

2006

Land Titling: A Mode of Privatization with the Potential to Deepen Democracy

Bernadette Atuahene

Chicago-Kent College of Law, Illinois Institute of Technology

Follow this and additional works at: <https://scholarship.law.slu.edu/lj>



Part of the [Law Commons](#)

Recommended Citation

Bernadette Atuahene, *Land Titling: A Mode of Privatization with the Potential to Deepen Democracy*, 50 St. Louis U. L.J. (2006).

Available at: <https://scholarship.law.slu.edu/lj/vol50/iss3/7>

This Respondent is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in Saint Louis University Law Journal by an authorized editor of Scholarship Commons. For more information, please contact [Susie Lee](#).

LAND TITLING: A MODE OF PRIVATIZATION WITH THE POTENTIAL TO DEEPEN DEMOCRACY

BERNADETTE ATUAHENE*

Thousands of people in the developing world are in constant danger of eviction. These are poor individuals and families, who live illicitly on state-owned land because they have few—if any—housing options. In response to this crisis, several governments, including Thailand, Peru, South Africa, Ghana, and Brazil, have given individuals ownership to the land they occupy—a phenomenon commonly known as land titling.¹ I argue that when property is transferred to poor people through land titling measures, democracy is strengthened.

Insofar as the property transferred is state owned, this is, indeed, a form of privatization. What distinguishes this mode of privatization from how we typically understand it is that the decision-making function is assigned to poor people rather than the local elite or multinationals.² This is why privatization via land titling has the potential to deepen and strengthen nascent

* Assistant Professor of Law, Chicago-Kent College of Law. J.D. 2002, Yale Law School; M.P.A. 2002, Harvard University, John F. Kennedy School of Government; B.A. 1997, University of California, Los Angeles. I would like to thank Carol Rose and the other participants of the Saint Louis University School of Law Childress Lecture, Chicago-Kent faculty workshop participants, and the participants of the Property, Citizenship and Social Entrepreneurism (PCSE) annual meeting. A special thanks to Marty Malin and Graeme Dinwoodie for their extensive written comments on this paper. Exceptional research assistance was provided by Michael Huston, Emily Grande, and Stephanie Crawford.

1. Property is often conceptualized as a bundle of sticks. This bundle includes, *inter alia*, sticks such as the right to occupy/use, exclude, transfer and mortgage. Under land titling programs, members of informal communities transition from having one stick in the bundle (possession) to all of the sticks (ownership in fee simple). Others have defined land titling as “a policy intervention to introduce systems to formally recognize rights in land and enable the state and individuals to trade in these rights.” *Id.* (quoting TONY BURNS ET AL., LAND TITLING EXPERIENCE IN ASIA 1.3 (1998), http://www.surv.ufl.edu/publications/land_conf96/BURNS.pdf).

2. Privatization is “the delegation of the decision-making function historically assigned to a governmental entity to a non-governmental entity.” Shubha Ghosh, *Deprivatizing Copyright*, 54 CASE W. RES. L. REV. 387, 395 (2003). See generally Amy Chua, *The Privatization-Nationalization Cycle: The Link Between Markets and Ethnicity in Developing Countries*, 95 COLUM. L. REV. 223 (1995).

democracies.³ The challenge is ensuring that various forms of corruption do not prevent land titles from reaching the poor. This can be difficult because in weak democracies, officials have latitude to privatize land in a corrupt, self-serving fashion. When privatization of land does not benefit the poor, it does not bolster democracy.

First, using Peru as an example,⁴ I will explain the process by which poor individuals and families receive title to the land they occupy. Second, I will argue that there are four primary ways that land titling strengthens democracy.

By creating a property-owning society, land titling:

1. Gives indigent populations a buffer between themselves and the state, which allows them to make the independent electoral decisions vital to a functioning democracy;
2. Makes poor people stakeholders in democratic institutions;
3. Gives people an incentive to secure greater liberties; and
4. Provides a space where individual autonomy is respected and minority viewpoints, critical to a healthy democracy, can thrive.

I. THE JOURNEY TOWARD LEGAL RECOGNITION OF INFORMAL PROPERTY RIGHTS

The formal recognition of informal land holdings is not the beginning, but rather the culmination of a long, arduous journey for many poor individuals and families. In urban areas, informal communities (e.g., squatter settlements) are commonly a result of a substantial migration of poor rural populations to urban centers in search of expanded employment and educational opportunities.⁵ A constant flow of rural migrants can rapidly exhaust state

3. Census data consistently show that, controlling for other factors, property owners are more apt to participate in the democratic process through voting. See JENNIFER CHEESEMAN DAY & KELLY HOLDER, U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2002: POPULATION CHARACTERISTICS 8 (2004); AMIE JAMIESON, HYON B. SHIN & JENNIFER DAY, U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2000: POPULATION CHARACTERISTICS 5–8 (2002); JENNIFER C. DAY & AVALAURA L. GAITHER, U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 1998: POPULATION CHARACTERISTICS 8 (2000).

4. I will use Peru as a case study because it is one of the most extensive and well-documented instances of land titling.

5. Bernadette Atuahene, *Legal Title to Land as an Intervention Against Poverty in Developing Nations*, 36 GEO. WASH. INT'L L. REV. 1109, 1112 (2004). In this Article, I will focus on urban titling, although titling occurs both in rural and urban areas. The main difference between the two is that access to quality land in rural areas means access to fertile land, which gives one the ability to farm and provide for the needs of her family. *Id.* “In contrast, access to quality land in urban areas places the poor closer to employment opportunities and within neighborhoods with basic infrastructure and services.” *Id.* “Whereas rural titling involves

resources and the low-end housing market's ability to absorb newcomers. This overflow population is then faced with three choices: move back to the opportunity-deprived rural communities that they sought to escape, remain in the city without shelter, or invade a vacant or underutilized parcel of land. In Peru and several other countries, many chose to invade public lands.

In general, private lands are invaded less often than public lands for two reasons. First, private owners are usually more vigilant and will move to evict the invaders before they acquire informal rights. Second, various governments have taken an ambivalent approach to land invasions, which increases incentives to invade public land. At worst, in Peru, politicians actually were complicit in land invasions in an attempt to garner political support. At best, if the invasion is sizable, it can be political suicide for politicians to evict vulnerable families without making alternative housing arrangements. In the cases where squatters invaded private lands at the urban fringe of Lima, the government relocated them to public lands or purchased the land for them.⁶

In Peru, invasions were orchestrated events that principally took place from the 1960s through the 1980s. A deluge of rural inhabitants moved to urban areas in the 1960s as a result of rapid job growth in the cities and through the 1980s as a consequence of the instability created in rural areas by the guerilla war begun by the Shining Path.⁷ Upon arrival, these migrants

increasing the productivity of land, urban titling involves providing opportunities to earn physical capital and develop human capital." *Id.*

6. See Carol Graham, *The APRA Government and the Urban Poor: The PAIT Programme in Lima's Pueblos Jóvenes*, 23 J. LATIN AM. STUD. 91 (1991). In a town called Pampa de Arena, 500 families invaded, while in Huascar 35,000 families were involved. *Id.* at 107. The media coverage surrounding the Huascar invasion drew attention to the underlying problem, which was the shortage of low-income housing. *Id.* Those who participated in the invasions captured the public's sympathy and thus although the invaders were evicted, politicians had to provide alternate housing arrangements. *Id.* The state relocated the families to a plot of public land on the urban fringes. *Id.*

The government helped squatters buy the private lands they had invaded in the Philippines. See Atuahene, *supra* note 5, nn.44, 129, 131 (citing Michael Lee, *The Community Mortgage Program: An Almost-Successful Alternative for Some Urban Poor*, 19 HABITAT INT'L 529, 529 (1995)); Gilberto M. Llanto et al., *A Study of Housing Subsidies in the Philippines* 1 (Phil. Inst. for Dev. Studies, Discussion Paper Series No. 98-42, 1998) <http://dirp4.pids.gov.ph/ris/dps/pidsdps9842.pdf> (last visited Apr. 27, 2006); Faith Chistian Q. Cacnio, *Microfinance Approach to Housing: The Community Mortgage Program* (Phil. Inst. for Dev. Studies, Discussion Paper Series No. 2001-28, 2001), <http://dirp4.pids.gov.ph/ris/pdf/pidsdps0128.pdf> (last visited Apr. 27, 2006).

7. See Center for Defense Information, *Terrorism Project: In the Spotlight: Sendero Luminoso*, July 1, 2002, <http://www.cdi.org/terrorism/sendero.cfm> (last visited Mar. 18, 2006) (summarizing the "Shining Path" movement). See generally GUNNAR MALMBERG, GEOGRAPHICAL REPORTS NO. 9: METROPOLITAN GROWTH AND MIGRATION IN PERU (1988).

found that there was a shortage of dwellings.⁸ Consequently, a small group of people often identified public land that, in their estimation, the state would be unlikely to defend. This land was usually of low value, far from employment opportunities, and located in environmentally unsound locations such as on river banks, hillsides, and flood-prone areas.⁹ This small group then usually recruited others, occupied the land under the cover of nightfall, constructed temporary shelters of bamboo and straw, and hoped that police would not force them to leave in the morning. The larger the invasion, the less likely it was for politicians to instruct police to evict the families, due to the ensuing bad publicity.¹⁰

8. Lima's deficit in homes was 1.5 million in 2000. Catherine Elton, *Peruvian Squatters Get Attention at Election Time*, CHRISTIAN SCI. MONITOR, Mar. 1, 2000, at 7.

9. In many countries besides Peru, poor people occupy the worst land. See Alan Gilbert & Peter M. Ward, *Land for the Rich, Land for the Poor*, in THE URBANIZATION OF THE THIRD WORLD 129, 134 (Josef Gugler ed., 1988).

In general, invasions have occupied only those areas of public land that would fetch low prices on the market. For example, most land invasions in Lima have occurred on desert lands distant from the city centre, the invasions of Guayaquil have occupied swampland, those of Caracas the unstable hillsides, and those of Barranquilla the land close to the river estuary. A few exceptions, such as the *favelas* in Copacabana or the Policarpa Salvarrieta invasion in Bogotá, have occupied central land and have been vigorously opposed and sometimes eradicated . . . Generally, valuable public land has not been invaded.

Id. (citations omitted); Jane E. Larson, *Free Markets Deep in the Heart of Texas*, 84 GEO. L.J. 179, 183–228 (1995) (documenting the condition of *colonias*, which are poor, Latino neighborhoods in Texas near the Mexican border that often lack clean running water, sanitary sewers for disposal of human waste, paved roads, storm drains, electricity, trash collection, streetlights or street addresses); see also Lee, *supra* note 6, at 538 (stating that poor people in the Philippines build squatter communities in environmentally unsound locations). Also, the literature on environmental justice documents the fact that poor people occupy the worst land. See Vicki Been, *What's Fairness Got To Do With It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1002 (1993) (claiming that lawmakers choose to place environmentally hazardous facilities in poor and minority areas because this is the least politically damaging course of action due to the fact that the poor and minorities are the least likely to participate in politics); Kent E. Portney, *Environmental Justice and Sustainability: Is There a Critical Nexus in the Case of Waste Disposal or Treatment Facility Siting?*, 21 FORDHAM URB. L.J. 827 (1994) (documenting how minority and poor populations bear the risk of environmentally impacting events).

10. In a town called Pampa de Arena, 500 families invaded, while in Huascar 35,000 families were involved. See Graham, *supra* note 6, at 107 (detailing the Huascar invasion); Henry Dietz, *Urban Squatter Settlements in Peru: A Case History and Analysis*, 11 J. INTER-AM. STUD. 353, 356–59 (1969) (case study concerning the Pampa de Arena invasion). The media coverage surrounding the Huascar invasion drew attention to the underlying problem, which was the shortage of low-income housing. Graham, *supra* note 6, at 107. Those who participated in the invasions captured the public's sympathy and thus although the invaders were evicted, politicians had to provide alternate housing arrangements. *Id.*

Despite less than auspicious beginnings, over the years informal settlements have grown into established communities where properties are commonly bought and sold on the informal market.¹¹ The longer a community has been in existence, the more secure its informal rights;¹² thus, in long-standing communities, investments such as paved roads and other forms of capital-intensive infrastructure are common even in the absence of land titling. In newer communities land titling gives people the security they need to invest and as a result, where the original straw shacks once stood, dwellings of brick and mortar are erected and a town with basic functions emerges.

In the 1990s, the movement to legally recognize informal settlements began in earnest. Hernando de Soto wrote two influential books that drew international attention to the importance of land titling—*The Other Path* and *Mystery of Capital*.¹³ De Soto argues that the reason capitalism flourishes in the West and fails elsewhere is due to disparate access to capital.¹⁴ Although poor people in the developing world have assets, these assets cannot be transformed into capital because they are locked in the informal economy, where they cannot be used as collateral for loans.¹⁵ This dead or illiquid capital is caused by the inordinate amount of bureaucratic red tape necessary to gain legal title to land. For instance, in Peru it takes six years, eleven months, and 207 administrative steps through 52 government offices to obtain

11. In another article, I argue that the titling process pursued by Peru missed an opportunity to dismantle expansive ghettos, which in Peru are called *pueblos jóvenes*. The *pueblos jóvenes* were created by invasions and formalized through titling procedures. See Atuahene, *supra* note 5, at 1138–43. *Pueblos jóvenes* are located at the urban fringes of Lima far from employment opportunities, quality schools, and basic infrastructure and services. *Id.* at 1143–44. The location of the titled land has various costs that will be borne by all residents who occupy the plot of land for generations to come so long as nothing significant changes. *Id.* I propose a method of land titling called “titling mobility” that does not create or ossify areas of concentrated poverty and focuses on breaking cycles of poverty. See *id.* 1116–37.

12. Jean O. Lanjouw & Philip I. Levy, *Untitled: A Study of Formal and Informal Property Rights in Urban Ecuador*, 112 *ECON. J.* 986, 988–89 (2002) (In urban Ecuador, property values increased by 23.5% on average for newer communities, and 51.6% for communities in existence for one year).

13. See HERNANDO DE SOTO, *THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD* (1989) [hereinafter *THE OTHER PATH*]; HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2000) [hereinafter *THE MYSTERY OF CAPITAL*]; see also Ray Bromley, *A New Path to Development? The Significance and Impact of Hernando de Soto's Ideas on Underdevelopment, Production and Reproduction*, 66 *ECON. GEOGRAPHY* 328 (1990).

14. *THE MYSTERY OF CAPITAL*, *supra* note 13, at 5.

15. De Soto and his organization, the Institute for Liberty and Democracy (ILD), argue that informal real estate holdings are worth \$74 billion in Peru (eleven times more than Peru's potentially privatizable government assets); \$133 billion in the Philippines (seven times greater than all commercial banks' total deposits in that country); and \$240 billion in Egypt (fifty-five times the value of all foreign investment in that country). *Id.* at 33–34.

permission to build a house on state-owned land, and it takes 728 steps to obtain legal title to the house.¹⁶ The Institute of Liberty and Democracy (ILD) has documented similarly cumbersome processes in other countries as well.¹⁷ De Soto's proposed solution is to streamline the land titling process and make it easy for people to have their informal assets legally recognized and thus brought into the formal economy.¹⁸

The ILD found that legal recognition of assets via land titling increased the value of land in Peru by 900%,¹⁹ and other researchers have found that it increased property values by 23.5% in urban Ecuador;²⁰ 58% in Davao, Philippines;²¹ 23% in Manila;²² and 45% in Jakarta.²³ Land titling is also correlated to increased investment in property and access to credit.²⁴ While there have been studies that question the economic benefits of titling,²⁵ the majority of the evidence suggests that there are significant economic benefits.

16. *Id.* at 20.

17. In the Philippines it takes 168 steps, through fifty-three public and private agencies, during thirteen to twenty-five years. *Id.* In Egypt it takes seventy-seven steps, through thirty-one public and private agencies, during five to fourteen years. *Id.*

18. *See generally id.*

19. *See generally id.*

20. Lanjouw & Levy, *supra* note 12, at 988.

21. Emmanuel Jimenez, *Tenure Security and Urban Squatting*, 66 REV. ECON. & STAT. 556, 565-66 (1984).

22. Joseph Friedman et al., *The Demand for Tenure Security in Developing Countries*, 29 J. DEV. ECON. 185, 197-98 (1988) ("On average dwelling units in the squatter sector of Manila would rent for 11 percent more or sell for 23 percent more had they been in the formal sector.")

23. David E. Dowall & Michael Leaf, *The Price of Land for Housing in Jakarta*, 28 URB. STUD. 707, 718 (1991); *see also* Gershon Feder & Akihiko Nishio, *The Benefits of Land Registration and Titling: Economic and Social Perspectives*, 15 LAND USE POL'Y 25, 36 (1998) ("[Based on] empirical evidence from Asia, Latin America, and Africa[,] [t]he net economic benefits of land registration can be substantial.")

24. *See* Feder & Nishio, *supra* note 23, at 26-29; Yongyuth Chalamwong & Gershon Feder, *Land Ownership Security and Land Values in Rural Thailand* 13-23 (World Bank Staff Working Papers, No. 790, 1986); GERSHON FEDER ET AL., *LAND POLICIES AND FARM PRODUCTIVITY IN THAILAND* 44-69 (1988). *See generally* LEE ALSTON ET AL., *TITLES, CONFLICT AND LAND USE* (1999); Gershon Feder & David Feeny, *Land Tenure and Property Rights: Theory and Implications for Development Policy*, 5 WORLD BANK ECON. REV. 135 (1991); Janelle Larson et al., *An Economic Analysis of Land Titling in Peru*, 42 Q. J. INT'L AGRIC. 79 (2003) (land title increases access to formal credit and is correlated to higher investment); Lee J. Alston, Gary D. Libecap & Robert Schneider, *The Determinants and Impact of Property Rights: Land Titles on the Brazilian Frontier* (Nat'l Bureau of Econ. Research, Working Paper No. 5405, 1996); Frank Byamugisha, *How Land Registration Affects Financial Development and Economic Growth in Thailand* (World Bank Policy Research Working Paper Series, Working Paper No. 2241, 1999) (land titling has positive effects on financial development).

25. Anne-Sophie Brasselle et al., *Land Tenure Security and Investment Incentives: Further Puzzling Evidence from Burkina Faso*, 67 J. DEV. ECON. 373, 373 (2002) (results from Burkina Faso suggest that there may not be a systematic positive correlation between increased land tenure security and increased investment); Frank Place & Peter Hazell, *Productivity Effects of*

II. PROPERTY OWNERSHIP ACHIEVED THROUGH LAND TITLING DEEPENS DEMOCRACY

There have been several critiques of land titling.²⁶ Most notably, scholars and policymakers alike have claimed that *inter alia*, land titling promotes further land invasions,²⁷ rewards illegal actions,²⁸ gives people ownership of worthless and/or environmentally unsound land,²⁹ undermines or is not as effective as customary forms of land tenure,³⁰ increases property values such that housing becomes unaffordable to the poorest sectors,³¹ makes land

Indigenous Land Tenure Systems in Sub-Saharan Africa, 75 AM. J. AGRIC. ECON. 10, 16–19 (1993) (investments and productivity of land and access to credit are not significantly related to individualized land rights).

26. Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition From Marx to Markets*, 111 HARV. L. REV. 621 (1998) (stating that the clear definition of property rights is not sufficient to create new markets in these rights and that lack of property rights can lead to a tragedy of the commons (overuse of land) while the presence of property rights can result in a tragedy of the anticommons (underuse of the land)); Flávio A.M. de Souza, *The Future of Informal Settlements: Lessons in the Legalization of Disputed Urban Land in Recife, Brazil*, 32 GEOFORUM 483, 491 (2001); Steven E. Hendrix, *Myths of Property Rights*, 12 ARIZ. J. INT'L & COMP. LAW 183, 187–208 (1995) (offering six land titling myths).

27. See Atuahene, *supra* note 5, at 1130.

28. In Peru land invasions were not conducted by criminals with the intent of amassing public land. Land invasions were executed by desperate, poor people who were fleeing from poverty or violence resulting from guerilla warfare in the countryside. The government and private sector failed to provide affordable accommodation for the expanding urban population, so when people were faced with the choice of invasion or homelessness, they invaded. As I mentioned *supra* note 6 and accompanying text, government officials often encouraged invasions, so the government's complicity in the illegal act of land invasion goes beyond its failure to provide low-cost housing. See Atuahene, *supra* note 5, at 1130.

29. See *supra* note 9 and accompanying text.

30. See Ellen Bassett & Harvey Jacobs, *Community-based Tenure Reform in Urban Africa: The Community Land Trust Experiment in Voi, Kenya*, 14 LAND USE POL'Y 215, 228 (1997) (concluding that although "people universally want and will pursue . . . individual (or family) title to the land . . . there are instances where individual interests are best served by community-based tenure"); Tor A. Benjaminsen, *Formalizing Land Tenure in Rural Africa*, 29 F. DEV. STUD. 362, 364, 366 (2002) (Customary forms of tenure may be preferable due to overlapping rights and uses. Formalization may ossify rights and deprive communities of adaptability and flexibility vital to certain communities); Katherine V. Gough & Paul W.K. Yankson, *Land Markets in African Cities: The Case of Peri-urban Accra, Ghana*, 37 URB. STUD. 2485, 2497 (2000) (examining both the advantages and disadvantages of customary land tenure in Accra and recommending specific modifications).

31. ALAN GILBERT, *THE LATIN AMERICAN CITY* 98 (2d ed. 1998) (noting that poor people's self-help housing in Latin America is affordable, unlike government housing); Rod Burgess, *Petty Commodity Housing or Dweller Control? A Critique of John Turner's Views on Housing Policy*, 6 WORLD DEV. 1105, 1120 (1978) ("If [the Latin American state] legalizes such lands before possession, it will merely allow for the market valuation of these lands, which otherwise would have been invaded or bought illegally (at lower prices)."); Jane Larson, *Informality, Illegality, and Inequality*, 20 YALE L. & POL'Y REV. 137 (2002) ("Nonconformity with law is a means of

alienable and subject to foreclosure or legal acquisition by richer or more savvy populations who will push out poorer populations,³² increases conflict and divisions in society,³³ incorrectly assumes that the poor will be able to leverage their newly titled homes to access capital,³⁴ and has ephemeral economic benefits.³⁵

The most salient critique relates to the distributional implications inherent in de Soto's proposal, which distributes land titles based on present occupation. Those who reside on the land may not be the neediest, but instead may be the most aggressive and cunning, characteristics society is likely to frown upon.

gaining access to land not otherwise available for development, and access to housing not otherwise affordable to the settler population.”).

32. Jonathan Manders, Note, *Sequencing Property Rights in the Context of Development: A Critique of the Writings of Hernando de Soto*, 37 CORNELL INT'L L.J. 177, 180, 186 (2004) (noting that the wealthy may use their economic and political leverage to acquire what has been made an alienable right). Many Native American lands were converted from communal to individual ownership under the General Allotment Act of 1887. Unencumbered by collective interests, individuals began to sell communal native lands to outsiders. This had dire consequences for Native American self-determination with respect to the lands in its territory. Congress did stop the individualization of tribal lands via the Indian Reorganization Act of 1934 (IRA), but this was only after tribes had lost over 90 million acres of their land to white settlers. See Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 8–20 (1995). See generally Susana Lastarria-Cornhiel, *Impact of Privatization on Gender and Property Rights in Africa*, 25 WORLD DEV. 1317, 1320 (1997) (stating that land titling concentrates ownership in the hands of savvy persons including male household heads and community leaders while the less savvy are dispossessed of the nominal rights they once had).

33. Anan Ganjanapan, *The Northern Thai Land Tenure System: Local Customs versus National Laws* 28 L. & SOC'Y REV. 609 (1994) (stating that a study of villages in Chiang Mai, Thailand, suggests that the titling program caused conflicts among villagers and encouraged villagers to assume unsustainable debt burdens, which increased the risk of foreclosure). See generally Mario Fandino, *Land Titling and Peasant Differentiation in Honduras*, 20 LATIN AM. PERSP. 45 (1993); Daniel Fitzpatrick, *Evolution and Chaos in Property Rights Systems: The Third World Tragedy of Contested Access*, 115 YALE L.J. 996, 1013–14 (2006) (“Long-term conflict has resulted because poor or otherwise vulnerable land occupiers have been dispossessed by wealthier and more powerful groups; yet the new titleholders and state enforcement mechanisms have been unable to prevent encroachment by the former occupiers. . . . In other cases, titling programs provoke long-term conflict due to the fluid nature of nonstate systems of land tenure.”).

34. Amin Sajeda, Ashok S. Rai & Giorgio Topa, *Does Microcredit Reach the Poor and Vulnerable? Evidence from Northern Bangladesh*, 70 J. DEV. ECON. 59, 60 (2003) (although micro credit does reach the poor, it does not reach the vulnerable).

35. Fitzpatrick, *supra* note 33, at 1015–16.

This is illustrated by the paradigmatic case of Kenya, where, although individualized titling programs initially appeared to yield productivity benefits, the titles register gradually lost value as an accurate record of land relations due to high formal and informal registration costs and inconsistency between state law and local inheritance and transfer practices. As a result, it appears that any economic benefits attributable to land titling were not sustained over time.

Id.

Despite its imperfections, I agree with the strategy of distributing land title based on present occupation for several reasons. First, it circumvents the need to determine who is deserving and who is not.³⁶ This divisive exercise will inevitably drive a wedge between neighbors who have been living together in a squatter settlement for years. This endeavor is also subject to government failure. That is to say, assuming that the government can devise objective criteria for determining who is deserving, then this creates a rent-seeking opportunity for bureaucrats given the task of implementing the program.

Second, there are millions of squatters who have acquired informal occupancy rights through long-term possession. Allocation of land titles based on present occupation acknowledges and embraces existing realities by formalizing existing informal arrangements.³⁷ Third, distribution of land titles based on present occupation takes into account the fact that many people came to cities and invaded lands not because they were thieves, but in order to avoid starvation and/or violence in rural areas.³⁸ It also acknowledges that they often engaged in invasions with the complicity of government.³⁹

Although I do agree with the allocation of land titles based on present occupation, I also acknowledge that this can lead to further land invasions.⁴⁰ However, there are simple ways to circumvent a stampede. For instance, in Peru the government instituted an amnesty of sorts. The government declared that for any invasion that occurred before March 22, 1996, those who presently occupy the land receive title.⁴¹ For any invasion that occurred after the appointed date, occupants would be removed from the land. So far as the Peruvian government adheres to this policy and potential invaders are convinced that there will be no future amnesty, then this is a promising policy for dealing with the brooding threat of future invasions. Another strategy is to have communities purchase their land titles through micro finance-type

36. There is some value in having targeted beneficiaries. In order to achieve spatial integration, my concept of titling mobility requires the use of targeted beneficiaries. I propose that those society deems to be among the neediest should receive free land title where they reside, while those who have some capacity to pay should collectively buy strategically located land through micro-finance schemes such as the one used in the Philippines. This proposal avoids serious issues of divisiveness because it is not a matter of people getting left out (i.e., everyone can get title to the land on which she resides), but rather some people are given additional options based on their wants and financial capabilities. See Atuahene, *supra* note 5.

37. See *supra* notes 18–24 and accompanying text.

38. Center for Defense Information, *supra* note 7.

39. See generally Graham, *supra* note 6.

40. In the Huascar invasion, 35,000 people participated. *Id.* at 107. They were not allowed to remain on the land they had invaded, but instead the government gave them alternate lands on which they could reside. *Id.* This encouraged other landless families to invade and, more specifically lead to the invasions in Bayovar, Ariba Peru, and Villa Hermosa. *Id.*

41. Atuahene, *supra* note 5, at 1131 (citing La Comisión de Formalización de la Propiedad Informal (COFOPRI) (Mar. 1, 2003), <http://www.cofopri.gob.pe>).

programs like the one found in the Philippines called the Community Mortgage Program (CMP).⁴² In the CMP, the incentive to invade is mitigated somewhat because land invasions do not automatically lead to free land titles.⁴³

Despite the various critiques that I have mentioned in this section, the data consistently show that titling has significant economic value.⁴⁴ I would like to expand the discussion relating to the virtues of land titling by analyzing its political value.⁴⁵ In the following section, I will give four reasons why property ownership via land titling can deepen and strengthen the nascent democracies in which it is pursued.⁴⁶

A. *Property Ownership Gives Indigent Populations a Buffer Between Themselves and the State, Which Allows Independent Electoral Decisions Vital to a Functioning Democracy*

In a liberal democracy, rights *inter alia* protect individuals against government. However, widespread economic dependence on government largess can interfere with the exercise of these rights.⁴⁷ New democracies are especially vulnerable to systematic compromise by opportunistic politicians who can use their unchecked power over people's subsistence and control of government largess to get re-elected. Privatizing land by giving people ownership in fee simple to the public land they occupy will inject a dose of independence into patronage-infested democracies.

In the *Federalist Papers*, Hamilton correctly asserted that “[i]n the general course of human nature, a power over a man's subsistence amounts to a power over his will.”⁴⁸ In other words, if the State has amassed an inordinate amount

42. *See Id.* at 1130–31.

43. *Id.*; *see also* Thomas W. Merrill, *Property Rules, Liability Rules and Adverse Possession*, 79 NW. U. L. REV. 1122, 1152 (1984). In the context of applying a liability rule to cases of adverse possession, Merrill states that “[s]quatters and thieves would know that, even if they could obtain title to property after the passage of the statute of limitations and the satisfaction of the common law's five elements, they would have to pay for their gain. *Id.* Consequently, the incentive to engage in coerced transfers would be reduced.”

44. *See supra* notes 19–23 and accompanying text.

45. While many forms of property enhance democracy, land-based property has additional benefits. It is more visible, tangible and hence more real to people than other property rights such as stocks or bonds. It is an integral component of our everyday lives and consequently is imbued with more meaning.

46. My argument that land titling deepens democracy is predicated upon a factual understanding of how squatters acquire titled land. Land titled is either government land bequeathed to the squatters or it is private land that squatters buy collectively (as in the Philippine CMP program) or that the government buys for them. Governments are supposed to ensure that there is good title before the land is officially transferred to squatters.

47. Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 760 (1964).

48. THE FEDERALIST NO. 79, at 408 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001). Hamilton argued that true independence for judges was contingent upon them obtaining a fixed salary for their subsistence: “[W]e can never hope to see realized in

of power over a person's material well-being, then her political independence can be easily compromised. The veracity of this statement has been repeatedly tested and proven.

There were many instances throughout the 1960s where the political independence of black Americans was compromised by their economic dependence. Blacks were not allowed to exercise their constitutional right to vote in the South long after the passage of the Fourteenth Amendment and the 1965 Voting Rights Act. Many white, racist landowners threatened to fire or evict black sharecroppers who worked their land if they exercised their voting rights.⁴⁹ Only black landowners and other economically independent families

practice the complete separation of the judicial from the legislative power, in any system which leaves the former dependent for pecuniary resource on the occasional grants of the latter." *Id.*; see also WILLIAM BLACKSTONE, 1 COMMENTARIES *171 ("The true reason of requiring any qualification, with regard to property, in voters, is to exclude such persons as are in so mean a situation that they are esteemed to have no will of their own."); STEVEN R. MUNZER, A THEORY OF PROPERTY 241–46 (1990) (a decent life requires certain minimum entitlements); Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J.L. & PUB. POL'Y 37, 38 (1990) ("In this R/republican tradition, there is a recognition that for one truly to be a citizen in a democracy and to participate in the democratic process, one needs a minimum amount of independence. Economic independence is necessary if the citizen is to be able to deliberate on the common good, the *res publica*, the thing public"); Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319, 1329 (1987).

In the ancient and early modern republican traditions of which the founding generation were still in some measure partaking, an unquestionably secure base of material support was viewed as indispensable if one's independence and competence as a participant in public affairs was to be guaranteed. Material security was thought necessary to ensure the authenticity and reliability of one's politically expressed judgment regarding what course of policy would best conduce to the rights and other interests of the governed. The person whose material security became a matter of doubt or contingency—either because the person had no property and thus depended for livelihood on the grace of others or because the person relied on a form of property such as public office, pension, or public debt, that was constantly up for grabs in the conduct of government itself—would too likely act in public councils either as the tool of his patron or as the tool of his own particular, immediate, and possibly delusive material interest.

Id. Carol Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329, 345 (1996) ("Property is the keystone right because property makes individuals independent and thus capable of self-government. . . . [P]roperty removes people's dependence on others, and fundamental autonomy makes them capable of exercising unencumbered judgment in the political forum."); Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335, 351–52 (1989). See generally Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. REV. 273 (1991).

49. The reprisals were especially effective when blacks were dependent on the state's largess or plantation owners. The famous and intrepid voting rights activist, Fannie Lou Hamer, attested to the breadth of such reprisals:

On just one day—September 3, 1962—these incidents occurred, all connected to the vote drive: a black city worker in Ruleville was fired, two black dry cleaning establishments

and individuals were somewhat shielded from these abuses of power.⁵⁰ There is also a patron-client literature that documents how rural elites in the developing world systematically leverage their ownership of land and their concomitant access to resources to illicitly gain political control using methods similar to those employed in the rural South during the Civil Rights Movement.⁵¹ These examples show that throughout the world, economic independence is a predicate to meaningful political rights.

As Charles Reich aptly pointed out years ago, economic dependence comes in several forms.⁵² We should not only focus upon the dependence of the landless on a landowner for their basic needs, but also on the dependence of citizens on the growing largess of the state for their subsistence.⁵³ Reich notes that without regard for an individual's basic right to be free from the state's undue interference in one's private affairs, in 1941, a New York appellate court decided to uphold an administrative decision to withhold a man's public assistance because he literally lived in what was tantamount to a pig sty.⁵⁴ The court reasoned that "[o]ne would admire his independence if he were not so dependent, but he has no right to defy the standards and conventions of civilized society while being supported at public expense."⁵⁵ This indigent man's independence was abridged by his economic dependence on the state.

Despite its putative status as the international icon of democracy, it is not necessary to search America's past to locate instances in which independence is compromised by economic dependence. As recently as 1990, the cultural and political independence of Native American tribes was undermined by their economic dependence on the state's largess. In *Employment Division*,

were shut down, Williams Chapel Baptist Church was told it was losing its tax exemption and free water, and a plantation bus driver was told that henceforth he would need a hard-to-obtain commercial license to ferry workers to the field. The fired city worker's wife had been going to the voter registration classes. The dry cleaners were owned by blacks. The suddenly uninsured church was a meeting place for voter registration workers. And the mother of the harassed bus driver had registered to vote.

KAY MILLS, *THIS LITTLE LIGHT OF MINE: THE LIFE OF FANNIE LOU HAMER* 40 (1993).

50. Consequently, these people were more often able to exercise their political independence by taking leadership roles in grassroots organizations committed to civil rights for blacks. *Id.*

51. JOHN P. ENTELLIS, *CULTURE AND COUNTERCULTURE IN MOROCCAN POLITICS* 48 (1989); GARY W. WYNIA, *THE POLITICS OF LATIN AMERICAN DEVELOPMENT* 48 (2d ed. 1984); James C. Scott, *Patron-Client Politics and Political Change in Southeast Asia*, 66 *AM. POL. SCI. REV.* 91 (1972).

52. Reich, *supra* note 47, at 756-58.

53. *Id.* at 758.

54. *Id.* (citing *Wilkie v. O'Connor*, 25 N.Y.S.2d 617, 619 (1941)).

55. *Wilkie*, 25 N.Y.S.2d at 619. This statement succinctly validates Hamilton's intuitions about political independence.

Department of Human Resources of Oregon v. Smith,⁵⁶ the court upheld a lower court decision to withhold unemployment benefits from two Native Americans because they ingested peyote, a hallucinogenic drug that has been used for centuries by certain tribes in various cultural ceremonies.⁵⁷ Oregon's state law does not allow employees discharged for work-related misconduct and drug use to receive unemployment benefits.⁵⁸ The ceremonial use of peyote is illegal in Oregon, thus when Smith and Black were fired from their jobs, they were unable to collect unemployment benefits.⁵⁹ In a blow to the cultural and political independence of many Native Americans, the Supreme Court ruled that the Free Exercise Clause of the First Amendment was not violated by the state's prohibition of the sacramental use of peyote and the subsequent denial of benefits.⁶⁰ For those native Americans who are dependent on unemployment benefits, the consequences of exercising their cultural and political independence can be crippling.

The politics surrounding informal settlements are no exception to the maxim that economic dependence compromises an individual's independence. Informal settlements are a form of government largess, which poor people depend upon for basic sustenance. As I outlined earlier in this Article, many informal settlements are initiated through extralegal land invasions.⁶¹ As long as the state agrees not to evict the squatters, then the state is in effect issuing a tacit license to reside on its lands, which is revocable at will.

As "Operation Drive-Out Trash" in Zimbabwe demonstrates, this license can be revoked when squatters become politically dispensable.⁶² On May 19, 2005, the ruling party in Zimbabwe, the Zimbabwe African National Union-Patriotic Front (ZANU-PF), began the process of evicting individuals and families from Harare's urban squatter settlements forty-eight days after the general election.⁶³ The U.N. Special Envoy on Human Settlement Issues in Zimbabwe conducted a fact-finding mission which discovered that about 700,000 people lost their home, business, or both due to this ill-planned mass

56. 494 U.S. 872 (1990).

57. *Id.* at 874-75.

58. *Id.*

59. *Smith*, 494 U.S. at 874-75.

60. *Id.* at 890.

61. *See supra* notes 5-10 and accompanying text.

62. The actual name is "Operation Murambatsvina," which is the Shona translation of "Drive Out Trash." Sydneysider.com, Operation Murambatsvina: Drive Out Trash, <http://sydneysider.com.au/news/42/operationmurambatsvinadriveouttrash> (last visited Mar. 28, 2006).

63. ANNA KAJUMULO TIBAIJUKA, REPORT OF THE FACT-FINDING MISSION TO ZIMBABWE TO ASSESS THE SCOPE AND IMPACT OF OPERATION MURAMBATSVINA BY THE U.N. SPECIAL ENVOY ON HUMAN SETTLEMENTS ISSUES IN ZIMBABWE 7, 15, 20 (2005), <http://www.unhabitat.org/documents/ZimbabweReport.pdf>.

eviction.⁶⁴ The government had its purported reasons for initiating the mass evictions,⁶⁵ but it is widely believed that the evictions were a reprisal against areas that have repeatedly voted against the ZANU-PF in presidential and parliamentary elections.⁶⁶ If this is in fact true, then this is an acutely clear instance where people's political independence was jeopardized by their dependence on the state's largess.

Charles Reich stresses the importance of creating property interests in government largess so that people have the means to act independently and are not in a constant state of political vulnerability.⁶⁷ Land titling does just this. It transforms a person's tacit license to reside on government lands into a property interest in fee simple.⁶⁸ Property rights attained through land titling provide a measure of economic independence so individuals are less vulnerable to political reprisals like the one orchestrated by the ZANU-PF in Zimbabwe.

64. *Id.* at 7.

65. The government of Zimbabwe offered the following rationales for the mass eviction: "arresting disorderly or chaotic urbanization, including its health consequences; stopping illegal, parallel market transactions, especially foreign currency dealing and hoarding of consumer commodities in short supply; and reversing environmental damage caused by inappropriate urban agricultural practices." *Id.* at 20.

66. *Id.*; see also *Zimbabwe Slum Clearance May Worsen AIDS Epidemic, Doctors Say*, BLOOMBERG.COM, July 6, 2005, http://www.bloomberg.com/apps/news?pid=71000001&refer=Europe&sid=afKbKiEzF_kM; *UN Condemns Zimbabwe Slum Blitz*, BBCNEWS.CO.UK, July 22, 2005, <http://news.bbc.co.uk/1/hi/world/africa/4706115.stm>.

67. Reich, *supra* note 47, at 771, 786.

Political rights presuppose that individuals and private groups have the will and the means to act independently. . . .

. . . .

. . . Only by making such benefits into rights can the welfare state achieve its goal of providing a secure minimum basis for individual well-being and dignity in a society where each man cannot be wholly the master of his own destiny.

Id.

68. Most land titling programs result in individuals receiving title in fee simple. Collectively titled land, however, is also a possibility. For example, in the Philippine Community Mortgage Program (CMP), the government buys land from private owners. See *Atuahene, supra* note 5, at 1131. Then a community of squatters gets a mortgage in exchange for collective title to the land. *Id.* After the mortgage has been amortized significantly through collective payments, then title can be individualized. *Id.* at 1146-47. The downside of collectively titled land is that it is difficult to use collective title as collateral to obtain a loan for productive purposes. While it is possible in New York cooperative apartments to draw a loan against a collective title, loans to squatters are too small to make this complicated financial transaction profitable for banks in the case of developing nations.

While there is not a fixed or predetermined amount of property that ensures political independence,⁶⁹ it is important to note that the democracy-enhancing effects of property ownership are more pronounced when it is distributed to poor people, and less pronounced for someone who owns a significant amount of property. For instance, the democracy-enhancing effects of ownership are more profound for someone who lives in poverty and receives title to land on which she resides, as opposed to someone who acquires her third home. In the former, property ownership is establishing the buffer, while in the latter, it is fortifying it.⁷⁰

B. Property Ownership Makes Poor People Stakeholders in Democratic Institutions

Stakeholders are people who own, or are somehow invested in, one piece of a larger enterprise. A stakeholder in the enterprise of democracy is a person who has a self interest in its perpetuation and proper functioning. For several reasons property ownership can transform a marginalized individual into a stakeholder.⁷¹

First, property ownership gives one an incentive to play the game (i.e., participate in the democratic enterprise). Property is a legal fiction that protects certain interests at the expense of others,⁷² and this fiction is made real through the creation and enforcement of laws.⁷³ Democratic institutions afford property owners the opportunity to influence these laws. Consequently,

69. In the context of squatter communities, ensuring political independence can result from something as inexpensive as land title, but in the context of elections it could cost millions of dollars to ensure candidates are politically independent and not beholden to corporate interests.

70. I acknowledge that the inverse can also be true. The more land a person has, the more power a state can have over her. However, the state's power has different effects. For those with fewer resources it is likely to affect their ability to subsist. In contrast, for those with more resources, their ability to live well is affected.

71. See generally David Ellerman & Peter Pitegoff, *The Democratic Corporation: The New Worker Cooperative Statute in Massachusetts*, 11 N.Y.U. REV. L. & SOC. CHANGE 441, 461 (1982–1983). It is conceptually helpful to liken an individual's relationship to a democratic society to the metaphor of a game. The game is the democratic enterprise. Stakeholders are the players. The rules are societal laws created through various democratic institutions. The playing field is the background against which the game is played.

72. I acknowledge that in the Lockean configuration, there are some forms of property that are pre-political and thus not a political fiction. See generally JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., 1960) (1698).

73. For example, a property rule that allows an individual to secure a patent for cultural knowledge privileges this individual at the expense of the community that has been using the information without restriction for centuries; or a rule that formalizes the principle of "finder's keepers" privileges people who happen upon lost property over true owners. These are all political choices that a society makes.

property owners have a compelling incentive to participate in the lawmaking process in order to protect their interests.⁷⁴

Second, property ownership brings more players into the game. In Peru, with the stroke of a pen, thousands of poor people were transformed into stakeholders.⁷⁵ For several years, even decades, impoverished populations lived precariously on government land, with nominal tenure security, each day in jeopardy of dispossession. With the advent of land titling, the same people now own the plot of land on which they have been residing for years and enjoy the residual benefits of property ownership.⁷⁶ Unlike other forms of privatization, where resources are transferred to local elite or multinationals, land titling transfers resources to the poor masses and thereby gives them a stakeholding.

Third, property ownership consolidates the rules of the game. After the land titling process is complete, formally marginalized people own property recognized and protected by the state; this gives them an opportunity to play, abide by, or change the rules established by the state instead of those enforced by local power brokers.⁷⁷ In informal communities, local bosses and loan sharks often fill the vacuum left by the state's absence.⁷⁸ For instance, a

74. Those dependent on government largess, in theory, also have a strong incentive to participate in the lawmaking process. In reality, those dependent on government largess are among society's poor. For many reasons, poor people are less likely to vote. See DAY & HOLDER, *supra* note 3, at 8; JAMIESON, SHIN & DAY, *supra* note 3, at 5–8; DAY & GAITHER, *supra* note 3, at 7.

75. Between 1991 and 1995 alone about 300,000 titles were registered in urban Lima. PERU-URBAN PROPERTY RIGHTS PROJECT REPORT NO. PID6523 2, http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1998/05/18/000009265_3980929101751/Rendered/PDF/multi0page.pdf.

76. See Atuahene, *supra* note 5, at 1138–42 (describing Peru's land titling process).

77. It is more efficient for everyone to play by the same rules. The dominance of local bosses may not present Herculean problems if each community were content trading within itself. However, trade would be severely hindered if each time an outsider wanted to occupy a property, she had to learn a new set of unpublished rules. See Ngugi, *supra* note 1, at 476.

78. Depending on the particular situation, the local boss can be a legitimate community association or an organized crime-like unit. Carol Rose states, “[P]roperty protected by formal title tends to erode the kinds of ‘natural,’ community-based property rights that *can* predate government.” Carol M. Rose, *Privatization—The Road to Democracy?*, 50 ST. LOUIS U. L.J. 691, 704 (2006). This statement under-emphasizes the presence of mafia-like organizations in informal settlements that often fill the void left by the state's absence. See JAMES L. GARRETT, INTERNATIONAL FOOD POLICY RESEARCH INSTITUTE, COMEDORES POPULARES: LESSONS FOR URBAN PROGRAMMING FROM PERUVIAN COMMUNITY KITCHENS 13 (2001), <http://www.ifpri.org/themes/mp14/unpublished/m14careperu.pdf> (“Multiple levels of authority, official and unofficial, operate across multiple spheres of action. Neighborhoods face potential intervention not only from national and municipal authorities but also from local actors, including local elected officials, party leaders, and even criminal ‘bosses’ or gangs.”); see also Erica Field, *Property Rights, Community Public Goods and Household Time Allocation in Urban Squatter Communities: Evidence From Peru*, 45 WM & MARY L. REV. 837, 865 (2004) (land titling shifts

dispute as to who can occupy a particular plot of land cannot be adjudicated in local courts because informal communities are not formally recognized by the state. Instead, local bosses act as arbitrators, and the involved parties are denied all procedural and substantive protections of the state.⁷⁹ If someone requires a loan, she cannot go to the state lending institution or a private bank and use her home as collateral to secure a loan. Instead, that person's only recourse is to go to loan sharks who exact exorbitant interest rates and at times levy lethal fines for failure to repay.

Fourth, property brings more people into the game with an incentive to play harmoniously. Political instability can undermine a democracy. It results when people's interests are drastically divergent and there is no accepted process that can effectively reconcile those interests.⁸⁰ Property is one area that often leads to inflammatory divisions in society.⁸¹ Through land titling, the landless are given the opportunity to become property owners, thereby to some degree reconciling formerly incongruent interests and promoting peace and stability. More importantly, property owners should be invested in ensuring that their society's dispute reconciliation mechanisms function because their property rights become unstable when societal disputes spiral out of control and chaos prevails.

the burden of property protection to the state rather than individuals and/or communities); Curtis J. Milhaupt & Mark D. West, *The Dark Side of Private Ordering: An Institutional and Empirical Analysis of Organized Crime*, 67 U. CHI. L. REV. 41, 92 (2000) ("[P]rivate ordering by organized criminal firms is a substitute for state-provided and state-sanctioned enforcement mechanisms."). Also, a functioning democracy is a prerequisite for an individual to play and abide by the rules of the game established by the state. If an aura of corruption envelopes the courts or if the state's enforcement powers are ineffective, then local power brokers will fill the lacuna.

79. This can be a problem even if a community is lucky enough to have a community organization in control and not a mafia-like organization, because although sometimes community organizations function more efficiently than the state in addressing disputes, other times they do not. The travesty is that the justice system is not centralized and consistent, which means similarly situated parties can receive drastically different results. *See generally* Rose, *supra* note 78.

80. I am not convinced by the distraction argument, which claims that property security promotes commerce and commerce deflects attention away from politics, thus making politics less volatile. *See* Rose, *supra* note 78, at 710–14. I believe the correct lens for analyzing political instability is one that focuses on divergence of interests and the efficiency of the established process for reconciling these discordant interests.

81. Amy Chua has documented how political instability is fostered when property-rich ethnic minorities are faced with the native propertyless masses who have acquired political power as part of the global move towards democratization. AMY CHUA, *WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY* 127–31 (2003).

C. *Property Ownership Gives People an Incentive to Secure Greater Liberties*

There is a strong connection between the free flow of information guaranteed by the right to free speech and free press and property ownership. Property ownership concentrates information in the hands of the owner.⁸² This is why owners need a free flow of information to maximize their assets. Consequently, property ownership should increase the demand for liberties that ensure free flow of information.

Also, in *Buckley v. Valeo*,⁸³ the U.S. Supreme Court insisted that freedom of speech is connected to property when it ruled that certain campaign finance restrictions unduly limit an individual's right to free speech.⁸⁴ Under *Buckley*, the right to free speech results in more freedom to dispose of one's property as one sees fit.⁸⁵ This should give property owners an incentive to advocate for increased liberties and hence help democracy to thrive.⁸⁶

D. *Property Ownership Provides a Space Where Individual Autonomy Is Respected and Minority Viewpoints, Critical to a Healthy Democracy, Can Thrive*

Individual autonomy is one of the core elements of democracy.⁸⁷ A society must create spaces where its denizens can develop their sense of autonomy and individuality because this is the clay from which diverse viewpoints, so critical to a robust democracy, are formed. Individual autonomy, however, is often at odds with another defining element of democracy—majority rule. Property ownership resolves this tension by providing a space of autonomy where an individual can exercise her will even

82. Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1728 (2004). Smith argues that

property responds to uncertainty over uses by bundling uses together and delegating to the owner the choice of how to use the asset, thus avoiding the need to specify uses at any stage . . . property rules have advantages that stem from this delegation to the owner of the tasks of gathering and acting on information about assets.

Id.

83. 424 U.S. 1 (1976).

84. *Id.* at 44; see Spencer Overton, *Racial Disparities and the Political Function of Property*, 49 UCLA L. REV. 1553, 1563–68 (2002) (noting the racially discriminatory results of connecting property to freedom of speech).

85. Overton, *supra* note 84, at 1564.

86. Many commentators have claimed that property is the keystone right. See JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 26 (2d ed. 1992) (quoting Arthur Lee as saying: "The right of property is the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty.").

87. Voting is one of the most important acts in a democracy and, more importantly, is an exercise of individual autonomy. See generally Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144, 182 (2003).

when it does not coincide with the will of the majority. In this space, to a large extent the powerful state is kept in abeyance so that people can make independent choices that may go against the interests of the majority.

[P]roperty performs the function of maintaining independence, dignity and pluralism in society by creating zones within which the majority has to yield to the owner. . . . The Bill of Rights also serves this function, but while the Bill of Rights comes into play only at extraordinary moments of conflict or crisis, property affords day-to-day protection in the ordinary affairs of life.⁸⁸

By providing a space of autonomy where minority viewpoints can flourish, property ownership can enhance the democratic trajectory of countries.

E. If the Process Undertaken to Distribute Land Titles is Corrupt This May Initially Undermine Democracy; However If Distributed to the Needy, Then the Property Allocated Can Buttress Democracy in the Four Ways Described Above

In several countries, the granting of land titles is a highly politicized process. It is not uncommon for politicians to distribute title to land just before an election, effectively holding the provision of stable shelter out like a carrot before a starved electorate. For instance, “[t]wo weeks before the midterm elections of August 1991, Salinas [the incumbent President] toured Mexico and personally handed out in less than ten days as many land titles as distributed by the Mexican government over the past fourteen years.”⁸⁹ This was widely, and rightfully, viewed as an unabashed attempt by the *Partido Revolucionario Institucional* (PRI) to distribute government largess in the form of land titles in exchange for votes.⁹⁰ However, if the distribution of land titles was one of the most pressing needs of the people, then is it accurate to claim that this expenditure of resources was nothing more than a thinly veiled vote-buying scheme?

In representative democracies, one of a politician’s many duties is to contribute to the *process* of addressing the needs of her constituency. If the majority of the electorate does not approve of her choices, then, in a functioning democracy, the politician can be voted out at the end of her term.

88. Reich, *supra* note 47, at 771.

89. Cynthia Anderson-Barker, *A Case Study of Elections in the State of Michoacan on July 12, 1992*, 16 LOY. L.A. INT’L & COMP. L.J. 307, 320–21 (1994) (quoting DENISE DRESSER, NEOPOLITAN SOLUTIONS TO NEOLIBERAL PROBLEMS: MEXICO’S NATIONAL SOLIDARITY PROGRAM 24 (1991)). This phenomenon is not limited to Mexico. See, e.g., Mark Fineman, *Aquino, Rebels on Propaganda Campaign Trail*, L.A. TIMES, Dec. 12, 1986, at 10 (reporting that Philippine President Aquino blamed the squatter problem on exiled President Marcos, who she claims promised squatters legal title to land without a legal mandate. Aquino claimed that the squatters’ present problem was a result of “the promise of a desperate politician who wanted to buy the votes of the poor”).

90. See Anderson-Barker, *supra* note 89, at 307, 320–22.

The line between the illicit act of vote-buying and a legitimate effort to satiate the electorate's needs is determined by the process undertaken. A decision to allocate land titles will have more legitimacy if it has traversed the established and legitimate processes of democratic deliberation. For instance, a decision that was vetted through the legislature, allowed space for various parties to shape the policy, and involved some form of popular engagement and debate would be on the democratic end of the spectrum. In contrast, a decision that bypassed the system of democratic checks and balances and was forced through near election time by an executive using her bully pulpit would be on the opposite end.

In the example above, at the time Salinas distributed the land titles, Mexico was a democracy in name only. In reality, it was a one-party government dominated by the PRI and bereft of the traditional checks and balances vital to a properly functioning democracy.⁹¹ When Salinas handed out hundreds of land titles to impoverished slum dwellers two weeks before the election, this was a clear instance of vote buying because he bypassed the democratic decision-making process.⁹²

A true democracy entails rule by the people where each individual is expected to vote his or her conscience. In a democracy where votes can be bought, however, those with the most resources rule. The Mexican example demonstrates how the privatization of public land through land titling done in an undemocratic environment can lead to vote buying and hence *initially* undermine rather than strengthen democracy.⁹³ Once the land has been privatized, however, then democracy will be edified along the lines of the four arguments given above if the land was distributed to poor populations and not the financially privileged.⁹⁴

III. CONCLUSION

I have argued that land titling is a form of privatization with the potential to deepen democracy. Land titling enhances democracy by creating a

91. *Id.* at 307.

92. *Id.* at 319, 320–22. While a legitimate process may not guarantee a fair result, it greatly improves the likelihood that the outcome will be fair.

93. This is consistent with Carol Rose's claim that "privatization and democratization are siblings, co-existing in a mixed environment of mutual support [and] dependence" See Rose, *supra* note 78, at 694.

94. If land titles are not distributed within the context of a functioning and transparent democracy, then it is more likely that political cronies will receive title rather than the neediest. See Timothy Lindsey, *Square Pegs & Round Holes: Fitting Modern Title into Traditional Societies in Indonesia*, 7 PAC. RIM L. & POL'Y J. 699, 700 (describing Indonesia's experience with land titling under its Basic Agrarian Law (BAL): "[T]he BAL's land reforms have largely failed, mainly due to labyrinthine and corrupt modes of implementation that have turned land administration into a bureaucratic rentier activity.").

property-owning society. Property ownership allows previously vulnerable populations to make independent electoral decisions, increases the number of stakeholders in society gives people an incentive to secure greater liberties, and provides a space where autonomy is respected and minority viewpoints can thrive. If corruption is rampant then the process undertaken to distribute land titles may initially undermine democracy, but if distributed to poor people, the property allocated can deepen democracy.

