Foreword: Property Rights and Economic Development

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FOREWORD: PROPERTY RIGHTS AND ECONOMIC DEVELOPMENT

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The macroeconomic problems facing nations have changed little over the last century. Undeveloped nations continue to look for tools to increase the growth rate of their economies. Developed nations, content with or perhaps resigned to modest long-term growth rates, focus more on business cycles, with their inevitable downturns (recessions and depressions). Law and economics scholarship, with a few minor exceptions, has little to offer business cycle theorists.¹ This is not surprising. Law and economics generally applies the tools of microeconomics, not macroeconomics, and even relatively recent scholarship on the microeconomic foundations of business cycles does not involve issues commonly addressed by law and economics scholars.

Until fairly recently, the same could have been said about growth theory. Its traditional focus on accumulation of capital, stages of

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development, and creation of key infrastructure—for example, roads and railroads—did not require the application of expertise in micro-level, legal relations.\textsuperscript{2} Over the last decade or two, however, economists have begun to focus on microeconomic legal foundations that may be catalysts of growth for undeveloped economies. In particular, they have devoted considerable attention to the role that property rights play in economic development.\textsuperscript{3}

Given that economists have been gearing up on the role that property rights play in economic growth, it would seem natural for legal scholars of property, and especially those with a law and economics bent, to follow this lead. Property, after all, is essentially a legal construct. Moreover, it permeates the foundations of developed legal systems: contracts is about the consensual transfer of property rights; torts is about the protection of property rights from nonconsensual harm.

Yet it seems clear that property law scholars, the author included, generally have not followed their economist colleagues into the breach. Here is one piece of anecdotal evidence: over the last five years, ten leading law journals have published ten articles, summing to 714 pages, on the finer points of the Constitution's Takings Clause.\textsuperscript{4} Over the same period, these journals have published only two articles, summing to 105 pages, on the role of property rights in economic development.\textsuperscript{5}

This is not to say that the Takings Clause (on which the author has published more than his fair share) is an unworthy subject; indeed, later in this introductory essay we will highlight the importance of the principles for which it stands. Moreover, in America and other developed economies, at least outside of the ghettos discussed at the end of this essay, the Takings Clause is more relevant to everyday life than economic development in the Third World. To the extent that taxpayers directly or indirectly fund legal research at public law schools (such as my employer), our focus on the finer points of doctrines of interest to the domestic citizenry


\textsuperscript{3} See extensive cites to the economics literature on property rights in developing nations cited by Field and by Lanjouw & Levy in their contributions to this symposium.

\textsuperscript{4} See infra Appendix.

\textsuperscript{5} See infra Appendix.
may make some sense. Yet it seems that, if we were to attach equal weight to the welfare of every person planet-wide, property scholars might well maximize their marginal product by devoting less time to the Takings Clause and other fine points of domestic property law, and more time to the role that property rights may play in bringing affluence to impoverished nations. At any rate, it is this thought that motivated me to organize a conference that would enlighten property scholars about economists’ work on property rights in developing economies, and vice versa.

For legal scholars who choose to study the role of property rights in economic development, an initial question presents itself: What is their comparative advantage? In what way can they draw on their special skills and experience to maximize their contribution? Economists are better equipped to address many questions. For example, they are trained to develop theoretical models that capture the essence of costs, benefits, and trade-offs. They are also better equipped to conduct the statistical research necessary to put such theories to the test, and to uncover mechanisms that theorists may have overlooked. Erica Field’s contribution to the symposium, for example, used data gathered in Peru to make a strong case that establishing property rights may free up labor used to protect possession in economies without such rights. Jenny Lanjouw, in her contribution co-authored with Philip Levy, finds that titled owners are twice as likely to rent out their properties; presumably, lack of title makes even a temporary transfer of possession too risky.

Having ceded theoretical and statistical work to the economists, is there anything left for legal scholars? Contributions to the symposium suggest two affirmative answers that draw on intimate knowledge of the institutions behind property rights. First, at a level of high generality, one of the staples of legal scholarship is the definition of property rights, and the division of such rights in analytically helpful categories. Perhaps most famously, property law scholars speak incessantly of the “bundle of sticks” that constitute


property: various combinations of the rights to exclude, to use, and to alienate as the three sticks that, tied together, make up the bundle of rights we commonly associate with the word "property." A more recent example is the division of remedies for violations of property rights into two categories: "property rights" providing as much protection as the legal system can offer, and lesser "liability rights" that limit remedies to fair market compensation, permitting others to force a transaction on an unwilling owner. Brett McDonnell's contribution to this symposium focuses on the role that institutions play in defining the contours of property rights.

Second, legal scholars have extensive knowledge of the nuts and bolts of everyday property relations, across a wide range of times and economies, from feudal times to the present. This idiosyncratic collection of knowledge can be viewed as a source of suggestive, imprecise empirical data. Perhaps of greater importance, legal researchers are experts on key institutions, often unfamiliar to economists, that are essential to well-functioning markets. There is perhaps no better example than title insurance, a private ordering solution to the problem of uncertainty over the state of legal ownership of land discussed in Joyce Palomar's contribution to the symposium. Economists, and others without some experience in real property law, would be shocked at the disarray of the

8. One of the earlier uses of the "bundle of sticks" analogy for property rights was by Benjamin N. Cardozo. See BENJAMIN N. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 129 (1928) ("The bundle of power and privileges to which we give the name of ownership is not constant through the ages. The faggots must be put together and rebound from time to time.")
public land records in most jurisdictions, yet title insurance, along with subsidiary institutions, permits relatively easy alienability of real property despite these systemic defects in land recorders' offices across the nation.

As intimated in the preceding paragraphs, we can define property rights functionally in terms of the institutions that create and protect them. Organizing our discussion in terms of the sticks in the bundle of property rights—exclusion, use, and alienation—the first essential institution is some sort of police force to protect possession, that is, to enforce exclusionary rights. Upper- and middle-class property owners in developed nations may take the presence of a well-organized police force for granted. One need only look to areas lacking an effective police force to see the high costs of self-protection imposed on property owners. Again, Erica Field's Article on this issue shows that lack of legal title forces some family members to forgo gainful employment so they can protect possession of their homes.

The judiciary is the institution responsible for facilitating alienability of property, and for deterring interference with use. The only justification for the enormous body of contract law is that it greases the wheels of commerce; combined with the division of labor, easy trading lies at the root of the wealth of developed economies. It is easy to forget the importance of simple exchange, though economists are unlikely to suffer such an oversight; all of the considerable analytic machinery of competitive market models boils down to exhausting all opportunities for mutually advantageous trades. The judiciary also serves as a backstop to the police in deterring nonconsensual interference with exclusion and use—i.e., torts.

The police and the judiciary are the central institutions in maintaining property rights. Earlier portions of this introduction referred to other such institutions: the public land records, and title

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15. Nat'l Ctr. for Policy Analysis, Using the Private Sector to Deter Crime (identifying the increasing amount spent even in the United States on private security guards and systems in response to at least perceived ineffective police forces), at http://www.ncpa.org/studies/s181/s181e.html (last visited Feb. 8, 2004).
16. See Field, supra note 6, at 857-59.
insurance. The word “institution,” especially in a discussion that began with the police and judiciary, may carry with it an implicit suggestion that we are talking about public institutions; we should avoid any such notion. For economically minded policymakers, the relevant normative question is whether the market can provide something, or the identification of some market failure that requires state intervention.

For example, there is widespread, though not universal, agreement that the police and judiciary are public goods: any attempt at private provision of these services would run into problems due to the difficulty of excluding nonpurchasers from many of their benefits.  

Land records, on the other hand, do not suffer from non-excludability; indeed, title insurance companies frequently establish their own, better-organized private versions of the public records and, of course, exclude their competitors (or anyone else) from using this valuable informational capital.  

Use of land records, however, is nonrivalrous, so they have at least one of the attributes of a public good. In addition, it is possible that the provision of land records is a natural monopoly: high fixed costs for each producer may mean that a single provider can minimize total cost per unit.  

Undeveloped economies surely could benefit significantly from greater state provision of any of these goods or services that the market cannot provide. More police, at least of the noncorrupt variety, would enable people to devote less time and resources to protecting existing property, and more to creating additional wealth. More efficient and impartial judges would facilitate trade and minimize tortious damage to body and property. We could add many other public goods to this list. Markets in developing economies may undersupply education because of imperfect capital markets—children cannot borrow to fund schooling that would enable them to be much more productive and easily pay back such loans. If education has positive external benefits, that is an additional reason

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19. See id.; Musgrave & Musgrave, supra note 17.
the market would underproduce it. Roads and airports are other public goods mentioned earlier that might also yield significant returns in undeveloped nations.

The problem with providing more police, judges, roads, or education, of course, is that they are expensive. Poor countries (by definition!) don’t have sufficient resources to provide many highly productive public goods. In addition, the benefits from many of these goods, especially education, take decades to materialize. The seductiveness of providing property rights via titling programs is their low cost and rapid impact. It takes a relatively small cadre of public surveyors and bureaucrats to grant title to squatters. The hope is that a modest up-front investment will yield large returns in a short time.

The role of land titles in property law is precisely the sort of issue on which legal academics have expertise. As both Robert Ellickson and Thomas W. Merrill pointed out during two different discussions at the symposium, title is a relative matter. Someone who finds a piece of personal property (a watch, for example) has title as against everyone else except the “true owner” who lost it. In the context of real property, state recognition of title confers two quite different benefits. First, if it is anything more than a sham, granting title is at least a partial recognition that the new owner has property rights as against the state itself. Second, it usually carries with it the implicit promise that the new owner may draw on the police and the judiciary to defend her property rights against other private parties.

Property rights against the state and against other private parties differ both in the small and in the large. In the small, an owner’s rights against the state are generally weaker than her

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22. Felix Cohen nutshelled the institution of property by imagining that owners attached the following sign to all items of (tangible, at least) property that they own:

To the world:
Keep off X unless you have my permission, which I may grant or withhold.
Signed: Private citizen
Endorsed: The state

rights against other private parties. For example, the state can force a title holder to sell at a court-determined fair (market) price; this is the power of eminent domain, to effectuate a taking for just compensation. Private parties, outside of some relatively narrow exceptions, cannot force an owner to sell. To take another example, the state has broad powers to regulate property use without the consent of a property holder; in a democracy, this means a majority can foist regulations on everyone. Private parties wishing to impose regulations on property use must obtain the consent of every last party affected.

In the large, nations can and do provide various gradations of property rights versus the state and versus others. To highlight the basic society-wide possibilities, the following table boils down the two continua into four categories.

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23. See, e.g., FLA. STAT. ANN. § 334.30 (2002) (creating process to condemn for private transportation facilities); MICH. COMP. LAWS ANN. § 486.252 (1998) (giving electric and gas power companies power to condemn); JOHN LEWIS, 1 A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES § 250 (3d ed. 1997); MCKINNEY'S HIGHWAY LAW § 300 (giving private power to condemn if landlocked).

24. Thus absent a special per se rule (e.g., permanent physical invasion, or destruction of all economically viable use), property owners are unlikely to win regulatory takings claims. Agins v. Tiburon, 447 U.S. 255 (1980) (holding that zoning amendment that limited construction on a five-acre parcel to at most five houses was not a taking); Penn Cent. Trans. Co. v. New York, 438 U.S. 104 (1978) (holding landmark designation that prevented construction of skyscraper in midtown Manhattan was not a taking).

25. Absent a prior agreement empowering a majority of owners to alter them, changing private land use restrictions ("covenants") requires the consent of all owners. Jeffrey E. Stake, Toward an Economic Understanding of Touch and Concern, 1988 DUKE L.J. 925, 938.
Developed nations tend to provide strong property rights against both the state and others. As mentioned earlier in this essay, police and judicial protections are generally so well-established and effective in developed nations that they are taken for granted. Thus property rights scholarship about such legal systems tends to focus on protections against state expropriation. The prime example in

<table>
<thead>
<tr>
<th>Property Rights v. State</th>
<th>Strong</th>
<th>Weak</th>
</tr>
</thead>
<tbody>
<tr>
<td>Developed Nations</td>
<td>(1) strong police and courts protect property against other private parties</td>
<td>Predatory Police State; e.g., Soviet Union and other former communist regimes; North Korea, Zimbabwe today</td>
</tr>
<tr>
<td></td>
<td>(2) constitutional rules and norms limit government expropriation</td>
<td>(1) Powerful police state maintains strict order where desired</td>
</tr>
<tr>
<td></td>
<td>“The Anemic State”</td>
<td>(2) Same powerful state faces no constraints in expropriating property</td>
</tr>
<tr>
<td></td>
<td>(1) Weak state unable to provide effective police, judiciary, land titling, and other property institutions</td>
<td>(1) State is strong enough to engage in predation</td>
</tr>
<tr>
<td></td>
<td>(2) State so weak it cannot expropriate; a weak state is the functional equivalent of strong property rights against the state</td>
<td>(2) State refuses to protect property owners from their neighbors</td>
</tr>
</tbody>
</table>
the United States, of course, is the Takings Clause mentioned at the beginning of this introduction.

The lack of such protections is perhaps the primary distinction between market economies and the traditional communist economies of the former Soviet Union, its eastern European satellites, and China before the reforms of the last three decades. The omnipresent security and police forces generally protected citizens from thievery by other private persons; people were generally secure in the possession of their homes and personal property. Yet if the state decided it needed your property, there was no recourse to such naked expropriation.

The lower right box of the table above describes a world in which the government, in addition to engaging in predation itself, fails to protect property owners from private predation. It is hard to imagine a historical example of such a state. As a matter of self-interest, it makes little sense for a powerful government bent on grabbing wealth for itself to permit private parties to compete with it. Such a state likely could maximize its take by monopolizing the role of predator. In the short run it could grab more, and in the long run it could curb its predations to a level that would give citizens some incentives to create wealth.

Finally, the lower left box envisions a seemingly odd situation: the state provides little protection against private interference with property rights, yet poses little threat itself to property. There is, however, a natural and indeed common explanation for this oddity: a weak government. Such a state is too weak to protect owners against private predations, and is itself too weak to pose any sort of threat to property rights. This model of a weak state may be a reasonable description of the government in many undeveloped nations in South America and Africa.

This categorization, at first blush, suggests that the major problem with property rights in such nations is the weakness of the


police, the judiciary, and other institutions that protect owners against private interference with property rights. As implied earlier, there is no cheap solution to this set of problems: Effective and honest police forces and judiciaries are expensive. A naked grant of title, unsupported by effective protection against the predations of others, is worth little more than the paper on which it is printed.

Missing from this equation, however, is what may be a critical and underappreciated feature of undeveloped nations: state ownership of large tracts of valuable land, in rural, urban, and especially in suburban areas at the edge of rapidly expanding cities. The very same weakness of government that protects private owners from public expropriation in undeveloped nations will lead to mismanagement of these lands.

Based on the empirical work of Field, Lanjouw and Levy, and others, it seems that in South America large numbers of urban immigrants participate in land rushes that result in squatter communities on state-owned property. Indeed, Lanjouw and Levy report that “[d]ue to their prevalence throughout the developing world, land invasions and informal systems of land tenure have been the focus of considerable research.” Organizers with political savvy and perhaps some political connections orchestrate the process. Once a critical mass of squatters has moved in, they begin to clamor for formal recognition of their claims.

It is difficult to understand why these governments make little if any effort to transfer title directly to the waves of rural inhabitants flocking to cities as their economies adopt more efficient agricultural methods and develop other industries. In trying to understand this pattern of land distribution, it is helpful to consider the experience of other nations during their industrial revolutions. In England, the Normans divvied up most of the country to lords, who in turn granted land on feudal terms to sublords, and so on in a chain of obligation. Eventually many small holders (copyholders) came to own their parcels. More relevant for comparison to the South American experience, by the time England began to industrialize

29. Id. at 894.
31. Id. at 155-72.
and thus major population movements took place, most of the undeveloped area around cities (suburbia) likely was in the hands of private owners who had the incentives and the initiative to meet the demand of rural immigrants.

The United States began with an immense stock of public lands, and more than tripled it with the Louisiana Purchase and other acquisitions.\textsuperscript{32} Contrast continued state ownership of large and valuable suburban tracts in South America with the distribution of these vast public lands owned by the United States. The American government devoted considerable energy throughout the 1800s to transferring most acreage to private citizens. It surveyed millions of acres, set up land offices in remote regions, offered land at relatively low prices, provided financing at a time when private capital for this purpose was generally unavailable, and eventually gave away millions of acres to homesteaders.\textsuperscript{33} By the time cities like Cincinnati, Chicago, Denver, or San Francisco began to develop, most of the surrounding area was in private hands.\textsuperscript{34} As these cities expanded, self-interested owners either developed suburbia themselves, or sold to the highest bidder—invariably a professional developer.

Why have Peru, Ecuador, and perhaps other undeveloped nations failed to transfer title to rural immigrants to suburbia in a similar fashion? The answer may be that their governments have long been, and continue to be, relatively weak, poor, and disorganized.\textsuperscript{35} Simply put, they have been inefficient land managers, unable to undertake on their own initiative the surveying and sale of their extensive suburban land holdings despite swelling demand.

Seen in this light, the pattern of organized land rushes followed by demands to validate the squatters' ownership may actually be

\textsuperscript{32} Benjamin H. Hibbard, A History of the Public Land Policies 13 tbl.1 (Univ. of Wis. Press 1965) (1924) (describing an initial public domain of about 347,000 square miles), \textit{id}. at 14 (noting that the Louisiana Purchase embraced about 828,000 square miles), \textit{id}. at 16-31 (describing other purchases).

\textsuperscript{33} Paul W. Gates, History of Public Land Law Development ch. 15 (1968).

\textsuperscript{34} Cf. Hibbard, supra note 32, at 408-09 (summarizing the effects of these transfers of public land).

the best feasible method to effectuate the transfer of land to those who value it most. Organizers and their followers provide the initiative and part of the investment necessary to establish new residential suburbs. They then turn to the government to solidify their claims. From this perspective, the organizers of these land rushes, far from being the head of a massive criminal enterprise, have much in common with residential property subdividers and developers in wealthier nations where more efficient governments have privatized most land.

This observation runs counter to the usual assumption that unplanned development is inefficient. Lanjouw and Levy, for instance, note that

we might think that such land invasions are a bad way to settle property. Often invasions occur in marginal areas where the provision of services may be more costly and where conditions are poor or even dangerous; and it is always more difficult to put in infrastructure after housing has been built.\textsuperscript{36}

The problem is that, if the state is truly impotent, planned real estate development simply may be impossible. The alternatives are then squatter developments or no developments at all.

It is interesting to contrast this sanguine view of gaining title by squatting—adverse possession—in weak nations with its treatment in countries which better manage their public lands. Although a few states permit private parties to gain title to public land by adverse possession on some terms against private owners, most along with the federal government either bar adverse possession against themselves or make it more difficult.\textsuperscript{37} This different treatment may well make sense because of differences between the United States and South American nations in the nature of the lands each government owns.\textsuperscript{38} In contrast to the suburban tracts targeted by

\begin{itemize}
\item \textsuperscript{36} Lanjouw & Levy, supra note 7, at 908.
\item \textsuperscript{37} See generally Carl C. Risch, Comment, Encouraging the Responsible Use of Land by Municipalities: The Erosion of Nullum Tempus Occurrit Regi and the Use of Adverse Possession against Municipal Land Owners, 99 DICK. L. REV. 197, 197-98 (1994) (describing different methods jurisdictions use to bring adverse possession claims against municipal governments).
\item \textsuperscript{38} Symposium, Time, Property Rights, and the Common Law, Round Table Discussion, 64 WASH U. L.Q. 793, 832-33 (1986) (comments of Robert C. Ellickson).
\end{itemize}
urban immigrants in South America, most land owned by the federal and state governments is rural—parks and wilderness. It would be very expensive to monitor for squatters in, for example Yellowstone National Park, which consists of over 2.2 million acres, much of which is wilderness accessible only by foot. Moreover, the raison d’être for the existence of such lands is frequently to serve as a commons. It would be doubly difficult, then, for the government to distinguish between “regular” park users posing no threat of adverse possession and those continuing their presence in a manner substantial enough to satisfy the normal requirements of adverse possession.

Returning to South Americans adversely possessing suburban lands owned by their governments, what exactly do they stand to gain by obtaining official title to their homestead? They clearly gain a prima facie defense to any attempt by the state to regain title, though if the state is weak this is not a serious threat. More significantly, formal title may make them more secure against private predation. If real property law in South America tracks American law, a squatter, like a finder of personal property, has title against all the world except the true owner (the holder of legal title) so long as the requirements of adverse possession are satisfied. Under this rule, squatters should not have to worry about incursions by other private parties.

If, however, as we are assuming, the state is weak, the police and the courts may be ineffective, erroneous in their findings, or partial to one side because of bribes and political influence. When these fundamental property institutions are so flawed, squatters might worry that they will lose disputes with later claimants due to the incompetence or venality of the police and the courts. Formal legal title granted by the state, however, will simplify disputes, by making errors less likely and partiality more difficult to conceal. The central finding of Erica Field’s contribution to this symposium, that obtaining formal title enables households to reduce time on protecting possession and increase time devoted to earning income, suggests that formal title indeed does assist squatters in securing

their claims against interlopers. Field reports additional findings that buttress her case. First, title tends to release male household members for work outside the home; presumably men have a comparative advantage defending homesteads when families fear incursions. Second, she finds that households without title disproportionately operate businesses out of their homes, enabling them to simultaneously protect possession and earn some income. Similarly, Lanjouw and Levy's finding that those with title are more than twice as likely to rent their properties suggests that formal title confers on owners feelings of security in ultimate title sufficient to make them comfortable granting time-limited rights to others.

Formal legal title may also facilitate the alienability of land and, as trumpeted by Hernando de Soto, the use of land as collateral for loans to facilitate entrepreneurship by home owners. Though unclear as presented by de Soto, the story here must be that the interest rate on unsecured loans is much higher than the rate on secured loans. The important point is that the utility of title in obtaining a mortgage is derivative of the direct benefits of title: Lenders will feel secure and offer much lower interest rates on a mortgage only if they are confident that the borrower's title—on which any claim they would make in a foreclosure will be based—is in practice safe from adverse claims.

The discussion in the previous paragraph is a nice illustration of the type of contribution that legal scholars can make to the study of property rights and economic development. Drawing on the legal principle that a mortgage lender's rights are equivalent to the borrower's in case of foreclosure, we then focus the inquiry about the financing benefits of titling onto rights as against two very different threats: governmental and private. Similarly, it can help economists gathering data to ask questions in order to harvest information with the highest possible resolution. For example, Lanjouw and Levy divide households in their Guayaquil, Ecuador survey into two groups: purchasers and squatters. It is not clear, however, if the purchasers bought directly from the state, from a titled private

40. Field, supra note 6, at 860-61.
41. Id. at 858-59.
42. Lanjouw & Levy, supra note 7, at 921-25.
owner, or from an earlier squatter. If they purchased from a squatter, then their legal status is exactly the same as a squatter; just as a foreclosing lender's rights are derivative of her borrower's, so too a purchaser's rights are no better than her seller's.

Lanjouw and Levy point out another, subtler indirect benefit of titling: it allows the property holder to "participate directly in the formal service markets associated with property, including basic utilities such as water and electricity. Such services are often denied to untitled landholders, forcing them to rely upon less efficient and unsafe modes of delivery."44

This discussion has assumed that squatting occurs on publicly owned land. What, if any, difference should it make if instead incursions occur on privately held land? This is not an idle question; according to Lanjouw and Levy, "[t]he most common form of ... irregular settlement [is] unauthorized land developments, which are often found on private agricultural land on the periphery of cities."45

Presumably the law in developing nations at least roughly parallels U.S. law: Landlords can sue in trespass to evict squatters, but if they fail to sue within the statute of limitations for this tort then the occupier obtains title by adverse possession.46 Unless the land is worthless, or worth less than nonrecoverable legal fees, it is difficult to understand why landlords would fail to protect their rights by suing trespassers. Of course, if the police and the courts are weak, it may be impossible in practice for owners to expel squatters.

The more interesting policy questions about disputes between the landless and the landed revolve around state programs of land tenure reform and redistribution. Passing over the long-standing and continuing debates over fairness and the distribution of wealth, there are important efficiency considerations. Few doubt that frequent confiscation of land or wealth in general is anathema to productive activity—why work hard and take risks to accumulate assets when the government is going to grab them? On the other hand, a credible one-time redistribution of property may lack these

44. Lanjouw & Levy, supra note 7, at 903.
45. Id. at 896.
disincentive costs and offer real benefits. For example, redistributing land from idle landlords to tilling tenants may solve agency costs inherent in employer-employee, sharecropping, and other arrangements. There is some evidence that land tenure reform after World War II in Taiwan and Korea contributed to the explosive growth of those nations in the latter half of the twentieth century.47

These reforms usually did not consist of naked redistribution of land; they instead regulated rents and gave tenants the right to force landlords to sell them land at prices set by law.48 Regulating rents might be justifiable on efficiency grounds if a small group of collusive landowners has market power. But what of forced sales—giving tenants, in effect, the power of eminent domain? By definition, to be economically efficient, transfer of title to tenants should occur only when tenants value the land more than landlords. Why then not leave the parties to determine when this does and does not hold—i.e., why not rely on an unfettered market?

The answer may come from transactions costs. Tenants who have resided on a particular parcel may have made plot-specific investments in homes or fields of higher value to themselves than to other tenants. This places the parties in a bilateral monopoly: parcels are uniquely valuable in the hands of their current tenants, who thus will pay above-market rents to retain them. Landlords will accept offers at one cent above rent that others would pay, but of course would like to bargain for all of the tenant’s premium value on the parcel. The parties are in a bargaining game over this surplus value, a situation that likely will involve all sorts of hijinks (threats to exit, for example)—transactions costs that are a deadweight loss. As in other settings,49 the law can short-circuit this bargaining game and its attendant transactions costs by granting one side the right to force a transaction at market rates.

Is it possible that this and other lessons from developing countries have applications to poverty here in the United States? An underdeveloped nation is simply a jurisdiction with a disproportion-

48. KUO ET AL., supra note 46, at 48-55; SONG, supra note 46, at 176-77.
49. See RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 55-56 (6th ed. 2003) (government acquisition of key parcels of land for roads), id. at 60-61 (neighbors in dispute over a nuisance), id. at 117-18 (stranded ship and potential salvor).
ate number of poor people. The United States certainly has areas that qualify as underdeveloped. In addition, inner cities like Detroit have wide swathes of abandoned property, as owners stop paying taxes on land that they cannot operate profitably.\footnote{See Broken Detroit: Death of a City Block (discussing “vast tracts of abandoned land” in Detroit), at www.detnews.com/specialreports/2001/elmhurst (June 17, 2001).} These parcels do not look like Yellowstone Park; they are not broad expanses in the wilderness without roads, designed to be used as a commons. Moreover, municipal government in Detroit may manage these lands as inefficiently as South American nations.\footnote{See id.} Indeed, Detroit’s government has failed to obtain title to many lots in tax arrears due to errors and oversights in the tax foreclosure process. By analogy, then, perhaps we should permit adverse possession against urban governmental units; as in developing nations, this “bottom-up” initiative may be the best way to put land in blighted neighborhoods to productive use.

The similarities between the United States’ impoverished urban landscapes and developing nations go far beyond poor governmental land management. Inadequate police protection leads to excessive time and expense devoted to self-protection, more costly goods due to the impact of these costs on businesses, and a host of similar costs. Poverty, inadequate capital markets, and a weak tax base lead to underinvestment in education that translates into wasted human capital. Thus, although one sees little cross-fertilization between the literature on developing economies and the literature on urban poverty, the fundamental similarities between the two environments suggest that a creative policy prescription for one might well work for the other.

This introduction, along with a majority of the conference papers, focuses largely on realty. Although this may seem dated in the modern age, it is important to remember that land likely accounts for a greater percentage of wealth in undeveloped economies than in developed economies. In addition, its immobility makes it much more attractive as collateral to secured creditors than other, more mobile, types of property.

As economies grow, however, we would expect to see more and more wealth in business enterprises, the other sort of property considered at the symposium. Corporate shares, interests in part-
nerships, and other forms of property rights in business enterprises bear few similarities to land when we consider property relations among private parties. Exclusion, the central right in land enforced by police and courts, is not an issue for such intangible assets.

Unlike trespass in particular and real property law in general, business entity laws are "enabling" rather than constraining: corporate and other statutes provide "off-the-rack" default contracts to orchestrate relations among owners, and between owners and managers in public corporations. By providing such "form" contracts, the state saves each group of owners the cost of reinventing the wheel. In order to minimize transactions costs in forming business entities, governments should choose default rules based on the preferences of the majority (or plurality) of owners. In addition, the state should provide enough discrete entity types to cover demand for entities with fundamentally different properties. Finally, those who desire to deviate from the default statutory terms may do so on almost all matters—basically as long as there are no adverse impacts on third parties, such as creditors or the tax collector.

Implicit in Brett McDonnell's discussion is the fact that, despite major steps, China is still a long way from such an optimal set of business entity laws. After persuasively arguing that China's Township-Village Enterprises (TVEs) succeeded in spite of the complex web of formal property rights in the management and profit of these entities (in large part because in practice many of these complexities were ignored), McDonnell goes on to show that TVEs appear suitable only for relatively small enterprises.

Larger Chinese enterprises thus cannot draw on this business form. The vintage Maoist communist state-owned enterprises of course are unsuitable; if the Party and traditional approach had worked there would have been no need for major reforms over the last three decades. The Chinese Communist Party that runs the nation has moved toward free enterprise, but has not embraced free enterprise with fully open arms. Eventually they must offer large business enterprises one or more business forms that enable the firms to organize themselves and raise capital as efficiently as possible.


public corporations in the United States, Europe, Japan, and other developed nations.

Troy Paredes, in his contribution to the symposium, raises a flag of caution at this point: developing nations like China should not simply copy the corporate models observed in the United States, Britain, and other developed economies. He argues that in the United States, free-wheeling corporate law operates in the context of a host of institutions (e.g. efficient capital and compensation markets, accounting standards, expert judges, norms of conduct among corporate directors). Without these constraints, purely enabling corporate law might well fail to protect shareholders in general from rapacious managers, and minority shareholders from financial exploitation at the hands of the majority. Nations without the host of institutions essential to police such abuse, he maintains, need mandatory corporate law provisions as a second-best substitute—at least until they develop these institutions.

Finally, all property, be it land, corporate shares, or other varieties (patents, gold, etc.) is similar in the face of a government bent on expropriation. McDonnell’s Article highlights the continuing specter of this problem in China. Although the government has taken large steps away from a collectivized economy, fear of expropriation has not been extinguished entirely. Be it land or shares in a manufacturing company, nobody is going to invest time, effort, or money in an asset that the state is likely to pluck away. The Chinese government probably cannot erase fears of expropriation overnight; even if it enacted a constitutional rule like the United States’ Just Compensation Clause, potential investors know that the reins of power remain in the hands of a small clique who are willing to kill to retain power (Tiananmen Square), and so their promise to refrain from expropriations may not be credible. Over time, however, the Party may establish a reputation for respecting private property—or the Party may give way to a less threatening government in which property owners place greater trust.

APPENDIX


- Articles involving the Takings Clause: 10
- Total Pages: 714
- Cites:
- Articles involving property rights and economic development: 2
- Total Pages: 105
- Cites: