also argue that informal markets and forms of land tenure are “more contextual, more efficient, and more flexible than the formal.”\textsuperscript{257} Regardless of formal titling, informal economies in urban land economies are important and will continue to exist.\textsuperscript{258} Consequently formalization will not end informal economies, nor is one form of property ideal across all contexts: “For the supporters of titling, the informal is chaotic while for its opponents

\textsuperscript{252} See WORLD BANK POLICY RESEARCH REPORT, supra note 18, 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).

\textsuperscript{253} Robbins, supra note 70, at 176.

\textsuperscript{254} Anna Kajumulo Tibaijuka, UN-Habitat’s Contribution to Security of Tenure, in LEGAL EMPOWERMENT: A WAY OUT OF POVERTY 9 (M.E. Brother and J.A. Solberg eds., 2006).

\textsuperscript{255} Robbins, supra note 70, at 177; A. Durand-Lasserve & H. Selod, The Formalization of Urban Land Tenure in Developing Countries, WORLD BANK URBAN RESEARCH SYMPOSIUM (May 14, 2007).

\textsuperscript{256} Robbins, supra note 70, at 177; Cousins, supra note 152.

\textsuperscript{257} Robbins, supra note 70, at 177.

\textsuperscript{258} See T. ANAYAMBA, ‘DIVERSE INFORMALITIES’ SPATIAL TRANSFORMATIONS IN NAIROBI (2006).
Land titling is only part of the answer to solving urban poverty and galvanizing entrepreneurship. This fact is made evident by comparing the experiences of Indonesia and South Africa with the United States, which are used to exemplify the many nuances in property reform.

3. 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 to be followed 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.

3.1. Property Rights in the American West and Developed World

During the late 19th century, overlapping land claims were the norm in the American West, and squatting was common before adverse possession was an established legal doctrine, just as is the case in many developing nations today. How did the United States overcome this state of affairs? By codifying Locke’s labor theory of value. The thinking goes that if a

259 Robbins, supra note 70, at 177.
260 Id.
261 Adverse possession occurs when a trespasser can acquire ownership by continuously occupying a parcel of land until the statutorily set period of limitations runs out. See Matthew Baker, Thomas Miceli, C. F. Sirmans, & Geoffrey K. Turnbull, Property Rights by Squatting: Land Ownership Risk and Adverse Possession Statutes, 77(3) LAND ECON. 360 (2001).
262 De Soto, supra note 14, at 17.
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 lowering of government land prices, that are ideal drivers for quick and efficient formalized property claims. 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 culminating in the Homestead Act was far from straightforward. In fact, the process took three Supreme Court decisions, more than 500 Congressional statutes, and thousands of state laws passed from 1785-1890. And despite all these efforts, it was largely retroactive—32 million people and more than 300,000 farms were settled in the American West during this period, but only 2 million were done so legally under these progressive statutes. As a result, if anything the case study of the American West raises further doubt of the likelihood that the U.S. experience may be applied in the developing world. It is, after all, “hidden in thousands of pieces of legislation, statutes, regulations, court decisions, and institutions,” which are exceedingly difficult to replicate in foreign contexts much like the rationale behind newly independent nations choosing to institute

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263 Libecap, supra note 85.
265 DE SOTO, supra note 14, at 129.
266 Id.
267 Id. at 48.
civil rather than the more complex and abstract common law. 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.

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 will be a drawn out campaign rather than a one off political battle. For example, there were 35 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 20th century. Germany completed its formalized property registration in 1896. Japan only did so in 1958. The battle between second-hand clothes dealers and peddlers in France lasted more than 300 years and may have led to as many as 16,000 executions, stopping only with the French Revolution. 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). 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 Libyan land titles in 1992, placing the future of property law in post-Gadhafi Libya in question. And the problem is

De Soto, supra note 14, at 135.
Id. at 92.
Id. at 106.
Id. at 91.
daunting in many other nations. Only seven percent of Indonesian land has a clear owner, as is discussed below.  

Besides the sheer difficulty with defining and adopting a comprehensive property system, other glaring difference 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. This difference in 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 vested 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 (for males), and publicly financed infrastructure. Not all of these factors are as plentiful, or present, across the developing world, including Indonesia.

3.2. Analyzing Reform Efforts in Indonesian Land Law

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275 De Soto, supra note 14, at 91.
276 See Thomas, supra note 15 (pointing out that there may be some relevance for the Homestead Act in Brazil with indigenous peoples in Amazonia).
277 De Soto, supra note 14, at 91.
In order to determine the veracity of the views of the formalizers and their critics and the applicability of the developed world experience to emerging economies, the performance of the Indonesian titling program is considered as a case study. An Indonesian NGO called Mercy Corps, which possesses urban planning, housing and community development expertise, analyzed urban land implications for low-income urban dwellers in Jakarta. Its report advocates that “land is the catalyst ingredient upon which all other livelihood opportunities depend,” and summarizes how well Indonesia has implemented needed reforms and what barriers to formalization exist. Consequently, Mercy Corps presupposes the value of property rights formalization, stating in its report that: “Secure 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.” The report goes on to detail how Indonesia is not optimizing its land to catalyze equitable development. The stated reasons for this failure include: contradictory land laws, convoluted administration, and high certification costs. 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.

279 Id. The Mercy Corps report notes that informal dwellings are not as bad or insecure as they may seem, arguing that Indonesia’s poor enjoy some degree of tenure since land planning and ownership is not enforced. But 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 lacking formal ownership status. Id. Authors have argued that land formalization helps the labor market in that people no longer feel as though they have to stay home to protect their property. See Robbins, supra note 70, at 176; and Durand-Lasserre & Selod, supra note 255. 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 20 years without reprisals. Id.
280 See supra p.21.
The history of reform of Indonesian land law stretches back decades, which is mirrored in the experience of other nations that have undertook 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).\textsuperscript{281} The BAL cancelled both colonial and traditional laws to void former land registrations established during Dutch colonial rule. Yet in practice it failed to simplify the complex land holdings that are the norm in Indonesia. Land administration in Indonesia remains divided amongst three principle agencies: the Ministry of Forests oversees all of Indonesia’s forest, which comprise 70 percent of the total land area; BPN administers the remaining land (mostly urban); and the National Development Planning Agency (BAPENAS) has responsibility for overall land policy.\textsuperscript{282} Partly as a result of this bureaucratic inefficiency and high barriers to reform, more than 79 percent of Indonesian land remains unregistered.\textsuperscript{283}

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.\textsuperscript{284} These include: (1) the fact that 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 disputes (Adat), which is based on

\textsuperscript{281} Mercy Corps, supra note 278, at 4.
\textsuperscript{282} Id. at 6.
\textsuperscript{283} See id. at 7; and Land Policy, Management and Administration, Policy Brief, WORLD BANK 9 (2005).
\textsuperscript{284} See supra p.45.
community acceptance of boundary claims, and colonial property rights.285 These ongoing contradictions perpetuate unpredictable titling, tenure, and property enforcement despite more than 2,000 pieces of land use legislation aimed at simplifying the system.286 This figure may be compared with the more than 1,000 pieces of legislation that the U.S. Congress passed over more than a century to formalize property rights 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 thousands of interconnecting statutes and regulations that together comprise a property rights system. But even then, reform depends on enforcement and myriad social factors. 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, “so long as they are directly required in connection with the land use.”287 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 20 to 30 years.288 *Hak Pakai* is a right of use that may be given to individuals but is non transferable without express permission by the state.289 Other property rights also exist, such as *Hak Guna Usaha*, which only allows construction of buildings for agricultural purposes, and *Hak Pengelolaan*, which is synonymous with a right of management given to autonomous

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287 Mercy Corps, *supra* note 278, at 5.
288 *Id.*
289 *Id.*
regions and public bodies. Property that is unregistered with the BAL only enjoys *Girik*,
derived from colonial law, which allows for a quasi-legal ownership status proven by a tax
letter. As a result of how the BAL is setup, there are relatively few people who enjoy formal
property rights in Indonesia, and as a result little property may be used as collateral, thereby
limiting the amount of capital available for development purposes. Reforming this complex web
of property ownership is problematic, made more difficult by the undefined and uncoordinated
division of responsibilities between the various land agencies. The emphasis has been placed
on privatization rather than reinforcing and legitimating localized regimes, which has met with
predictable resistance and as a result little progress towards addressing endemic informality.
This state of affairs is compounded by the rich array of property rights and bureaucratic
inefficiency of the Indonesian government.

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290 *Id.*
291 *Id.* at 9 (defining ‘Girik’ as land that is accorded a quasi-formal tenure, and is administered by kelurahan, or other
local officials. Garapan is informal land ownership. Both urban land systems require certification by BPN before
being formalized).
292 See CITIES IN TRANSITION, WORLD BANK (2003).
Third, complicated procedures promote the growth of informal economies. In Indonesia, complex procedures and costly, long processing times mean that most urban residents do not certify their land through the BPA. A study in 2000 found that the land registration process in Jakarta involves 17 steps, 18 different agencies, at least five formal pieces of documentation, taking on average three years to complete. 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. Squatters have no formal right to the land upon which they reside—they may apply for registration, but it is rarely granted, as is the case in Egypt and many other nations discussed above. Even if the application is approved, poor government enforcement of property rights is common in Indonesia. Due to these high costs, Indonesians commonly certify their land through kelurahan (village) procedures, promoting the growth of local, informal dispute

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293 Mercy Corps, supra note 278, at 6.
294 See id. at 9; and International Comparative Review: Displacement of People and Resettlement, NATIONAL DEVELOPMENT PLANNING AGENCY AND NATIONAL LAND AGENCY (2000).
295 See Mercy Corps, supra note 278, at 9; and The Guide to Good Practices in Core Area Development Project, DFID (2000). 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 WORLD BANK POLICY RESEARCH REPORT, supra note 18, at xxiii.
resolution that the Indonesian government has not attempted to codify, perhaps for the reasons listed above.\footnote{See \textit{supra} p.35.} Such a codification would help promote culturally relative, localized reform that could lead to the establishment of markets for diverse types of property rights that could then be used for collateral.

Finally, high bureaucratic barriers to property registration have led to an increase in the Indonesian informal economy. Approximately 80 percent of Indonesia’s residential buildings are self-built, according to Mercy Corps.\footnote{\textit{Id.} at 21.} 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 the landowner.\footnote{\textit{Id.}} Of these respondents though, less than half, or 43 percent, actually possess formal documentation from BPN that guarantees land ownership.\footnote{\textit{Id.}} 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.\footnote{\textit{Id.}} 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, which cannot be used as collateral.\footnote{\textit{Id.}; Dail Asri, \textit{Participatory Planning Toward an Integrated Transportation Master Plan for Jabodetabek}, 5 \textit{PROCEEDINGS OF THE EASTERN ASIA SOCIETY FOR TRANSPORTATION STUDIES} 2308-2319, 2005 (2004), available at: http://www.easts.info/on-line/proceedings_05/2308.pdf.} The respondents to the Mercy Corps survey cited several reasons for not securing formal ownership documentation, including: (1) inability to obtain formal titling documents to
land owned by another party; (2) disregard of land certification; (3) high cost of BPN certification; and lack of information.\textsuperscript{302}

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 which also maintained home businesses.\textsuperscript{303} Furthermore, the Mercy Corps report found that property location was a main determinant in both property value and relocation decisions among Indonesian respondents. This is in contrast to the methodology of de Soto and his team, who minimized the importance of property location on value.\textsuperscript{304} In fact, many Indonesians unsurprisingly choose where they want to live based on its proximity to family, workplace, and affordable land prices.\textsuperscript{305} This outcome is more in line with Robbins’ findings, who argues that the physical scale, density, and location of settlements have important effects on the worth, fungibility, and use of property.\textsuperscript{306}

These three forces have contributed to the huge amount of unregistered Indonesian land promoting high rates of land disputes, especially in areas of rapid growth such as Jakarta; a biased land development process favoring private development and instituting high certification costs; and frequent evictions.\textsuperscript{307} Residential eviction, only occasionally with accompanying compensation, has been used as a mechanism for land clearance by the Jakarta Municipal Government. Since urban residents are typically unable to prove formal ownership, they may be summarily evicted without notice or compensation,\textsuperscript{308} which is an increasingly common practice.

\textsuperscript{302} Mercy Corps, \textit{supra} note 278, at 22.
\textsuperscript{303} \textit{Id.} at 20.
\textsuperscript{304} See \textit{supra} p.22.
\textsuperscript{305} \textit{Id.}
\textsuperscript{306} Robbins, \textit{supra} note 70, at 185.
\textsuperscript{307} \textit{Id.} at 22.
\textsuperscript{308} \textit{Id.} at 12.
in other nations such as Brazil as was described in the introduction. From 2001-2005 at least 86 cases of eviction occurred impacting 75,000 Indonesians. In 2006 alone, 146 cases were reported, with the highest rates being in North Jakarta. Consequently, though Indonesians use to not perceive security of tenure as a primary problem, it is increasingly worrisome. So far, though, most respondents stated that they were primarily concerned with environmental threats, including flooding and fires, followed by eviction and crime. But as the number of evictions increase, so too may the importance of property formalization. If true reform is to occur, it must begin at the grass-roots 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.

The poor remain vulnerable to public and private sector intervention in Indonesia despite decades of land reform efforts. They lack due process protections, are subject to biased conflict resolution should their ownership be contested, and face myriad challenges to their security and well-being. There is also evidence suggesting that the urban Indonesian poor in Jakarta are

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309 See supra p.2.
310 Id.; Pressure Letter to Cancel the Honoris Causa Award for Jakarta Governor Sutiyoso, ECOSOC RIGHTS (2007).
311 Mercy Corps, supra note 278, at 22.
312 A large majority of Indonesian respondents stated that they felt secure, including 100 percent with formal documentation, 95.5 percent with quasi-title, and 70.5 percent with informal documentation. Id. at 23. Most land status has not been contested due to a lack of government oversight and public monitoring. These high numbers may also be attributed to lack of experience with any form of land dispute (88 percent of respondents); 74 percent of respondents have lived for more than 20 years with no land disputes; 70 percent acquired their land through some form of financial transaction; and lack of government oversight. Id.
313 To get a sense of what several Indonesian communities are worried about, in one district in North Jakarta, named Kelurahan Kalibaru, the main local issues include: the presence of illegal squatting communities that are scheduled for resettlement; a large area of abandoned private land that was illegally settled; and state-owned land that has been settled for more than 20 years. Id. at 15. Similarly, in Kelurahan Kampung Rawa, a district in Central Jakarta, the main local issues also revolve around local squatting communities; high rates of unofficial land use; and government land that has been illegally settled for more than 20 years. Id. at 17.
314 Id. at 24.
unable to use their land as a formal asset to build collateral. The Indonesian case study has thus shown that “Low rates of formal land ownership curb opportunities for leveraging land as a livelihood resource and asset while heightening their vulnerability to poverty.” Yet, comprehensive rule of law reform efforts are mired in political, social, and economic difficulties requiring a sustained, organized drive for culturally relative titling.

3.3. The South Africa 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. In particular, there is criticism of state-led initiatives that create more individualized property rights in situations where communal rights may be more appropriate. A new system of formalized individual property rights can undermine the governance of traditional communities that rely on a custom of shared ownership. In South Africa for example, a characteristic of certain communities of homeowners who occupy older homes is that they rely on informal savings clubs (know in South Africa as a “stokvel” or “umgalelo”), rather than commercial banking institutions to finance needed improvements. Professors Richard Barrows and Michael Roth from the University of Wisconsin-Madison summarize the situation succinctly:

Economists using a narrowly defined neo-classical model 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

315 Id. at 27.
316 Id.
317 Boudreau, supra note 72.
318 See Rose, supra note 216, at 32-34.
owners are given incentives to use land most efficiently and thereby maximize agriculture’s contribution to social well-being.  

This passage evokes the contested theoretical arguments that form the basis of titling projects for the poor in that some argue that a system of communal property, which is owned jointly by all members of a given society—each of whom holds rights to use the group’s resources—does not effectively internalize gains resulting from a rise in property values. But that is not necessarily the case, as has been shown. Titling projects may be most effective where land values and returns on land are high and where collateral-based lending already exists. But for the rural poor, formal titling may be less valuable because the benefits that flow from titling may not exceed the costs associated with implementing such a complex project. This suggests that for some people, using different legal tools, such as secure certificates to occupy, may provide many of the benefits of titling without the high costs. Thus, the diverse array of property rights, especially communal relationships, shows that instituting a one-sized-fits-all formalization program divorced from social norms and mores is ill-advised.

4. Not a Magic Bullet, or a 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 leads to a biased...

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321 See CHANGES IN “CUSTOMARY” LAND TENURE SYSTEMS IN AFRICA 5-6 (Lorenzo Cotula ed., 2007); Boudreau, supra note 72, at 316.
322 See supra p.27-30.
323 Boudreau, supra note 72, at 318.
implementation and local resistance. At its core, Western markets treat property as a commodity, and thus ownership is predicated on having a claim to that property. Despite the insistence of some formalizers, this is not a universally accepted view of property. There is thus a need for a more nuanced understanding of property allocation and ownership. As has been shown, in some instances, informal property relations provide the basis for an active, functioning economy. Moreover, certain areas may be economically suitable for development, but socially inappropriate, and the community may enjoy that property collectively. 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.

To address these issues, it is necessary to consider the complexity of various forms of property rights and ownership practices in each society in which formalization is proposed. Property rights and claims may include everything from perceived tenure to registered freehold, to group tenure and joint leases, families, kin groups, corporate groups like clans or companies, settlement councils, voluntary groups, savings societies, and collective farming.

326 Robbins, supra note 70, at 190.
328 See Robbins, supra note 70, at n.6; and Huba Nguluma, Housing Themselves: Transformations, Modernization and Spatial Qualities in Informal Settlements in Dar es Salaam, Tanzania (2003).
329 Robbins, supra note 70, at 178.
330 Id.
331 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 ultimate 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, to use it as collateral, only subject to the regulatory authority of the absolute property holders; and (3) Usufruct – a limited right, understanding or claim to property limited by the nature of the right as defined by either the residual or absolute holder of property rights, and may vary substantially between cultures).
332 Clarissa Augustinus & Klaus Deininger, Innovations in Land Tenure, Reform and Administration, in LAND RIGHTS FOR AFRICAN DEVELOPMENT: FROM KNOWLEDGE TO ACTION 14 (CAPRi Policy Brief, 2005).
333 Robbins, supra note 70, at 178.
334 Id. at 186.
Decisions to transform these varying, collective property rights must be understood in reference to the local cultural traditions in play. 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, or use a property, each of which comes with rights and claims that vary by culture that may be organized formally or informally, be weak or strong, and individual or communal. The property rights spectrum thus goes from a 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 just solely individual property rights in keeping with the findings of polycentric governance.

The rationale for formalization cannot be divorced from cultural context. Property is more than just an unconditional set of rights; it is a universe of social perceptions, values and practices that differ across cultures. Benefits from land registration depend on the quality of governance and the nature of the intervention. As Robbins argues, “What 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.” This is particularly true in certain developing nations in

335 Id.
336 ANYAMBA, supra note 193.
337 See generally C. Acioly, Jr., The Challenge of Slum Formation in the Developing World, LAND LINES (Apr. 2007); Robbins, supra note 70.
338 Property is rarely unconditional, as seen in the United States expropriation context with Kelo v. New London CT, 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. See Robbins, supra note 70.
339 See Deininger & Feder, supra note 86, at 236.
340 Id. at 179.
which property is embedded in complex, social-ecological systems composed of multiple levels. Thus, the range of possibilities and the implications of formalizing property rights are 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 much more a social and political relationship than it is a right or a thing. The maintenance of property itself is a part of social relations that are inseparable from the larger social and legal context. As a result, property is increasingly the focus of “struggles at all levels of social organization, within and between families, communities, classes and states.” 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 then we must analyze how the system behaves and how it affects the larger social, political, and economic context. 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.

341 See Ostrom, supra note 107, at 420. Rural African farmers, for example, implicitly recognize the labor theory of value and agree that improvement of the land should bring social property rights, while market-based property systems place legal title above other considerations. See Robbins, supra note 70.

342 Robbins, supra note 70, at 181.

343 See, e.g., BILL KINSEY, COMPARATIVE ECONOMIC PERFORMANCE OF ZIMBABWE’S RESETTLEMENT MODELS IN DELIVERING LAND AND SECURING RURAL LIVELIHOOD (J.F. Richards ed., 2003).

344 VON BENDA-BECKMANN, supra note 327, at 2.

345 Robbins, supra note 70 (arguing that “People 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.”). See also UN HUMAN SETTLEMENTS PROGRAM, supra note 6, at 94.
What property is presumed to be changes with the purposes that a society expects property to serve.\footnote{See Robbins, supra note 70, at 180.} Property is never free from social or political considerations, and so “fostering one or another policy prescription for property forms is in effect favoring one or another vision of what the world should be.”\footnote{Id.} The evolution of Western notions of property beginning in 17\textsuperscript{th} century Europe mirrors this fact, showing that a rights-based interpretation became increasingly cumbersome in a more market-oriented economy in which joint ownership impeded the unfettered exchange of goods.\footnote{Id.} Public property rights gradually gave way to private property rights,\footnote{KLAUS BOSSELLE, THE PRINCIPLE OF SUSTAINABILITY: TRANSFORMING LAW AND GOVERNANCE 14-15 (2008).} but this progression did not happen in the same way or at the same rate around the world. Thus began the transition from property as a communal habitat in the West to a thing to be commercially exploited.\footnote{See N. Geras, Essence and Appearance: Aspects of Fetishism in Marx’s Capital, NEW LEFT ESSAYS 65, 69-80 (1971).} 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, provides a comparative tool that focuses on ontological and epistemological bases of law and concomitant legal theories.\footnote{See SANDRA BUNN-LIVINGSTONE, JURICULTURAL PLURALISM VIS-À-VIS TREATY LAW 9 (2002).} 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 favoring formal titling are rooted in the notion that the more formal property, the more growth, and thus equality.\footnote{Robbins, supra note 70.} 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 ignore the fact that those who are granted formal title over informal property do not have a level playing field, and are at a disadvantage to repeat players. Even Adam Smith argued that economic actors should enter in positions of relative equality, and that if this is not the case than interventions are warranted. Consequently, “[t]itling, 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.” While 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 human rights. 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.” The trick then is balancing local, culturally relative reform based on polycentric principles with formalized titling backed by the coercive power of the state. This is a difficult proposition, but a broader understanding about the nature of different forms of property claims and rights, and tenure systems within a juriculture framework is essential towards this end. 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 the strength of local governance. Even seemingly simple alterations of property rights regimes can have far-reaching impacts on the poor.

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354 Robbins, supra note 70, at 194.
355 Id. at 195.
356 Id.
357 WORLD BANK POLICY RESEARCH REPORT, supra note 18, at xxiv-xxv.
the appropriate distribution of property rights, whether they be to an individual or a group, should depend on the nature of the resource and existing social relationships.

**Conclusion**

Classic titling in and of itself will not give birth to capital markets or end poverty. But there is merit in property rights formalization. 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 spending associated with protecting property, increased investment by owners into their properties, and the empowerment of women. Formalizers such as de Soto have made a critical impact on development economics by shifting the discussion to regulation and informality. That being said, nations around the world have adopted the formalization hypothesis with varying degrees of success, as was shown in Indonesian 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.” 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 the benefits of universal titling may exceed the costs, the system may still fail to develop spontaneously. Thus, there is an important role for government action to determine who the owner of a given property is, and to create the registration and information systems that are the backbone of formal property rights.

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358 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).

359 Id. at xxiv.

360 See Deininger & Feder, supra note 86.

361 Woodruff, supra note 119.

362 NORTH, supra note 42, at 51.
registration systems.\textsuperscript{363} As this Article has made clear, though, this strategy is an oversimplification ignoring many important caveats, including: political opposition, diverse (and often unwritten) cultural practices, and the various levels and combinations of property rights that exist around the world. Instead of a single approach then, the case has been made for a localized, culturally-relative approach to titling in keeping with polycentric principles and the conceptual framework of juriculture. An example of how such an approach may work is a state granting secure certifications for a property interest that may fall short of exclusive use, such as \textit{Hak Pengelolaan} in Indonesia analogous to a right of autonomous management, which could then be traded and used for collateral to generate capital.

De Soto claims to have “closed his books, and opened his eyes.”\textsuperscript{364} 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, but must be followed by improved judicial efficiency, re-writing bankruptcy codes, and restructuring financial markets, among much else. Jagdish Bhagwati, for example, argues that property titling by itself is not sufficient to bring prosperity to places of chronic poverty.\textsuperscript{365} The results from Indonesia, South Africa, and many of the other nations for which data are available indicate that formalization can bring about increased housing values, some job creation, and a degree of poverty alleviation. But the policy represents only the beginning phases of a long journey to a world without poverty. Much more is needed, such as deregulating leasing markets, lowering registration fees, and limiting bureaucracy for property rights and business registration.

\textsuperscript{363} Woodruff, \textit{supra} note 119.
\textsuperscript{364} \textit{Id}.
\textsuperscript{365} Dolan, \textit{supra} note 84.
Formalizing property rights in an institutional environment that has other systemic weaknesses will not reanimate dead capital. The poor need more than a property title to break out of poverty—legal empowerment will work best in an institutional environment that supports broad-based entrepreneurship and rule of law.\footnote{See Boudreau, supra note 72, at 312.} For titling policies to have the greatest usefulness as tools 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.\footnote{Id. at 310.} Indeed, studies suggest that legal reform is only effective when the government can be held accountable, which is not necessarily true in developing nations.\footnote{See Deininger & Feder, supra note 86.} Former U.S. Secretary of State Madeleine Albright, a formalizer in her own right agrees, has argued that if providing legal rights to land and property is not sufficient, it is a necessary element in alleviating poverty.\footnote{See Robbins, supra note 70, at 176 (citing Madeline Albright, \textit{It's Time for Empowerment, in LEGAL EMPOWERMENT: A WAY OUT OF POVERTY} 9 ((M.E. Brother & J.A. Solberg eds., 2006))).} She backed up her assertion by citing a titling project in Argentina, which after 20 years found that squatters who possessed formal property rights decreased the size of their households, improved their housing and educational opportunities for their children.\footnote{Robbins, supra note 70.} 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 solutions such as formalization is important to give new life to the Washington Consensus and the virtues of private property rights.\footnote{See for example China in Laos, \textit{ECONOMIST}, at 46, May 28, 2011.}
Legal scholars and economists recognize that property rights are a vital part of the legal environment for purposes of economic development.\(^\text{372}\) It is now uncontroversial that countries with secure, clearly defined property rights experience more economic growth than countries that lack these rights.\(^\text{373}\) Thus, strengthening local property environments is critical to long-term economic success.\(^\text{374}\) Institutional economists argue that legal institutions are the way to do this, and are crucial determinants of capitalism’s success. Institutions do matter, as Douglass North among others would agree, but they are not the whole story. Other problems in developing countries must not be overlooked in the rush to formalization, such as inadequate infrastructure, which would help address the worst vulnerabilities associated with the world’s poor. Corrupt, authoritarian government should be confronted, and civil society energized to build political coalitions that will institute lasting, comprehensive property reform.\(^\text{375}\) Rather than generalized strategies, we need poverty alleviation driven by local, grounded, sustained and context-specific efforts that promote economic growth and increased welfare, thereby realizing the promise, while avoiding the perils, of property rights formalization.


\(^{375}\) Robbins, supra note 70.